SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/Respondent, v. MARCHAND ELLIOTT Defendant/ Appellant	DEATH PENALTY CASE Supreme Court S-027094 Los Angeles County Superior Court No. VA 008051

APPELLANT'S OPENING BRIEF

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INTRODUCTION

In the late 1980's, a series of armored car and store robberies were committed. The fruits of the investigation of this signature robbery spree placed Steven Young and his gang as the prime suspects. However, today, Marchand Elliott, who is not a member of this gang, stands convicted of two of these crimes – one of which involved the murder of an armored car personnel. Most notably, eyewitness accounts of the murder show that the gunman was right-handed. It is undisputed that Mr. Elliott is left-handed.

How could a jury have convicted Mr. Elliott in spite of these and many other inconsistencies? The path to wrongful conviction was laid out by a string of reversible legal errors, from pretrial motions and jury selection through jury instructions and sentencing. A non-exhaustive list includes tainted eyewitness identifications, inaccurate jury instructions, and significant discovery errors that prevented Mr. Elliott's attorneys from showing the jury that a man named Steven Young, and not Mr. Elliott, was responsible for the charged crimes in this case.

Among the most troubling legal errors in this case was the court's determination that the defense was not permitted to impeach the methodology used by the State's fingerprint expert to determine that Mr. Elliott's fingerprints were found on movable objects in the getaway van. The sole physical evidence allegedly connecting Mr. Elliott to one of the charged crimes in this case was latent fingerprints found on a Star magazine

and a Rubbermaid container lid left in this van. The trial court impermissibly prevented the defense from cross-examining the State's fingerprint expert on its faulty methodology used to match Mr. Elliott's fingerprints to the latent prints, thereby violating Mr. Elliott's Sixth Amendment rights to confrontation. Moreover, the trial court shifted the burden of proof to Mr. Elliott by forbidding further cross-examination unless Mr. Elliott represented that he intended to call his own expert to state that the fingerprints were definitively not Mr. Elliott's.

Mr. Elliott's defense was further thwarted when the trial court refused to admit evidence of Mr. Young's involvement in this crime, which would have raised a reasonable doubt in the juror's mind as to Mr. Elliott's guilt. The court applied an erroneous standard for admitting third-party defense evidence – it determined that unless the proffered evidence would have shown Mr. Young, and not Mr. Elliott, to have been the killer beyond a reasonable doubt, Mr. Elliott was not entitled to introduce it to raise a reasonable doubt in the juror's minds as to his guilt. The exclusion of this critical evidence showing that Mr. Young, and not Mr. Elliott, may very well have been the shooter in this case, was extremely damaging to Mr. Elliott's defense.

Despite these legal errors, a jury of Mr. Elliott's true peers may still have had a reasonable doubt about the gunman's identity. But this possibility was foreclosed when the trial court made its greatest error in

failing to conduct a *Batson* analysis when the prosecutor used her peremptories to remove every single African American and eight Hispanic members of the venire. Notably, the trial court found that a *Batson* analysis was unnecessary because the court determined the self-identified Hispanic jurors were likely "Hispanic by marriage" based on its observation that the venire persons in question were not of "Hispanic coloring." Moreover, a black woman was removed because of the prosecutor's generalized complaint about her questionnaire answers. The record, however, shows that all of the black woman's answers were identical to white jurors who were selected to serve on the jury. The trial court also accepted the prosecutor's proffered reasons for removing the sole black man from the venire – that he had a "bizarre" appearance and he would not be "open-minded." However, this prospective juror merely had his hair in a ponytail, and the answers to the questions posed to him in both the questionnaire and in *voir dire* showed remarkable even-handedness with regard to every single subject covered. Thus, even a cursory application of *Batson* would have shown that the prosecutor's proffered reasons for removing the black and Hispanic jurors had no record support and were plainly pretext for racial discrimination.

The errors in jury composition are even more troubling given the inconsistent and unreliable evidence used to convict Mr. Elliott. At the Boys Market robbery, none of the gunman's fingerprints at the crime scene

matched Mr. Elliott's. The only evidence implicating Mr. Elliott as the gunman came from two eye-witnesses. One of these witnesses purported to recognize Mr. Elliott as the gunman based on his hair and eyes. However, on the day of the robbery, the same witness had told the police that he had never seen the gunman's face.

At the Lucky's Market robbery and murder, the key prosecution witness identified Mr. Elliott because she recognized him from her prior employment at a dry cleaner. She claimed that he was a customer on a weekly basis for a two-year period. However, there was no record of Mr. Elliott ever having been a customer of the dry cleaner, and no other employee of that store knew of or recognized him.

At the Hughes Market robbery, which was described only at the penalty phase, again, none of the fingerprints belonging to the gunman matched Mr. Elliott's. The only evidence linking Mr. Elliott to the robbery was the testimony of the victim who was only able to identify Mr. Elliott after seeing his picture in the newspaper and on television in connection with another offense nearly a year after the Hughes incident. In fact, the witness made his first identification of Mr. Elliott nearly two years after the incident. This witness's initial description of the gunman given to the police did not match the physical characteristics of Mr. Elliott's hair, face, facial marks, height, or age by 10 to 20 years. When asked again to pick the

gunman from a second line up, the witness selected someone other than Mr. Elliott. .

Thus, Mr. Elliott was sentenced to death following a trial tainted by constitutional errors and unreliable evidence. Unfortunately, the appellate process has been fraught with numerous errors as well. Over the course of seven years, Mr. Elliott's first appellate counsel, Mr. O'Connor, unsuccessfully attempted to correct the highly inadequate and incomplete record. Mr. O'Connor certified the record as complete, but after several months, realized he had made a grave error in claiming that the record was adequate for appellate purposes and sought decertification. This motion was denied. Mr. O'Connor then sought to be relieved.

Present counsel assumed full responsibility for this case and received additional time to attempt to correct the record, but after a year of diligent efforts to locate critical materials, determined that the record was unworkably incomplete. Counsel's request to remand the case to the trial court for the purpose of completing the record correction process was denied. Current counsel has been left with the impossible task of challenging apparent constitutional infirmities in the record without significant portions of it. Moreover, thousands of pages of the clerk's transcript apparently belong to entirely unrelated cases, having nothing to do with Mr. Elliott. The lengthy list of missing portions of the record includes a *Faretta* hearing which allowed Mr. Elliott to represent himself at

two different portions of the proceedings against him, and the transcripts of the instructional conferences between the court and counsel in both the guilt and penalty phases of the trial. Thus, the highly incomplete and utterly disorganized record curtails Mr. Elliott's appeal rights, and Mr. Elliott's conviction cannot stand without meaningful appellate review.

Due to these and numerous other constitutional errors implicating both the trial and appellate aspects of the proceedings against him, Mr. Elliott requests this Court to grant his appeal, vacate his conviction and sentence, and remand his case for retrial.

STATEMENT OF APPEALABILITY

This appeal is from a final judgment imposing a verdict of death and is automatic pursuant to Penal Code section 1239(b)and California Rules of Court, Rule 8.200.

STATEMENT OF THE CASE

An information filed in the Superior Court of California, Los Angeles County on May 21, 1990, charged Marchand Elliott,[1] AKA Marshawn Elliot, with seven felony counts and included special circumstances and allegations. (17 Supp. CT 4412-17.)[2]

Count One charged that on December 15, 1988, Mr. Elliott committed the murder of Patrick Rooney in violation of Penal Code section 187(a), and included the special circumstance per Penal Code section 190.2(a)(17) that Mr. Elliott committed the offense in violation of Penal Code section 211 by engaging in the commission of the felony of robbery. This count also alleged that Mr. Elliott used a firearm in the commission of this offense, within the meaning of Penal Code section 1203.6(a)(1) and

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[1] Mr. Elliott's name was spelled incorrectly throughout the information (Elliot). For purposes of the Appellate Brief it will be spelled correctly.

[2] The method of citation for this brief will be as follows: Volume numbers will precede the title of the record, followed by the relevant page number(s). The record is divided into three sections, abbreviated as follows: Clerk's Transcript as CT, Supplemental Clerk's Transcript as Supp. CT, and the Reporter's Transcript as RT.

12022.5, causing the offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8). (17 Supp. CT 4413.)

Count Two charged that on December 15, 1988, Mr. Elliott committed second degree robbery of Patrick Rooney, in violation of Penal Code section 211. It further alleged that this offense was a serious felony pursuant to Penal Code 1192.7(c)(19), (17 Supp. CT 4413), and that Mr. Elliott used a firearm within the meaning of Penal Code sections 1203.6(a)(1) and 12022.5, causing the offense to become a serious felony under the separate grounds specified in Penal Code section 1192.7(c)(8). (17 Supp. CT 4414.)

Count Three charged that on October 31, 1988, Mr. Elliott committed the crime of second degree robbery of Boys Market, in violation of Penal Code section 211. It further alleged that this offense was a serious felony pursuant to Penal Code 1192.7(c)(19), and under the firearm provisions of Penal Code sections 1203.6(a)(1) and 12022.5, causing the offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8). (17 Supp. CT 4414.)

Count Four charged that on October 31, 1988, Mr. Elliott committed the crime of assault with a firearm against Ardis Irvine, in violation of Penal Code section 245(a)(2). It was again alleged that during the commission of this offense, Mr. Elliott used a firearm as described above. (17 Supp. CT 4415.)

Count Five charged that on December 29, 1987, Mr. Elliott committed the crime of attempted murder of Augustus[3] Guardino, in violation of Penal Code section 664/187(a). It further alleged that this offense was a serious felony pursuant to Penal Code 1192.7(c)(19), as well as Penal Code section 1192.7(c)(8) under the theory that Mr. Elliott used a firearm within the meaning of Penal Code sections 1203.6(a)(1) and 12022.5. (17 Supp. CT 4415.) It is further alleged that during the commission of this offense, Mr. Elliott inflicted great bodily injury upon the victim within the meaning of Penal Code section 12022.7, causing the above offense to become a serious felony within the meaning of Penal Code section 1192.7(c)(8). (17 Supp. CT 4415-16.)

Count Six charged that on December 29, 1987, Mr. Elliott committed the crime of mayhem against Augustus Guardino, in violation of Penal Code section 203. As above, allegations that Mr. Elliott used a firearm within the meaning of Penal Code 1203.6 (a)(1) and 12022.5, rendered the above alleged offense a serious felony pursuant to Penal Code section 1192.7(c)(8). (17 Supp. CT 4416.)

Count Seven charged that on December 29, 1987, Mr. Elliott committed the crime of second degree robbery of Augustus Guardino, in violation of Penal Code section 211, a serious felony pursuant to Penal

[3] Mr. Guardino's name was spelled incorrectly throughout the information (Agustus). For purposes of this Appellate Brief, it will be spelled correctly.

Code 1192.7(c)(19) (17 Supp. CT 4416) and Penal Code section 1192.7(c)(8), again alleging the use of a firearm. (17 Supp. CT 4416-17.) Independent grounds for classifying the crime a serious felony under Section 1192.7(c)(8) arose from the allegation that Mr. Elliott inflicted great bodily injury upon the victim within the meaning of Penal Code section 12022.7. (17 Supp. CT 4417.)

Mr. Elliott was initially represented by attorneys John Meyers and Michael Bourbeau. On August 13, 1990, a *Marsden* hearing was held in which Mr. Elliott's motion to relieve counsel and appoint new counsel was denied. (17 Supp. CT 4491.) The reasons for the motion are unknown because the motion or a transcript of the hearing could not be located in the record. On February 4, 1991, during a preliminary hearing for the Boys Market incident (Case Number BA032273), Mr. Elliott again requested that his attorney, John Meyers, be removed on the basis of a conflict of interest, and further explained that he did not feel comfortable with his attorney, nor could he trust him. (1 CT 154-59.) The court responded that this was not a conflict of interest and denied Mr. Elliott's request. (1 CT 159.) On February 21, 1991, in Case Number A980576 (Lucky's Market incident and Hughes Market incident), another *Marsden* hearing was held in which Mr. Elliott was note permitted to remove attorneys John Meyers and Michael Bourbeau from his case. (18 Supp. CT 4627.)

On November 30, 1990, defense counsel moved to sever Counts Three and Four, and separately Counts Five, Six and Seven on the grounds that these incidents are three separate and distinct incidents that joined together would be highly prejudicial and in violation of Mr. Elliott's constitutional right to due process and a fair trial. (18 Supp. CT 4556-68.) On January 9, 1991, the People filed a response in opposition to defense counsel's motion to sever counts. (18 Supp. CT 4574-4582.) The court ultimately granted defense counsel's motion to sever Counts Five through Seven (Hughes Market incident) from Counts One through Four (Lucky's Market and Boys Market incidents) of the information. (18 Supp. CT 4689-90.)

On January 3, 1991, defense counsel also filed a motion to set aside Count Three of the information, the robbery of Boys Market, because a market is not a person within the meaning of the statute. (18 Supp. CT 4570-72.) The People filed an amended information on January 11, 1991 deleting the count of robbery against Boys Market, making Count Three the assault with a deadly weapon against Ardis Irvine, Count Four the attempted murder of Augustus Guardino, Count Five the mayhem against Augustus Guardino, and Count Six the second degree robbery of Augustus Guardino. (18 Supp. CT 4584-88.)

On February 4, 1991, Mr. Elliott was held to answer on the charge of Robbery of Joseph Swal of Boys Market and bail was set at $20,000. (1 CT 176.)

On February 14, 1991, the People filed a motion to consolidate Case Number BA032273 (Boys Market robbery) into Case Number A980576 (now the Lucky's incident without the Hughes incident) as Count Three, resulting in counts Three through Six of the January 11, 1991 amended information, becoming Counts Four through Seven. (18 Supp. CT 4595-4607.) On March 8, 1991, defense counsel filed a motion opposing the consolidation of these incidents and moved to sever the counts because the "spillover effect" the other incidents would have on Mr. Elliott's capital case. (18 Supp. CT 4637-58.) The court ultimately ruled in the People's favor, and consolidated Case Number BA032273 into Case Number A980576. (18 Supp. CT 4690.)

On February 21, 1991, Mr. Elliott filed a petition to proceed *in propria persona*. (18 Supp. CT 4616-26.) On March 4, 1991, the court appointed Michael Maloney, Ph.D. to evaluate Mr. Elliott's capacity to knowingly and intelligently waive his right to counsel and represent himself. (18 Supp. CT 4634-36.) On March 18, 1991, Mr. Elliott's request to proceed *in propria persona* was granted. (18 Supp. CT 4678.) This order was stayed until March 22, 1991. (18 Supp. CT 4689-90.)

In the March 28, 1991 status conference, the court granted Mr. Elliott's request that private counsel Derrick Miller be substituted as counsel of record and that his *propria persona* status be removed. (18 Supp. CT 4691.)

On April 25, 1991, the People moved to transfer Mr. Elliott's case from the Central Judicial District (Los Angeles) to the Southeast Judicial District (Norwalk) stating it would protect the witnesses from the "undue burden of fighting traffic downtown, finding parking, and paying for said parking." (18 Supp. CT 4692-97.)

On May 6, 1991, the court received information that Mr. Elliott's private counsel, Derrick Walker, had been arrested and was in custody. John Meyers was again appointed, this time as stand by counsel. (18 Supp. CT 4699.) On May 15, 1991, attorney Angela Wallace was substituted as counsel of record and attorney Meyers was relieved of stand by duty. (18 Supp. CT 4701.)

On June 5, 1991, defense counsel Wallace filed an opposition motion to the People's motion to transfer the case from Los Angeles to Norwalk. (18 Supp. CT 4702-08.) That same day, upon the court's denial of the People's motion to transfer the case, the People made a motion that Counts One through Four of the amended information be dismissed on the basis that they would not receive a speedy trial in the Central Judicial

District (Los Angeles). The court granted this motion. (18 Supp. CT 4709.)

Despite filings by defense counsel that it was unprepared to proceed, a second preliminary hearing was held on July 24, 1991. (1 CT 9-66.) At the conclusion of this hearing, the magistrate court held Mr. Elliott to answer on the five counts in the complaint. (1 CT 65-66, 74.) On July 29, 1991, the felony complaint for Case Number VA008051 was filed in the Municipal Court of Los Cerritos Judicial District alleging five counts against Mr. Elliott for the Lucky's Market and Boys Market incidents. (1 CT 69-74.) Mr. Elliott was again arraigned, this time in front of Judge Armstrong in the Superior Court of California in Norwalk on August 7, 1991. (1 RT 1-6.) The new Information charged Mr. Elliott in case VA008051 with five felony counts related to the Lucky's Market and Boys Market incidents. Count One charged that on December 15, 1988, Mr. Elliott committed the murder of Patrick Rooney in violation of Penal Code section 187 (a). It further alleged the special circumstance under Penal Code section 190.2(a)(17) that Mr. Elliott committed the offense while engaged in the commission of the felony of robbery in violation of Penal Code section 211. As with the previous counts, the information alleged that Mr. Elliott used a firearm in the commission of this offense within the meaning of Penal Code section 1203.6(a)(1) and 12022.5, causing the

offense to become a serious felony pursuant to Penal Code section 1192.7(c)(8). (1 CT 193; 1 RT 5.)

Count Two charged that on December 15, 1988, Mr. Elliott committed the crime of second degree robbery of Patrick Rooney, in violation of Penal Code section 211. The offense was alleged to be a serious felony under Penal Code 1192.7(c)(19), as well as (c)(8), on the allegation that Mr. Elliott used a firearm within the meaning of Penal Code sections 1203.6(a)(1) and 12022.5. (1 CT 194; 1 RT 5.)

Count Three charged that on October 31, 1988, Mr. Elliott committed the crime of second degree robbery of Joseph Swal, in violation of Penal Code section 211. The offense was alleged to be a serious felony under Penal Code 1192.7(c)(19), as well as (c)(8), on the allegation that Mr. Elliott used a firearm within the meaning of Penal Code sections 1203.6(a)(1) and 12022.5. (1 CT 195; 1 RT 5-6.)

Count Four charged that on October 31, 1988, Mr. Elliott committed the crime of attempted murder of Pierre Jacobs, in violation of Penal Code section 664/187(a). It further alleged that this offense was a serious felony pursuant to Penal Code 1192.7(c). (1 CT 195; 1 RT 6.)

Count Five charged that on October 31, 1988, Mr. Elliott committed the crime of assault with a firearm against Ardis Irvine, in violation of Penal Code section 245(a)(2). Once again, it was alleged that Mr. Elliott's use of a firearm within the meaning of Penal Code sections 1203.6(a)(1)

and 12022.5 rendered the offense a serious felony pursuant to Penal Code section 1192.7(c)(8). (1 CT 195; 1 RT 6.)

Mr. Elliott pled not guilty to the charged offenses. (1 RT 6.)

On August 8, 1991, Mr. Elliott once again lost the assistance of his chosen counsel. Angela Wallace appeared at the hearing requesting to be appointed as counsel of record. (1 RT 1.) The court denied Ms. Wallace's appointment, reasoning that she had less than 10 years experience and was not a member of the Southeast Bar Association. (1 RT 1-2.) In an attempt to remain on the case, Ms. Wallace asked that Karl Henry request appointment based on his adequate experience. (1 RT 2.) Court denied this request, and stated that because Mr. Elliott is indigent, "then it is exclusively my choice; and my choice is that I am going to appoint Mr. Javier Ramirez to be the attorney" and designated Andrew Stein as his co-counsel. (1 RT 3; See also 1 CT 243-44, 264.)

On November 26, 1991, Mr. Elliott asked to address the court in camera about the court's refusal to appoint his chosen attorney and its impact on his Sixth and Fourteenth Amendment Rights. (1 RT 26.) The court postponed Mr. Elliott's request because the trial was about to begin and the motion was not calendared for that day. (1 RT 27.)

A motion to dismiss the information pursuant to Penal Code section 995 was filed on December 17, 1991. (2 CT 347-397.) Also on December 17, 1991, defense counsel filed a motion to dismiss Count Three of the

Information pursuant to Penal Code section 1387.1 (robbery of Joseph Swal at Boys Market). (2 CT 398-405.) The People opposed both motions. (2 CT 419-25; 2 CT 427-448.) On January 14, 1992, the motion to dismiss pursuant to Penal Code section 995 and the motion to dismiss Count Three pursuant to Penal Code section 1387.1 were argued and submitted. (2 CT 452; 3 RT 115-45.) The court denied the section 995 motion and granted the section 1387.1 motion to dismiss Count Three. (2 CT 452; 1 RT 125, 145.)

On January 16, 1992, Mr. Elliott filed a declaration under Code of Civil Procedure section 170.1 and 170.6 stating that the trial court was so prejudiced against the defendant that he was unable to receive a fair and impartial trial before the judge. (2 CT 454.) The court denied the motion as untimely on January 17, 1992. (2 CT 456.)

On February 10, 1992, defense counsel filed a motion to sever Counts Four and Five of the Information, requesting that the court sever the Lucky's Market incident from the Boys Market incident. (2 CT 479-502.) The People filed a motion in opposition to the defense motion to sever counts in case VA008051 and moved to consolidate this case with Case Number A980576 on February 14, 1992. (2 CT 516-28.) On February 18, 1992, these motions were argued, submitted, and denied. (2 CT 534; 2 RT 202-23.)

On February 18, 1992, jury *voir dire* and selection proceedings began, lasting until February 28, 1992. (2 RT 231-819.) Defense counsel made several *Batson* and *Wheeler* motions based on the People's use of peremptory challenges to remove both black venire members from the jury pool, and for removing a series of Hispanic venire persons. (4 RT 794, 798, 803.) In response to these motions, the court determined either that there was no reason to conduct a *Batson/Wheeler* hearing, or found that the peremptory strikes were not impermissibly race-based. (4 RT 796, 800, 805-06.) Defense counsel further objected during the selection of alternates because the People challenged another Hispanic woman. (4 RT 813.) The court overruled the objection. (4 RT 814.)

On March 2, 1992, the guilt phase of Mr. Elliott's trial began with the People delivering their opening statement. (5 RT 830-838.) Also, on March 2, 1992, a 402 hearing was held to determine the admissibility of evidence of an alibi for Mr. Elliott including job applications, a sign-in log, and the testimony of Alice Mangram, the woman that interviewed Mr. Elliott. (3 CT 683; 5 RT 889-933.) The court granted the admission of the applications since they met the hearsay business records exception agreed to allow Ms. Mangram's to testify, but denied admission of the sign-in logs because they were not properly maintained. (5 RT 932-933.)

On March 3, 1992, defense counsel moved for a mistrial on the basis that the People had left, in plain view of the jury, a box with a large label

that recited a long list of crimes allegedly committed by Mr. Elliott and the corresponding law enforcement agency responsible for investigating those crimes. (3 CT 684; 6 RT 1015.) The motion was argued, submitted, and denied. (3 CT 684; 6 RT 1015-17.)

On March 4, 1992, the People filed a motion in limine to admit evidence of Mr. Elliott's prior conviction. (3 CT 685-88; 7 RT 1130-31.) The People and defense counsel stipulated that Mr. Elliott was in Rancho Cucamonga on December 5, 1988. (7 RT 1131.)

Also, on March 4, 1992, defense counsel made a discovery motion for surveillance information in order to raise a third party defense. (7 RT 1131-37.) On March 5, 1992, the court granted this discovery motion. (3 CT 690; 7 RT 1392-93.)

On March 6, 1992, defense counsel made a motion to dismiss based on Penal Code section 1118 as to the whole case, but particularly to Count Four regarding Pierre Jacobs. (3 CT 691; 8 RT 1472-77.) The motion was argued, submitted and denied. (8 RT 1472-77.) On defense counsel's motion, the court reduced Count Four against Pierre Jacobs from attempted murder (Penal Code § 664/187(a)) to assault with a deadly weapon (Penal Code § 245(a)(1)). (3 CT 691; 8 RT 1477.) Defense counsel moved for a mistrial on the basis that the People knew they could not prove attempted murder. (8 RT 1476.) The court denied this motion. (8 RT 1477.)

On March 6, 1992, the People made a discovery motion to receive witness statements to defense investigators and to determine whether the defense would be calling an expert on eyewitness identifications. (8 RT 1478.) The motion was argued and granted. (8 RT 1478-82.)

On March 9, 1992, the People rested and moved their exhibits into evidence. (3 CT 692; 8 RT 1495.)

On March 11, 1992, defense counsel moved to admit third party evidence based on Evidence Code section 1101(B). (3 CT 763; 8 RT 1519-31.) The motion was argued and denied by the court. (3 CT 763; 8 RT 1529.)

On March 11, 1992, defense counsel made opening statements and began the presentation of guilt-phase evidence. (8 RT 1535.)

On March 16, 1992, defense counsel made a motion for mistrial due to an outburst by the defendant which was argued and denied. (3 CT 769; 10 RT 1906-10.)

On March 17, 1992, defense counsel concluded presentation of evidence and rested. (3 CT 770; 11 RT 2071.) Defense exhibits were moved into evidence with limited exceptions. (3 CT 770; 11 RT 2053-67.) Both sides rested and arguments of counsel were made that day. (3 CT 770; 11 RT 2079-2144.) On March 18, 1992, the court read the jury instructions. (CT 3 780; 11 RT 2146-80.) The jury retired to deliberate that day. (11 RT 2181.)

On Friday, March 20, 1992, the jury rendered a guilty verdict on Count One (first degree murder during special circumstances of a robbery [Lucky's Market]), Count Two (second degree robbery of Patrick Rooney [Lucky's Market]), and Count Four (assault with a firearm against Ardis Irvine [Boys Market]) (3 CT 865-872; 11 RT 2199-2201, 13 RT 2781.) The jury failed to reach a unanimous verdict with respect to Count Three (assault with a firearm against Pierre Jacobs [Boys Market]). (3 CT 865-872; 11 RT 2199-2201, 13 RT 2781.)

On Tuesday, March 24, 1992, defense counsel moved to have the guilt phase jury discharged and to impanel a new penalty phase jury. (3 CT 881-87; 11 RT 2207.) The motion was argued and denied. (11 RT 2207-08.) Also, defense counsel moved to strike evidence in aggravation, which was denied. (3 CT 888-99; 11 RT 2208-12.) The penalty phase began with opening statements. (4 CT 900; 11 RT 2224.) The penalty phase concluded on April 1, 1992, as both parties rested and began closing arguments. (4 CT 908; 13 RT 2680-2733.)

On Thursday, April 2, 1992, the court read the jury instructions and the jury retired to begin deliberations. (4 CT 909; 13 RT 2735-46.) On Tuesday, April 6, 1992, the jury returned a sentence of death. (4 CT 931; 13 RT 2759-61.)

On April 22, 1992, Mr. Elliott requested to discharge the services of trial counsel and to represent himself for the remainder of the proceedings.

(13 RT 2766.) The motion was granted. (4 CT 955; 13 RT 2766.) On April 24, 1992, Mr. Elliott was appointed advisory counsel, Elizabeth Harris. (4 CT 957; 13 RT 2773.)

On June 3, 1992, the trial court denied Mr. Elliott's *pro se* orally requested motion for new trial. (4 CT 964; 13 RT 2781.) On the same date, the trial court sentenced Mr. Elliott to death. (13 RT 2792–94.) No restitution was imposed. Mr. Elliott was advised of his automatic appeal rights, and the proceedings were concluded. (*Id.*)

Counts Five through Seven (the Hughes Market incident) had remained calendared in Los Angeles County. At the completion of the continuance through November 6, 1992, the People moved to dismiss the charges pursuant to Penal Code section 1385 because Mr. Elliott was sentenced to death in the Lucky's Market incident. (18 Supp. CT 4709-15, 4722-43.)

This appeal follows.

STATEMENT OF FACTS

CRIME FACTS

Los Angeles Area Crime Sprees

Between December 18, 1987 and December 26, 1988, a series of armed robberies of supermarket and armored truck personnel occurred in Los Angeles County. (1 RT 50-52.) Three of these robberies are at issue in

this case: the Lucky's Market incident of December 15, 1988, the Boys Market incident of October 31, 1988, and the Hughes Market Robbery of December 29, 1987. Two of these crimes had strikingly similar *modus operandi*, involving the robbery of substantial amount of cash. (1 RT 72, 5 RT 953-54, 7 RT 1314.) The crimes occurred at the time of the day when a supermarket would transfer its cash to an armored truck. (5 RT 951-954, 7 RT 1312-1318.) A lone perpetrator — described as a African-American man (5 RT 954, 7 RT 1323.) — who was waiting at the store at that time, used his right hand to place a gun to the head of the security guard or employee who was holding the cash, grabbed the money, fled through the back of the store, and jumped into a waiting getaway vehicle which had been previously stolen. (7 RT 1153, 1360, 1190, 1307-1310.) The robbers successfully escaped from the crime scene, and the police would later locate the abandoned getaway vehicle nearby. (7 RT 1307-09, 1188.)

The police suspected that sixteen separate robberies which occurred during this time period may have been the work of an organized gang headed by Steven Young. (1 RT 52-53, 2 RT 206, 5 RT 824.) The organized crime unit of the Los Angeles Police Department (LAPD) took over the investigation of the unsolved crimes. (1 RT 11–12, 52–53.) In 1988, the LAPD was engaged in surveillance of Mr. Young and others believed to be in his gang. (5 RT 820, 7 RT 1133.) Although Steven Young's fingerprint was found on an item in the getaway van used in the

Lucky's Market robbery, he was never charged with that crime. (7 RT 1247-48, 1265, 1267, 1296.)

Boys Market Robbery

On October 31, 1988, an armored car employee named Joseph Swal went to Boys Market in Inglewood, California to pick up deposits and drop off cash. (7 RT 1313, 1316.) Mr. Swal entered the store without incident and picked up the store's cash deposits. (7 RT 1316–17.) As he was walking out of the store, he turned his head in the direction of a voice and suddenly felt a gun against his right temple. (7 RT 1318.) The voice ordered him to drop the money bag and get down on the floor. (7 RT 1318–19.) Mr. Swal complied. (7 RT 1319.) As he was going to the ground, the perpetrator took Mr. Swal's gun from his holster and the money bag and ran toward the back of the store. (7 RT 1319.)

Mr. Swal testified that he had limited information about the perpetrator because the only view he had of the perpetrator was of his back as he was running away with the money. (7 RT 1319, 1323.) From what he saw, the perpetrator had shoulder-length hair that was curly and perhaps in a jheri curl. (7 RT 1320.) The perpetrator was "around [his] height," approximately 5'7" or 5'8" and had a "medium build." (7 RT 1323.) Mr. Swal could not positively identify the perpetrator's race but testified that "I believe to the best of my knowledge it [the perpetrator] was a black person." (7 RT 1323.)

Pierre Jacobs was stocking the shelves at the time of the robbery. (7 RT 1344.) A co-worker yelled that the store was being robbed and Mr. Jacobs started running to the back of the store. (7 RT 1345–46.) Mr. Jacobs inadvertently ran into the perpetrator's left shoulder. (7 RT 1347.) Mr. Jacobs dropped to the floor and heard a voice yell "get back" and a "c-h-h, c-h-h" sound. (7 RT 1347–48, 1350.) The perpetrator ran away without Mr. Jacobs seeing his[4] face. (7 RT 1350.)

The perpetrator proceeded to run to the back of the store. (7 RT 1359.) With *his right hand*, he pointed a gun against the head of Ardis Irvine, who was a store employee, and threatened to kill him unless he opened the back door. (7 RT 1359–60, 1362, 8 RT 1457.) Mr. Irvine opened the door, and the perpetrator then jumped off the back dock. (7 RT 1360.) He ran up to a waiting blue van, jumped into the passenger side, and the van drove away. (7 RT 1360.)

Mr. Irvine told the police that the perpetrator had a shoulder-length jheri curl, droopy eyes, weighed approximately 165 pounds, and was taller than 5'6", Mr. Irvine's height. (8 RT 1440, 1464-65.) Mr. Irvine specifically testified that the perpetrator was using his *right hand* to hold the gun that was pressed against Mr. Irvine's head. (8 RT 1457.) At trial, Mr. Irvine identified Mr. Elliott as the perpetrator. (8 RT 1441.)

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[4] Mr. Jacobs was uncertain whether the person was a man or a woman. (7 RT 1352.) Mr. Jacobs later qualified that statement by saying that the person's voice sounded like a man's. (7 RT 1353.)

On the day of the robbery, Wilson Colon was the store manager. (7 RT 1355.) Mr. Colon's office was on the second floor, toward the back of Boys Market. (7 RT 1356–57.) Upon hearing a commotion in the store, he ran to the balcony. (7 RT 1359.) Mr. Colon heard a man threatening to kill Ardis Irvine unless he opened the back door, and he saw a man holding a gun to Mr. Irvine's head. (7 RT 1359.) The perpetrator was holding the gun in his *right hand.* (7 RT 1362.)

At trial, Mr. Colon described the perpetrator as a black man who had a long, shoulder-length jheri curl (7 RT 1360–61, 1368), and was wearing jeans and a cap or hat. (7 RT 1360.) Mr. Colon estimated his height to be 6'0" or 6'1", with a "medium" build. (7 RT 1361.) Mr. Colon never saw his face. (7 RT 1360, 1370.) Mr. Colon noted the license plate of the getaway van, and reported it to the police. (7 RT 1360.)

While the Boys Market perpetrator was holding the gun in his right hand (7 RT 1362) Mr. Elliott is left-handed, (11 RT 2211),[5] and was characterized by a prosecution witness as handling a gun with his left hand. (11 RT 2304).[6] In addition, on March 17, 1992, the prosecution and

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[5] At a sidebar, Mr. Ramirez said, "I would point out to the court that Mr. Elliott is left-handed." (11 RT 2211.)

[6] In describing an incident during which a police officer, Deputy Kuhn, responded to a complaint that some men were gathered near a car in front of a building, Deputy Kuhn testified that, "[Mr. Elliott] was using his left hand while reaching for his left rear pocket." (11 RT 2304.) A loaded gun was found in his left pocket. (11 RT 2303.)

defense stipulated that on October 31, 1988, "useable and identifiable fingerprints were lifted" from the shopping cart and contents within the cart believed to have been used by the perpetrator. (2 RT 213, 11 RT 2070.) "[U]seable and identifiable fingerprints were also found" on the van believed to be the getaway vehicle. (*Id.*) "Specifically in the location of the rearview mirror, the right passenger door and a plastic baggie found in the van." (11 RT 2070.) All of the prints were compared to those belonging to Marchand Elliott and no match was found. (*Id.*)

Lucky's Market Robbery and Murder

On December 15, 1988, at around 10:50 am, an armored car with two security guards made its scheduled stop at Lucky's Market in Bellflower. (6 RT 1107–08, 1118, 9 RT 1774.) Howard Sands and Patrick Rooney were the two guards on duty in the car. (6 RT 1108.) Mr. Rooney walked into the store, delivered a money bag and picked up the store's cash and receipts from the prior day. (5 RT 952, 6 RT 1108–10.)

As he was leaving the store to walk back to the armored car, anAfrican-American man "rushed up behind" Mr. Rooney. (5 RT 954, 6 RT 1110.) The man grabbed Mr. Rooney, wrapped his elbow around his neck, and pushed his head through a store window. (6 RT 1110, 1119.) The perpetrator then shot Mr. Rooney in the right temple area. (6 RT

1110.) The man was holding the gun with his *right hand* when he shot Mr. Rooney. (6 RT 1113, 1120, 7 RT 1140.)

Although eye-witnesses' testimony varied slightly, most concurred that the perpetrator grabbed the money bag and Mr. Rooney's gun and then ran to the back of the store. (*See, e.g.,* 5 RT 854, 6 RT 1112–15, 8 RT 1674.) The perpetrator exited out of the store's receiving doors and ran across the street. (7 RT 1150, 1153.) A van drove by and picked him up. (7 RT 1153.) The van was later found abandoned and identified as a stolen vehicle. (7 RT 1191.)

Faulty Fingerprint Evidence

Although there were no fingerprints found at the actual crime scene, nine latent fingerprints were recovered from the abandoned getaway van that was believed to have been involved in the crime. (7 RT 1252, 1259.) All of the fingerprints were located on removable objects (7 RT 1248, 1249, 1264), and the fingerprint expert stated that there was no way of knowing when the prints were deposited on these movable items. (7 RT 1267-1268.) Five of the nine fingerprints were purported to match Marchand Elliott's rolled prints, (7 RT 1254–57, 1259–60), one matched Steven Young (7 RT 1265, 1267, 1296), and three were unidentified. (7 RT 1264, 1267, 1292–93.) The fingerprints were the sole piece of physical evidence purporting to link Mr. Elliott to the Lucky's incident.

Deputy Sheriff Ronald George, a latent fingerprint examiner, was called by the prosecution to testify that nine fingerprints had been recovered in an abandoned, stolen van determined by the police to have been used in the Lucky's incident. (7 RT 1245, 1247-48, 1252, 1259, 1264.) No fingerprints were found on any non-removable item in the van. (7 RT 1249, 1264.) Two prints were found on a Rubbermaid container lid, (7 RT 1252), and six fingerprints were found on a Star tabloid newspaper. (7 RT 1259.) The examiner testified that in his opinion, both fingerprints found on the lid matched Mr. Elliott's (7 RT 1254–55), and that three of the six fingerprints from the Star tabloid matched Mr. Elliott's. (7 RT 1259–60.) The fingerprints that are purported to match Mr. Elliott were found on two pages inside the magazine, and another was taken from the outside back cover of the magazine. (7 RT 1299-1300.) Three other Star tabloid prints were never matched to anyone. (7 RT 1264, 1267, 1292–93.)

Several years later, in 1991, after defense investigators initiated an examination of the fingerprints found on the moveable items in the van, the Sheriff's department was able to identify one fingerprint found on a copy of a Los Angeles Times newspaper dated December 5, 1988. (7 RT 1265, 1281.) That fingerprint was found to have matched Steven Young a person convicted of several identical crimes committed in the area at the same time as the Lucky's crime. (7 RT 1265, 3 CT 702, 3 CT 707-762.)

Deputy George testified that he had not counted the number of matching ridge characteristics in determining that a match existed between Mr. Elliott's rolled prints and the latent prints found on the objects in the van. (7 RT 1257, 1271, 1284.) He contradicted himself by first agreeing that there were eight matching characteristics, and then restating that he did not count the number of matching characteristics. (7 RT 1284–86.)

When counsel sought to question Deputy George's methodology (7 RT 1270–71), the trial court cut off cross-examination under California Rule of Evidence 352, and stated, "Under 352, that's the end. That is the end. You may not explore this any further. I've listened to all that I want to hear on the cross-examination of this witness on this point unless you are prepared to make an offer of proof ... that you're having someone who can say this is not Marchand Elliott." (7 RT 1287.) Defense counsel made a record of the planned impeachment, stating that "it is accepted within the community that there's a definite standard of minimum characteristics required before someone would render an opinion." (7 RT 1989-1990.) The court maintained its position that the defense was not entitled to impeach Deputy George's determination that the fingerprints belonged to Mr. Elliott, reasoning that "if you're a real fingerprint expert, you can use any technique you want." (7 RT 1290.)

Eyewitness Identification

The majority of witnesses claimed that there was one perpetrator who ran through the back of the store. (*See, e.g.*, 5 RT 854.) Most of the eye-witness accounts also concurred that the perpetrator was a black man who had a slender build. *See, e.g.*, (6 RT 944, 954) (race); (slender or thin) (5 RT 873; 8 RT 1550); (150 to 170 lbs) (5 RT 873); (165 to 175 lbs) (8 RT 1550.) Most witnesses described the perpetrator wearing dark pants, a white or beige jacket, and a white shirt. *See, e.g.*, (white jacket) (6 RT 1026; 8 RT 1609, 1674; 9 RT 1779); (dark pants) (5 RT 872; 6 RT 1115; 8 RT 1674); (white shirt) (6 RT 1063, 1115.) *But see* (white sweat shirt type jacket with blue stripe) (8 RT 1589.); (colored windbreaker, dark pants, blue or black...) (5 RT 872.); (brown or beige windbreaker type jacket) (8 RT 1550.); and (white shirt, dark colored pants and tan jacket) (6 RT 1115.)

However, beyond these general characteristics, there was no consensus regarding whether the perpetrator was light-skinned or dark-skinned (5 RT 876, 985, 6 RT 1025, 1126, 9 RT 1866); whether his hair was short, long, a "slight afro," "ratty," "shaggy," loose curls, wet, or in a jheri curl (5 RT 878; 6 RT 1003; 6 RT 1025; 6 RT 1037; 9 RT 1873; 9 RT 1883, 6 RT 1086; 9 RT 1724; 9 RT 1784, 8 RT 1550, 1619; 9 RT 1731); whether he was 24 or 35 years old (9 RT 1731, 1866); whether he was 5'6" or as tall as 6'0" (9 RT 1731, 6 RT 1065); whether he had a "clear complexion," active acne, or "pockmarks" on his face (8 RT 1691; 6 RT

1087, 6 RT 1093, 1094); whether he had no facial hair, a mustache, or a "five o'clock shadow" (5 RT 944-45, 8 RT 1661, 6 RT 1087); whether his eyes were "blue," "hazel," or "dark brown" (5 RT 876, 939, 975); whether his eyes were "slanted" or "big" (8 RT 1624, 1678); whether he was wearing silver glasses, black-rimmed glasses, gold-wired glasses, or no glasses at all (5 RT 872, 8 RT 1551, 9 RT 1719); and whether he was carrying one or two guns. (5 RT 954, 6 RT 995.)

The prosecution presented five individuals who testified that they recognized Mr. Elliott as the perpetrator. (7 RT 1151, 6 RT 983, 5 RT 854, 6 RT 995, 1051.) Of these witnesses, witness Lawrence Diehl did not realize until trial that he had identified two different people as the perpetrator at a March 13, 1990 line-up and a December 1991 mug shot viewing. (7 RT 1150–51, 1164–65, 1178, 1182-83.) Witness Michael Fiamengo selected two different people whom he believed were the perpetrator. (5 RT 982.) Witness Gerald Lindsey first identified Mr. Elliott after viewing a composite of the perpetrator that was in a newspaper. (5 RT 882.) And Cheryl Pitzer had seen two newscasts regarding the incident and a wanted poster, all containing photographs of Mr. Elliott before identifying him via a live line-up. (6 RT 1036.)

The prosecution key eyewitness was Janet Delaguila. Ms. Delaguila began working at Lucky's Market approximately one week before the

robbery. (6 RT 1047–48, 1050.) Her previous employer was Courtesy Cleaners, a dry cleaning business in Compton, California. (6 RT 1047–48.)

On December 13, 1988, two days before the robbery, Ms. Delaguila was working at Lucky's when she recognized a person who had been a regular customer of Courtesy Cleaners. (6 RT 1048-49.) The person was accompanied by a woman. (6 RT 1049.) The customer had come into the dry cleaners "three times a week" during her two years at Courtesy Cleaners. (6 RT 1050–51.) Ms. Delaguila testified that she waited on this customer between one and three of these days on a weekly basis, and different employees waited on him the other days. (6 RT 1050-51, 1069, 1073–74, 1084.)

On December 15, 1988, Ms. Delaguila was in the store when the robbery occurred. (6 RT 1050.) As the perpetrator was running through the store, Ms. Delaguila claimed to have recognized him as the former Courtesy Cleaners customer whom she had seen in Lucky's two days earlier. (6 RT 1050.)

Ms. Delaguila never independently recalled Mr. Elliott's name. (6 RT 1053.) Rather, Officer Yarbrough, who was handling the investigation of the incident, informed Ms. Delaguila that the suspect being investigated was named Marchand Elliott. (6 RT 1079, 1084.) Once Ms. Delaguila was provided with the name, she stated that Marchand Elliott was the person

who came into the cleaners, using his own name when dropping off and picking up clothes. (6 RT 1050-51, 1080.)

Based on this information, the police checked the Courtesy Cleaners' store records on the day of the incident to locate any customer whose last name began with "E." (6 RT 1072–73, 1095.) Not one single invoice or receipt bore the name Marchand Elliott. (6 RT 1072–73, 1092.) All subsequent searches of the cleaners' customer invoices and computer system found no records or evidence that Marchand Elliott ever had been a customer of Courtesy Cleaners. (6 RT 1072, 7 RT 1416–17, 9 RT 1812.)

Moreover, Modesto Ponce De Leon, the owner of the Courtesy Cleaners, did not recognize Marchand Elliott as a regular customer. (6 RT 1073, 7 RT 1416–17). In addition, the prosecution never called any of the other seven to ten employees who worked in the store during the relevant time period to state that they recognized Marchand Elliott as a regular customer. (6 RT 1073.)

The defense had sought to introduce testimony that a disinterested witness, Mr. Berton Wyngaarden, had called the police two days prior to the Lucky's incident (notably, the same day that Ms. Delaguila had first seen the person she "recognized") to report that it appeared that a dark-skinned black man and a woman were "casing" the same grocery store. (9 RT 1797-1802.) The testimony would have shown that the person who was pacing out the market and the parking lot more closely resembled Steven

Young than Mr. Elliott. (*Id.*) However, the trial court excluded this witness on the basis that it was "too remote," and also reasoned that "to say that because they were black people that therefore they were suspicious is, I think, a racist thing. It's an improper allegation to make in a court, to assume the people are suspicious because of their race." (9 RT 1798-99.)

Possibly to distract from the shortcomings in the State's star witness's testimony, the prosecution attempted to interject an insinuation of threats against Ms. Delaguila's personal safety. (6 RT 1104-1105.) Through leading questions, the prosecution essentially testified that Ms. Delaguila had received a leased car and relocation to a different Lucky's Market because, having been the only witness to have recognized Mr. Elliott, she was no longer safe. (*Id.*) The colloquy was as follows:

> Q. (By Ms. Najera): Miss Delaguila, were you moved from the Lucky Store after you identified the defendant as the person running from the store?
>
> A. Yes.
>
> Q. And were you moved to another Lucky's—Another place of work within the Lucky's Corporation?
>
> A. Yes.
>
> Q. Was this a substantial distance from the Lucky's in Bellflower that you were working at?
>
> A. Yes, it was.
>
> Q. And was this done for your safety?
>
> A. Yes, it was.

Q. And is that why they allowed you to lease a car from them?

A. Yes.

(6 RT 1105.)

Despite defense objection, the testimony was allowed to stand. (6 RT 1105.)

Aggravating Factors: Hughes Market Robbery

On December 29, 1987, the Hughes Market on National Boulevard in Los Angeles was robbed. (11 RT 2249–51.) The prosecutor introduced the Hughes Market robbery and the assault on Augustus Guardino as evidence against Mr. Elliott during the penalty phase. (11 RT 2249-95.) The state contended that Mr. Elliott had robbed and shot Mr. Guardino (11 RT 2249-52), and that this conduct constituted an aggravating factor warranting the death penalty. (13 RT 2688-89.) The sole evidence used to implicate Mr. Elliott in this case was the testimony of the victim, Augustus Guardino. (11 RT 2236-95.)

Augustus Guardino, the assistant manager of Hughes Market, was removing money from the store safe and transferring it to a counting room where the money was prepared for an armored car pick up. (11 RT 2249–50.) As Mr. Guardino was walking through the store carrying the bag of money, he saw a gunman. (11 RT 2250–51.) Mr. Guardino began to turn

his head and the gunman pulled the trigger. (11 RT 2251.) The bullet destroyed Mr. Guardino's left eye. (11 RT 2254-55.)

The perpetrator grabbed the money and ran out of the market. (11 RT 2242–44.) Once out of the store, he entered a car that sped away. (11 RT 2244.)

At trial, the prosecutor called Jesse Benavidez, who was an employee of Hughes Market on December 29, 1987. (11 RT 2236.) Mr. Benavidez described the robbery and shooting in detail. (11 RT 2235–44.) Mr. Benavidez never saw the perpetrator's face, and was therefore unable to identify anyone as the shooter. (11 RT 2244.)

The prosecutor then called Mr. Guardino, who described what happened to him and how he identified Mr. Elliott. (11 RT 2248–95.) Mr. Guardino saw the shooter for a total of two seconds, and while a gun was pointed at his head. The assailant's face was partially obstructed by the gun. (11 RT 2270-2271, 11 RT 2242-43.) No other evidence or witness was presented to inculpate Mr. Elliott.

On the day of the incident, Mr. Guardino reported that the perpetrator was a black man in his late 20's or early 30's, and was wearing a knit or skull cap. (12 RT 2371.) Approximately three days later, Mr. Guardino described the perpetrator as a black man who was 5'9" to 6 feet, 30 to 40 years of age, of medium weight, and was wearing a dark jacket and dark pants. (12 RT 2373-74.) In a third interview, Mr. Guardino

described the perpetrator as a man who was shorter than 5'11", had a thin mustache, and a dark mole-like coloration above the right side of his mustache. (12 RT 2376.)

Mr. Guardino had been unable to identify his assailant until nearly a year after being shot. He did so after seeing a composite of a suspect in the newspaper. (11 RT 2255.) He informed the police detective investigating the Hughes Market case that he had seen this suspect in the paper and on television, and believed it to be the person who shot him. (11 RT 2256.) In addition, prior to his initial identification of Mr. Elliott, Mr. Guardino was provided with a composite of the suspect from the "Hughes Market people." (11 RT 2275.) It was only then, and nearly two years after the shooting, that Mr. Guardino made his first identification of Mr. Elliott. He selected Mr. Elliott out of photographic line up of six individuals. (11 RT 2258.)

Prior to trial, Mr. Guardino was shown photographs of six suspects. (11 RT 2261–62.) Mr. Elliott was among the individuals. (11 RT 2262.) Mr. Guardino, however, identified another individual as the person who shot him. (11 RT 2262.) Mr. Guardino believed that this person was the perpetrator because they both had the same "eyes . . ., mustache, the tilt of the head, [and] just the look." (11 RT 2263.) When informed that this was a different person, Mr. Guardino defended his selection because the second

person reminded him of how Mr. Elliott appeared at the first line up where Mr. Guardino first identified him. (11 RT 2263.)

No fingerprint evidence and no other witnesses identified Mr. Elliott as the perpetrator. (11 RT 2236–2298.)

PROCEDURAL FACTS

Jury Selection

Mr. Elliott, a black man, was sentenced to death by a jury panel that was not representative of a cross-section of the population. The prosecutor's impermissible use of peremptory challenges resulted in a jury that lacked a single black juror or black alternate. By the end of jury selection, the prosecutor had removed a black woman, a black man, six Hispanics, as well as two Hispanic alternate venirepersons.

Patricia Jones was the only black woman in the venire. She was excused by the prosecutor's peremptory strike. The defense raised a *Batson* challenge (4 RT 794-95), and the prosecutor justified her peremptory challenge on the basis of Ms. Jones' answers to the questionnaire showing that she was "weak on death." (4 RT 795.) However, Ms. Jones' questionnaire answers were substantively identical to white and Hispanic venire persons who ultimately served on the jury. No evidence from the *voir dire* suggests that Ms. Jones would have had any difficulty in following the law. Rather, neither the defense nor the prosecution singled her out for questioning regarding her views of capital punishment or her

willingness and ability to follow all instructions given to her. (3 RT 465–510.) However, there were general questions to Ms. Jones's panel about the ability to impose the death penalty and to follow the law. (3 RT 467-68, 473-74, 476.) Ms. Jones did not indicate any inability in those regards. (*Id.*)

The prosecution used another peremptory strike to remove the only black male venire person. (4 RT 802.) The defense objected, raising a *Batson/Wheeler* challenge based "on the exclusion of blacks from the jury." (*Id.*) The court responded with, "I can't bring in a panel of black jurors for you." (*Id.*) The court also asked of the defense, "Would you suggest that in order to make things fair that we should abandon our random selection and start calling the only other black people out of order just to get them on the panel? ... Counsel have a right to exercise peremptory challenges without stating reasons." (4 RT 805-06.)

Upon continued defense objection on *Wheeler* grounds, the prosecution expressed reservations about Mr. Glasper's hairstyle and his purported inability to remain open-minded. (4 RT 803-804.) However, Mr. Glasper simply had his hair in a ponytail (4 RT 804-805), and his answers to the questions posed by the prosecution during *voir dire* showed that Mr. Glasper was uniformly even-handed in his consideration of the hypotheticals posed. (3 RT 591, 599-600.) The trial court nonetheless found no *Batson/Wheeler* violation had occurred. (4 RT 805-06.)

When the prosecutor moved to strike Prospective Juror Mary Garcia, (4 RT 798), the defense raised a *Wheeler* objection to the past five Hispanic women who had been excused from the venire. (4 RT 798.)[7] The court asked for the prosecutor's reasons for excusing Mary Garcia. (4 RT 798.) The prosecutor stated that she had been unclear on her answers that would make her death qualified, and that she had been nearly removed for cause, and that she had been seated next to prospective Juror Roux-Clough. The trial court reiterated this sentiment. (4 RT 798-99.) However, Ms. Garcia was not in the same panel as Ms. Roux-Clough, and had been clear that she could vote for death. (4 RT 638.)

The defense also raised a *Wheeler* motion "with regards to the pattern that's developed with regards to Hispanics, women in particular" and observed that the past five Hispanic women had been struck from the venire.[8] (4 RT 798.) When the prosecutor only responded to the reasons why she struck Ms. Garcia, Mr. Ramirez reiterated his request for "an explanation" for the prosecutor's reasons for striking the past five Hispanic women from the venire. (4 RT 799.) The Court dismissed the defense's request for such an explanation, stating that "a couple of them I noticed appeared to be Hispanic by marriage rather than Hispanic because they

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[7] The defense was incorrect. At that point in jury selection, four Hispanic women and one Hispanic man had been removed. Ultimately, another Hispanic was removed, as well as two more during selection of alternates.

[8] Again, four Hispanic women and one Hispanic man had been removed.

were not Hispanic coloring." (4 RT 799.) Counsel responded, "I'll point out to the court that Hispanic names come in all colors just as any other names. And we don't know. So that's a conclusion on the court's part. . . . ." (4 RT 800.) While the court acquiesced on this point, it maintained its ruling, stating that "if there are further Hispanic challenges . . . we're going to have to go right back through the list and check all the challenges and do it. But I don't think this is the time, so it's denied at this time." (*Id.*) Subsequently, the prosecution removed two more Hispanics in selecting alternate jurors. (4 RT 813, 815.) Despite the removal of these two additional Hispanic jurors, the court did nothing to revive the *Batson* motion as promised.

Also during *voir dire*, a prospective juror discussed her concerns with the possibility of the execution of an innocent person. The prosecution responded by assuring the juror that wrongful executions do not occur in California. (4 RT 774–75.) The prosecutor explained, "in the state of California you'll find that the laws are different than other states, where maybe they don't have as many safeguards as they do here." (4 RT 775.) Upon objection from the defense, the court reiterated the prosecutor's sentiment by stating, "I really don't think that [putting to death an innocent person] is a concern that [the jurors] have to be worried about in this courtroom." (4 RT 777.)

At a different stage of jury selection, an element of fear was injected into the proceedings. Specifically, the prosecutor asked the jury to consider if "you perceived some danger to yourself in coming back with a verdict one way or the other. Would that affect your decision? [sic]" (4 RT 683.) While the court admonished the prosecutor upon defense objection that this line of questioning was inappropriate (4 RT 683), no curative instructions were given to the jury.

Guilt Phase Jury Instructions

During the State's case, the prosecution attempted to show evidence of flight through testimony about the efforts made to arrest Mr. Elliott. (7 RT 1408-09.) At a bench conference following defense objection, the court precluded this line of questioning, stating that there was no such evidence of flight in the case. To be clear, the prosecutor asked, "[i]f I understand correctly, the evidence that we have that they surveilled his house and spoke to his family and the defendant was basically on the lam is something the court doesn't feel is appropriate?" (7 RT 1410.) The court responded, "No, I absolutely don't. He can be on the lam for all kinds of reasons." (*Id.*) Despite this exchange, and despite the fact that no evidence of flight after having been accused of a crime was introduced, the court gave the jury a standard flight instruction which permitted it to consider whether Mr.

Elliott fled after being accused of the crimes in this case. (3 CT 807, 11 RT 2157-58.)

The Penalty Phase

During the prosecutor's closing argument at the penalty phase, the prosecutor argued to the jury that Mr. Elliott "sat there the whole time as he sits there now, and he doesn't care. He isn't remorseful in the slightest." (13 RT 2705.) Defense counsel immediately objected, and the court responded with, "I think that's very much on the border. I would avoid that if I were you." (13 RT 2705.) However, the court failed to make any curative statements, and did no more than simply admonish the prosecutor regarding her clear violation of the prohibition on a prosecutor's comment on silence by the defendant. (*Id.*)

The defense requested a penalty phase instruction which admonished the jury to not consider the cost of capital punishment or life without parole. (3 CT 863.) It appears that such instruction was requested to remedy the fact that during *voir dire,* in the presence of jurors who ultimately served, the prosecutor, the judge, and numerous potential jurors commented on the costs of life without parole versus capital punishment. (3 RT 538, 498.) However, the trial court refused to give the requested instruction. (3 CT 863.)

Finally, in order to "cure" the prosecution's failure to give proper notice of its intent to introduce victim impact through the victim's wife, the trial court encouraged the prosecutor to argue the impact of Mr. Rooney's death on Ms. Rooney and her family *without introducing any evidence of such impact.* (12 RT 2339.) On its own motion, the trial court provided the jury a tailor-made victim impact instruction which encouraged the jury to consider victim impact, redacting any language that it should consider *evidence* of such impact. (12 RT 2339-41.) The prosecutor seized on the court's favorable ruling and instruction by imploring the jury to consider the impact of Mr. Rooney's death on the Rooney family as an aggravating factor, despite having failed to call a single witness to testify to victim impact. (13 RT 2700.)

Sentencing

On April 22, 1992, Mr. Elliott addressed the trial court and requested to discharge the services of Mr. Ramirez and to represent himself for the remainder of the proceedings. (13 RT 2766.) Mr. Elliott stated that he did not "trust" his attorneys, that they provided "false promises," that they "led [him] down a path full of lies," and that they provided him with "ineffective assistance of counsel." (13 RT 2767.) Specifically, Mr. Elliott took issue with counsel's failure to present his alibi defense. (13 RT 2785.) The trial court responded that he disagreed with Mr. Elliott's assessment of the

representation provided by his lawyers, but permitted Mr. Elliott to represent himself for sentencing. (13 RT 2767-68.)

The prosecutor interrupted, reminding the trial court that before Mr. Elliott is allowed to represent himself, "there statutorily has to be a motion for new trial made to preserve the appellate rights" (13 RT 2768), and reminded the trial court that it must follow "the statute and case law" before allowing Mr. Elliott to proceed *pro per.* (13 RT 2769.)

The trial court determined that Mr. Elliott "ha[s] the ability to go *pro per.*" (13 RT 2769), and entered a formal finding that Mr. Elliott was able to represent himself after commenting that Mr. Elliott was "alert throughout these proceedings and cognizant of everything that was going on" and taking judicial notice of the purported "findings of fitness re: pro per status made by another judicial officer of this court on a prior date." (13 RT 2770; 4 CT 955.) The court came to this conclusion despite its acknowledgement of Mr. Elliott's "bizarre" behavior in the courtroom. Specifically, during trial, Mr. Elliott threw three apples at the jury and judge (10 RT 1906), attended parts of his trial wearing similar glasses to those allegedly worn by the gunman despite his failure to previously have worn glasses (9 RT 1726, 12 RT 2338), refused to wear civilian clothing (11 RT 2207), and, in open court, made numerous statements suggesting paranoia or a failure to appreciate reality. (13 RT 2766-2768, 2778.) The court ordered no psychiatric evaluation of Mr. Elliott despite these

behaviors. Prior to allowing Mr. Elliott's self-representation, the court enumerate to Mr. Elliott the specific disadvantages of self-representation.

In his self-representation, Mr. Elliott submitted a request for a 30-day continuance to file his motion for a new trial. (13 RT 2776.) This request was made on June 3, 1992. (*Id.*) The court began its proceedings by denying this request because it felt that Mr. Elliott had been given ample time and because the court was "satisfied [that] there is no basis for a new trial." (13 RT 2777.) Mr. Elliott implored that he needed a continuance because his trial counsel had not provided him with the entire record. (*Id.*) Although many of the documents were delivered to him on May 8, 1992, there were outstanding documents that Mr. Elliott wanted to review. (*Id.*) The Court reaffirmed its denial, and sentenced Mr. Elliott to death. (13 RT 2792-94.)

The State of the Record on Appeal

Mr. Elliott was sentenced to death on June 3, 1992. (13 RT 2792–94.) In 1996, his first appellate attorney, Michael O'Connor (who has since been relieved), started his record correction process that lasted seven years. During this time, the record was recognized as unusually disorganized and missing many motions and materials. One such example is the February 19, 2002 record correction hearing, during which counsel described the record in open court "as if someone has taken documents in this case and

thrown them up in the air and then put them in a box. They're out of order. There's one document that suddenly appears in another document. There is another item that is referenced as 'attached' that aren't even attached. It's a mess." (See previously filed *Appellant's Motion For Remand To the Superior Court To Augment and Settle the Record, filed June 16, 2006,* at 3.)

On April 4, 2003, the trial court certified the record based on the problems that were known to it. (*Id.*) By October 2003, Mr. O'Connor had changed his mind regarding the superior court's certification of the record and requested that this Court decertify the motion. *(Id.* at 3.) This request was denied on November 12, 2003. *(Id.)*

Originally, present counsel was assigned as habeas counsel on August 14, 1998, and Mr. O'Connor was assigned as counsel for the direct appeal. However, after a multitude of extensions, Mr. O'Connor moved to be relieved of his responsibilities in this case on January 6, 2005. On February 17, 2005, undersigned Counsel filed a motion to elevate status to serve as lead appellate counsel and habeas counsel in the event that the Court granted Mr. O'Connor's request to withdraw as appellate counsel. *(Id.* at 3–4.*)* In this motion, Counsel noted that the prior record correction efforts conducted by Mr. O'Connor were inadequate and accordingly requested adequate time "to undertake the necessary efforts to augment, correct, settle, and reconstruct the record." *(Id.* at 3.*)* On March 2, 2005,

the Court granted Counsel's motion and authorized additional time and funding for Counsel to correct the record before filing Mr. Elliott's opening appellate brief. *(Id.* at 4.*)*

After one year of continuous and diligent efforts, present Counsel concluded that the record was incomplete. *(Id.* at 4–5.*)* On June 16, 2006, Counsel requested that the Court remand the case to trial court for the purpose of completing the record correction process. *(Id.)* The Supreme Court denied this request. (August 30, 2006, *Denial of Appellant's Motion for Remand to the Superior Court to Augment and Settle the Record.)* Several aspects of the record remain amiss, including such critical matters as the transcription of the jury charge conference, the transcripts of the *Faretta* hearing which determined Mr. Elliott's eligibility to represent himself at two separate stages of his case, and several motions and rulings. This is the unenviable position from which undersigned counsel now attempts to present Mr. Elliott's appeal.

ARGUMENT

I. THE SUPERIOR COURT'S FAILURE TO PROVIDE MR. ELLIOTT WITH REPORTER'S TRANSCRIPTS OF SIGNIFICANT PROCEEDINGS AND OTHER ESSENTIAL ELEMENTS OF THE RECORD DEPRIVES MR. ELLIOTT OF AN ADEQUATE RECORD ON APPEAL IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND REVERSAL IS REQUIRED.

In spite of the constitutional and statutory requirements that a complete record be made of all proceedings in a capital case, several proceedings and conferences in this case went unreported. In addition, motions and other filings that are required for proper appellate review of Mr. Elliott's conviction are not a part of the record. These unreported or otherwise undocumented matters include: the jury charge conferences for both the guilt and penalty phases; any motions and/or hearings relating to a challenge of the petite jury system; original defense counsel's request to be appointed to represent Mr. Elliott; and, a *Faretta* hearing.

The absence from the record of these motions and the reporter's transcripts of these proceedings makes it impossible for appellate counsel to determine whether all appellate issues have been raised or to ensure that all issues which have been raised have been properly briefed. The Superior Court's failure to make or provide Mr. Elliott with an adequate record on appeal deprives him of his right to due process of law under the Fifth and Fourteenth Amendments, his right to competent

counsel under the Sixth Amendment, his right to equal protection of the laws under the Fourteenth Amendment, and his right to a reliable determination of guilt and penalty under the Eighth Amendment. Reversal is required.

A. Through No Fault Of Mr. Elliott, The Appellate Record In This Case Is Missing Numerous Elements Which Cannot Be Reconstructed.

This case presents a highly unusual procedural history. Mr. Elliott was sentenced to death on June 3, 1992. (13 RT 2792–95.) In 1996, his first appellate attorney, Michael O'Connor (who has since been relieved), started his seven-year record correction process. During this time, the record was recognized as unusually disorganized and missing many motions and materials. At the February 19, 2002 record correction hearing, counsel described the record "as if someone has taken documents in this case and thrown them up in the air and then put them in a box. They're out of order. There's one document that suddenly appears in another document. There is another item that is referenced as 'attached' that aren't even attached. It's a mess." (See previously filed *Appellant's Motion For Remand To the Superior Court To Augment and Settle the Record,* at 3.)

On April 4, 2003, the trial court certified the record based on the problems that were known to it. (*Id.* at 3.) By October 2003, Mr. O'Connor had reconsidered his position regarding the superior court's certification of

the record and requested that the Supreme Court decertify the motion. *(Id.* at 3.) This request was denied on November 12, 2003. *(Id.* at 3.)

On February 17, 2005, undersigned Counsel filed a motion to elevate status to serve as appellate and habeas counsel in the event that this Court granted Mr. O'Connor's request to withdraw as appellate counsel. *(Id.* at 3–4.*)* In this motion, Counsel noted that the prior record correction efforts were inadequate and accordingly requested adequate time "to undertake the necessary efforts to augment, correct, settle, and reconstruct the record." *(Id.* at 3.*)* On March 2, 2005, the Court granted Counsel's motion and authorized additional time and funding for Counsel to correct the record before filing Mr. Elliott's opening appellate brief. *(Id.* at 4.*)*

After one year of continuous and diligent efforts, Counsel concluded that the record was incomplete. *(Id.* at 4–5.*)* On June 16, 2006, Counsel requested that this Court remand the case to trial court for the purpose of completing the record correction process. *(Id.)* Several matters which are critical to Mr. Elliott's appellate defense remain missing from the record, including: 1) the jury charge conference for both the guilt and penalty phases of Mr. Elliott's trial; 2), the transcript of a *Faretta* hearing which allowed Mr. Elliott to represent himself at two different stages of his trial; 3) a challenge to the method used to assemble the petit jury; and, 4) the request for appointment filed by Mr. Elliott's first retained attorney, Angela Wallace. The absence of each of these matters serves to prejudice Mr.

Elliott in his appellate process.[9,10] In addition, the gross disorganization of the record as it was received by Mr. Elliott has severely limited counsel from proper presentation of his defense.

1. The Jury Charge Conference

The record is lacking a transcript of the hearing in which the trial court rejected, modified, and accepted jury instructions for both the guilt or penalty phases of Mr. Elliott's trial. The record indicates that (1) the trial court requested the parties to submit instructions, (2) defense counsel verified that it provided these instructions to the trial court, and (3) defense counsel had disagreements with the instructions. However, no record exists to clarify the resolution of counsel's disagreement with the instructions, or to explain the trial court's reasoning for rejecting several defense instructions.

On March 6, 1992, the court informed counsel that it "want[ed] jury instructions." (8 RT 1490.) On March 16, 1992, Attorney Stein verified that he "did hand the court some jury instructions this morning," and the court replied by stating, "I see them." (10 RT 1905.) The next day, the

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[9] To the extent to which the missing documents are ever located, Counsel reserves the right to modify Appellant's Opening Brief to add and incorporate any additional appellate issues.

[10] The issue raised at this stage of the appellate process is the Court's failure to allow further record correction processes and the subsequent inadequacy of the record's effect on Mr. Elliott's appellate rights. To the extent that appellate counsel's acts and omissions resulted in the record's inadequacy, this will be raised as ineffective assistance of appellate counsel at the habeas level.

defense counsel raised a question regarding a proposed instruction, which, oddly, is neither argued by the prosecutor nor ultimately resolved by the court. (11 RT 2077–78.)

Moreover, the record contains a number of typed and handwritten notations on the actual instructions given: On March 20, 1992, a document containing approximately 77 pages of instructions presented at the guilt phase was filed with the court. (3 CT 787–864.) On April 17, 1992, a document containing approximately seventeen pages of instructions presented at the penalty phase was filed with the court. (4 CT 912–29.) These pages contain notations indicating that some instructions were accepted without modification (*see, e.g.,* 4 CT 927), but a number were modified from the original request (*see, e.g.,* 3 CT 800, 818, 4 CT 914–16, 919, 920), while others were entered based on the court's own motion. (*See, e.g.,* 3 CT 808, 809, 4 CT 921, 926.) Some defense instructions were rejected; handwritten notes on these instructions appear to belong to the trial court, but the record is unclear on this matter.

The clerk's transcript contains the modified instructions ultimately given to the jury, and the reporter's transcript contains limited and unresolved discussions between trial counsel and the court regarding the submission, acceptance, and rejection of instructions. The most reasonable inference from these facts – and from the practice that all criminal and capital trials have hearings on the content of jury instructions – is that a

hearing occurred in which the court accepted, modified, introduced, and rejected instructions.

Proposed jury instructions and a transcript of the hearing in which the court selected the instructions must be a part of the record pursuant to Rule 8.610(a)(2)(H)("[t]he reporter's transcript must contain" "any oral opinion of the court"); Rule 8.120(b)(3)(C) (the record must include "any instruction that a party submitted in writing").

The proposed instructions and the charge conference are critical to a proper appeal. Most reversible error occurs through improper instructions given to the jury. Whether defense counsel objected to particular instructions that were ultimately given, and the reasoning behind the inclusion over objection, are necessary for determining additional constitutional errors which very well may have occurred in Mr. Elliott's trial. The record is already clear that, for example, despite being precluded from introducing purported "evidence" of a particular type of flight during the guilt phase of this trial, the prosecutor's proposed instruction on this excluded type of flight was accepted and given to the jury. (7 RT 1410; 3 CT 807; 11 RT 2157-58.) (See Argument XVI, *infra.*) Without a transcript of the charge conference, appellate counsel has no manner of knowing how such an error could have occurred. More troubling is that there may have been numerous instructions requested by the defense, to which it was entitled, that were improperly denied. For example, Argument XVII, *infra*,

addresses an instruction apparently requested by the defense for the jury to disregard the relative costs of the death penalty and life without parole which was denied. (3 CT 863.) Again, with no record of the charge conference that would explain the judge's reasoning for refusing such a request, appellate counsel cannot properly bring this appeal.

Accordingly, the California Supreme Court erred by not remanding the case to the superior court to reconstruct the hearings in which the jury instructions for the guilt and penalty phases were proposed, rejected, modified, or accepted.

2. Transcripts of *Faretta* Hearing

Portions of this case were first brought in Los Angeles County, and during those proceedings, and after several attempts to explain to the court that he lacked confidence in his appointed attorneys, Mr. Elliott filed a petition to proceed *in propia persona.* Judge Flynn was presiding at that time. (18 Supp. CT 4616-26.) Then defense attorney Meyers filed a memorandum in which he requested psychiatric evaluation of Mr. Elliott before determining his ability to represent himself. (18 Supp. CT 4628-33.) Judge Flynn appointed Michael Maloney, Ph.D., to "make an examination of this defendant and report your findings to the Court as to defendant's capacity to knowingly and intelligently waive his right to counsel and represent himself," and further requested that it be determined "if the defendant [is] presently able to understand the nature and purpose of the

proceedings taken against him," and whether "he [is] presently able to prepare and conduct his own defense in a rational manner without counsel." (18 Supp. CT 4634-45.) The report was furnished to the court *in camera* (*Id.*), but was apparently never made part of the record. Nor is there any record of any *Faretta* hearing held to determine Mr. Elliott's ability to represent himself at trial.

It is known, however, that the court entered a minute order granting the request to proceed *pro per* (18 Supp. CT 4678) and that counsel was relieved. (18 Supp. CT 4689.) Mr. Elliott then asked that private counsel be substituted for his *pro per* status, which was granted a week later. (18 Supp. CT 4691.)

While it appears that nothing was calendared during this brief period of self-representation, Judge Flynn's unrecorded determination that Mr. Elliott was competent was relied upon at sentencing. (13 RT 2769-70.) These determinations, made years earlier, were relied upon despite the fact that Mr. Elliott had exhibited significant signs of psychological deterioration during the trial. (10 RT 1906, 12 RT 2338.) Moreover, the trial court may have relied on the conclusion reached in Judge Flynn's minute order, without considering the underlying psychological evaluation, as the evaluation was read *in camera* and did not become a part of the record in this case.

"Where a trial court's doubt about a person's mental competence to waive counsel is based upon a history of ... irrational behavior directly observed in the courtroom ... the court cannot properly determine that such person is competent to exercise the right asserted without first obtaining psychiatric evidence." (*People v. Burnett* (1st App. Dis't Div. 2 1987) 188 Cal. App. 3d 1314, 1322 (citations omitted).) It is impossible to know whether the trial court properly determined that the previous determination of Mr. Elliott's competency for self-representation was without error without a copy of the psychologist's evaluation of Mr. Elliott or a record of any *Faretta* hearing that might have occurred. As Mr. Elliott represented himself at sentencing based on the trial court's reliance on these prior, missing documents and determinations, Mr. Elliott's case must be remanded for resentencing.

3. Petit Jury Challenge

In a pre-trial status conference, Mr. Elliott's attorney Javier Ramirez mentioned that he intended to bring a constitutional challenge to the manner in which jurors are selected in Los Angeles County. (2 RT 361–62.) Mr. Elliott's second attorney, Andrew Stein, stated his intention to subpoena the jury commissioner and the court agreed to set aside time for this challenge during the next hearing. *(Id.)* No record of such a hearing exists. However, the court's commentary during *voir dire* makes clear that some challenge to the approach to jury assembly did occur in this case.

When defense counsel made a *Batson* motion on the basis that all the black venirepersons had been removed by prosecutorial peremptory, the court stated, "I can't bring in a panel of black jurors for you. So I can't control that. And that part, as far as challenge to the panel, is behind us." (4 RT 803.) No evidence of such a previous "challenge to the panel" exists on the record.

Present counsel requested formal intervention because he had been unable to receive needed cooperation from trial counsel through informal requests. (*See Appellant's Motion for Remand to the Superior Court to Augment and Settle the Record.*) On April 28, 2006, Counsel sent out a detailed letter with excerpts from the record to trial defense counsel, the prosecutor, and the Attorney General requesting clarification and information regarding all of these topics. The only response received was a phone call from Javier Ramirez on June 19, 2006, which led to an erratum filed with this Court. (*Id.* at 8 [referencing attachments]). On June 26, 2006, Counsel sent Mr. Ramirez a follow up letter in which he requested his assistance in determining whether the identified problems in the record occurred, and expressly asked for confirmation or denial regarding whether the Petit Jury Challenge was filed. (*Id.* at 8–9, "Surely you and Mr. Stein retain some knowledge about the 15 issues we outlined in our letter and attachments. For example, in Issue #1 (Petit Jury Challenge), you must

recall if there was any further action taken after the representations made in the transcript which we provided you and if so, what happened.")[11]

It is clear that — regardless of whether it has been due to time limitations, distractions, miscommunication, other commitments, or a disinterest in this case — informal efforts at communication failed. Because all these efforts to ascertain what happened at trial have failed, Court action was necessary to compel the individuals with firsthand knowledge to meet, confer, and settle the record. Mr. Elliott respectfully submits that this Court's refusal to take such action has concretized this inadequate record on appeal, and has thwarted present counsel's ability to present a proper appellate defense. As such, the convictions must be vacated and the case remanded for a new trial.

4. Angela Wallace's Request For Appointment

On the first day of the capital trial filed in Norwalk, attorney Angela Wallace requested to be appointed to represent Mr. Elliott. (1 RT 1–4.) The record shows that the superior court file contained a letter "in which Ms. Wallace had requested the Court appoint her." (1 RT 1.) Ms. Wallace had been representing Mr. Elliott as appointed counsel in the previous case that had been filed in Santa Monica. In the Santa Monica proceeding, that

[11] Mr. Ramirez's silence cannot be construed as conclusive proof that the hearing did not occur. It is significant that trial counsel refused to respond to any written correspondence on this matter. (*See Appellant's Motion for Remand to the Superior Court to Augment and Settle the Record,* at 8–9.)

court had appointed Ms. Wallace "for all purposes which this court has the authority to appoint her." (1 Supp. CT 42.) Despite this preexisting appointment, the Norwalk Court denied her request to continue to represent Mr. Elliott. (1 RT 2.)

It is essential for Mr. Elliott to have a copy of this written letter to determine what facts were presented by Ms. Wallace for continuing her representation of Mr. Elliott. This Court has held that the trial court's discretion to appoint attorneys is not absolute and the appointment of one attorney over one who had represented the defendant at his preliminary hearing may amount to an abuse of discretion. *(See, e.g., Harris v. Superior Court* (1977) 19 Cal. 3d 786, 798–99 (holding that trial court abused its discretion in declining to appoint the attorneys requested by the defendants who had represented them in related proceedings in municipal court and electing to appoint new counsel instead.)) Absent knowing what grounds were raised by Ms. Wallace, it is impossible to ascertain whether the trial court abused its discretion in selecting one appointed attorney over another.

5. Disorganization of the Record

The current Clerk's Transcript has been prepared with a distressing level of inattention. For instance, in Volume 1, the first document is the preliminary hearing for the capital case (VA008051), which was held on June 20, 1991 (1 CT 1-7), followed by the reporter's transcript for a June

24, 1991 preliminary hearing (1 CT 9-68)[12], followed by one complaint filed on July 29, 1991 in case number VA 008051 (1 CT 69–74), followed by an unfiled charging document with hand-written charges dated to August 7, 1991 (1 CT 75-80), followed by an amended complaint from December 1988 from a different case, numbered A 980576 (1 CT 82–86), followed by a hearing from May 15, 1990 in that case (1 CT 87–147), followed by an unfiled, undated charging document in that same case, (1 CT 148–53), followed by a preliminary hearing from February 4, 1991 in a third case, numbered BA032273 (1 CT 154–78), followed by a charging document in the third case from February 1991 (1 CT 179–80), followed by another unfiled charging document in the second case (A980576) from March 22, 1991 (1 CT 181–86), followed by random court notes (1 CT 187-91), followed by an unfiled document dated August 7, 1991 that appears to be the final charging document for the capital case (VA 008051) (1 CT 192–96) which had previously appeared one-hundred pages earlier in that volume (1 CT 75-80), followed by a continuance motion filed by Angela Wallace in June 17, 1991 (1 CT 197–202).

This description encompasses only the first two hundred pages. The Clerk's Transcript has improperly disclosed 987.1 materials (e.g., 1 CT 266–84, 3 CT 674–82, 3 CT 764–66, 3 CT 771–776, 3 CT 876–880), contains duplicative documents sprinkled randomly throughout the record

[12] Page 8 of 1 CT is missing.

(*e.g.*, Angela Wallace's continuance motion from June 1991 is listed at 1 CT 197–202, 2 CT 363–69, and partly at 3 CT 606–09), has incomplete documents (*e.g.*, 3 CT 606–09 appears to be part of Angela Wallace's continuance motion — however, it cannot be known for certain because the first page is missing), has converged the documents from the capital case with documents from the non-capital cases involving Mr. Elliott that never went to trial (*e.g.*, 1 CT 148–53 is a charging document from Santa Monica case that was stayed and dismissed and 1 CT 154–78 is a preliminary hearing from February 4, 1991 from Los Angeles case that was dismissed), and contains documents that appear to relate to a completely unrelated defendant and case (*e.g.*, 4 CT 903 lists an appointment order dated March 30, 1992 in case number VA 013422 for Michael Schur to represent defendant Joaquin Lopez and 3 CT 697 is an internal court memorandum describing "The untimely arrival of the two subject files" in two unrelated cases in March 1992; hundreds of pages of juror questionnaires from a totally unrelated case, apparently involving the death of a child, appear throughout the supplemental clerk's transcript).

The additional juror questionnaires have been among the most difficult aspects of this case's disorganization. On November 26, 1991, the prosecution submitted a 68-question juror questionnaire to the court. (1 CT 285–299.) The defense appears also to have submitted a juror questionnaire, which contained 132 questions. (2 CT 540–69.) Unlike the

formal filing made by the prosecution, the record copy of this defense juror questionnaire is not file-stamped by the Court, and therefore lacks proof that it was the version in fact received and considered by the court. (Cf. 1 CT 285 with 2 CT 540.) An entirely different 81-question juror questionnaire appears in the record (2 CT 576–96) which fails to indicate when it was filed, by which party, and for what reason. Yet another 125-question juror questionnaire is referenced at 3 CT 990–1017. The final juror questionnaire given to prospective jurors had 125 questions. (*See, e.g.,* 5 CT 1215–41.)

Much further in the record, buried among the juror questionnaires completed by the prospective jurors was an incomplete juror questionnaire with handwritten indications of the prosecution's objections, question modifications and question deletions. (9 CT 2412 – 24.) However, this partial questionnaire contains no indication of when or if it was filed with the court, by which party and who had made the handwritten changes. Moreover, it includes only two sections of a questionnaire that were missing questions as indicated by the number pattern: the court system and juror attitudes toward capital punishment. *(Id.)*

On February 3, 1992, the trial court presided over a hearing to determine the contents of the juror questionnaire. (1 RT 161–93.) This hearing was seriously deficient. From the record of the hearing in which several questions were stricken by the court, it was extremely difficult to

decipher from which of the juror questionnaires in the record these questions were stricken. (1 RT 163–69.) In fact, the hearing was not based on a complete questionnaire but the incomplete questionnaire discovered buried within the Clerk's Transcript (cf. 1 RT 161-93 with 9 CT 2412-24.) Present counsel gleans from the trial court's questions to defense counsel on the record that this incomplete questionnaire was defense counsel's proposed questionnaire. (See e.g., 1 RT 165.) Moreover, the sections pulled from the defense questionnaire are missing questions as evidenced by the number pattern. (9 CT 2415-16, 2423-24.)

Based on the fact that there were four different proposed juror questionnaires with uncertain authors, it is unclear how the parties arrived at the final questionnaire. From the record, it appears that only the prosecution made objections to the questionnaire (9 CT 2412-24). Given the numerous versions of the questionnaire and the limited discussion on the record, it is highly unlikely that defense counsel made no objections to the prosecution's requested version. However, this remains uncertain due to the record's disarray.

Despite repeated requests to have these defects cured before proceeding with his appeal, on August 25, 2006, the California Supreme Court ordered the case to go forward despite any existing defects in the record. The following two problems with the disorganized record

prevent Mr. Elliott from having a record that would allow him to effectively present his defense.

First, Mr. Elliott's record is not in any chronological order. Mr. Elliott is entitled under statute to have his record in chronological order. Pursuant to Rule 8.320(g) "the clerk's and reporter's transcripts ***must*** comply with rule 8.144" (emphasis added). Rule 8.144(a)(1)(C) provides that "the contents ***must*** be arranged chronologically" (emphasis added); Rule 8.144(a)(1)(D) "the pages ***must*** be consecutively numbered" (emphasis added). This statutory mandate is not conditioned on having a defendant first establish prejudice before the government will elect to comply with it. The government must therefore comply with the court rules and reorder the clerk's transcript as mandated by law.

Second, the complete disorganization of this record has grossly frustrated counsel's attempts to prepare Mr. Elliott's appeal. Counsel was appointed to represent Mr. Elliott in March 2005.[13] The vast majority of Counsel's time since then has been spent cataloguing the supplemental

[13] Undersigned counsel was originally appointed solely as habeas counsel in 1998, and became associate counsel for direct appeal matters later that year. However, in the division of labor for the production of the direct appeal, Mr. O'Connor (lead counsel) took full responsibility for the record correction process. It was not until after March of 2005, when lead counsel was removed from the case and undersigned counsel took full responsibility for both the direct appeal and the habeas, did undersigned counsel assume responsibility for the record correction process. However, at this point, prior counsel had agreed to the certification of the record in its incomplete form.

clerk's transcript, attempting to discern what is missing, searching for documents in Los Angeles and reviewing the files of trial counsel, pleading with unresponsive individuals to assist him in elucidating what is missing, what was never filed, and what can be reconstructed, and, on the eve of filing the appeal, being in a position in which he cannot ascertain the scope and nature of the problems with the record. Counsel has expended an enormous amount of time and efforts chasing down false and true leads because the record is not organized and complete. Among the most troubling aspects of the record are the entirely extraneous materials which appear in the Clerk's Transcript. The juror questionnaires from an entirely different legal matter to which Mr. Elliott was not even a party appear scattered throughout the record. (See, e.g., 12-13 Supp. CT 2971-3388 and 13-14 Supp. CT 3416-3726.) The time required to sort through these materials only to determine their irrelevance to this case has severely hampered appellate counsel's ability to produce this brief in an efficacious and timely fashion.

The time necessary to properly craft a capital appeal and has been frustrated by dead ends, incomplete answers, and further questions that the informal process has produced. The informal efforts to correct the record produced no results. A formal hearing was the only method of resolving the gaps and problems with this record, and under the law, Mr. Elliott was entitled to nothing less before presenting his brief.

At a minimum, the proper remedy was to have the superior court rearrange the 36 volumes of the Clerk's Transcript in chronological order and remove unrelated matters to ensure that all of the materials that are part of a normal record pursuant to Rule 8.320 – and nothing else – were in fact in Mr. Elliott's record. Having been denied this basic assistance from the Court, Mr. Elliott has been incapable of presenting a proper brief in this case. As discussed below, this failure has deprived Mr. Elliott of due process of law, a reliable determination of guilt and penalty, his right to counsel, and his right to equal protection of the laws.

B. The Inadequacy of The Record on Appeal Deprives Mr. Elliott of Due Process of Law, A Reliable Determination of Guilt And Penalty, His Right To Counsel, and His Right To Equal Protection of The Laws, and Reversal Is Required.

A criminal defendant is entitled to a record on appeal that is adequate to permit meaningful review. (*People v. Alvarez* (1996) 14 Cal.4th 155, 196, n. 8.) This right is guaranteed in all criminal cases by the due process clause of the Fourteenth Amendment to the United States Constitution, which guarantees a criminal appellant a record of the proceedings "sufficient to permit adequate and effective appellate review." (*People v. Howard* (1992) 1 Cal.4th 1132, 1166; citing *Griffin v. Illinois* (1956) 351 U.S. 12, 20; *Draper v. Washington* (1963) 372 U.S. 487, 496-499.) The United States Supreme Court has stated that a record which will

permit a meaningful and effective presentation of an appellant's claims is a "basic tool" for adequate appeal in all criminal cases. (*Britt v. North Carolina* (1971) 404 U.S. 226, 227.)

In addition, Mr. Elliott has a Fifth and Fourteenth Amendment due process "right not to be denied an appeal for arbitrary or capricious reasons. . . ." (*Griffin* v. *Illinois*, *supra*, 351 U.S. at p. 37 (Harlan, J., diss.)), the right to an accurate record on appeal (*People* v. *Gloria* (1975) 47 Cal.App.3d 1, 7), and the right to appellate review on a record settled in accordance with procedural due process. (*Chessman* v. *Teets* (1957) 354 U.S. 156, 162-165 and n. 12; *People* v. *Pinholster* (1992) 1 Cal.4th 865, 923, n. 9.) The Fourteenth Amendment due process clause also protects the right of a criminal appellant to consistent application of procedural protections provided by state law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.) California law guarantees a criminal appellant an "entire" record on appeal, and the due process clause thus protects Mr. Elliott's right to such a record in this appeal. (Pen. Code §190.7; former Penal Code §190.9; See also Rule of Court 8.620; former Rule of Court 39.5.)

The Sixth Amendment, through the Fourteenth, also guarantees competent counsel on appeal, which in turn imposes on that counsel both the obligation to brief all arguable issues, citing the appellate record and appropriate authority, and the preliminary obligation to insure that there is an adequate record before the appellate court to resolve those issues.

(*People* v. *Barton* (1978) 21 Cal.3d 513, 518-520.) When the record is missing or incomplete, "counsel must see that the defect is remedied . . . ," or counsel will fail to provide a competent level of advocacy. (*Id.*, at p. 520.)

Additionally, the Fourteenth Amendment guarantees the right to equal protection in the formulation of procedures used in deciding appeals (*Evitts* v. *Lucy* (1985) 469 U.S. 387, 393; *People* v. *Barton*, *supra*, 21 Cal.3d at p. 517, n. 1), and thus ensures appellant an appellate record that is as complete and reliable as that provided to other capital appellants.

The right to an adequate appellate record is also specifically guaranteed in capital cases by the Eighth Amendment, which requires a record sufficient to ensure that there is no substantial risk of an arbitrarily imposed sentence of death. (*Stephens v. Zant* (5th Cir. 1980) 631 F.2d 397, 402-404; *People v. Alvarez, supra*, 14 Cal.4th, at p. 196, n. 8; *People v. Howard, supra*, 1 Cal.4th, at p. 1166; see also, *Dobbs v. Kemp* (11th Cir. 1986) 790 F.2d 1499, 1514.) This is particularly so as to omissions involving the appellate record. "Since the State must administer its capital-sentencing procedures with an even hand ([citation]) it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed." (*Gardner* v. *Florida* (1977) 430 U.S. 349, 361.) Otherwise, the "capital-sentencing procedure would be subject to the defects which resulted in the

holding of unconstitutionality in *Furman* v. *Georgia* [(1972) 408 U.S. 238]." (*Gardner* v. *Florida*, *supra*, 430 U.S. at p. 361.)

Each of the foregoing federal constitutional protections is also magnified by the Eighth Amendment's requirement of heightened reliability in capital cases. (*See Beck* v. *Alabama* (1980) 447 U.S. 625, 638 and n. 13; *see also McElroy v. United States Ex Rel. Guagliardo* (1960) 361 U.S. 249, 255 (Harlan, J., diss.).) All these federal constitutional rights are also guaranteed under the California Constitution's parallel provisions. (Art. I, §§ 1, 7, 15, 16, 17 and 24.)

As applied to the specific situation in this case, a complete and thorough transcription of the trial proceedings is a prerequisite to the effective representation on appeal that is guaranteed by both the due process clause and by the Sixth Amendment right to counsel. "When, as here, new counsel represents the indigent on appeal, how can he faithfully discharge the obligation which the court has placed on him unless he can read the entire transcript?" (*Hardy v. United States* (1964) 375 U.S. 277, 280.) "A criminal defendant has a right to a record on appeal which includes a complete transcript of the proceedings at trial." (*United States v. Carrillo* (9th Cir. 1990) 902 F.2d 1405-1409; citing *Hardy v. United States, supra*, at pp. 279-282.)

As previously noted, the right to a complete record in capital cases is now codified in Penal Code sections 190.6 through 190.9. Under these

sections, which were enacted in their current form in 1996 and took effect ion January 1, 1997, a capital defendant is entitled to have the "entire record" prepared and certified to this Court for review. In contrast with non-capital criminal appeals, the "entire record" in a capital case consists of a complete transcript of *all* proceedings in the trial court, including those conducted in chambers. (Pen. Code §§190.7, 190.9(a).)

Because this case was tried prior to the enactment of the foregoing sections and rules, preparation of the record in this case was governed by former Penal Code section 190.6 and former Rule of Court 39.5 (c), and both of these provisions also required preparation of the "entire record." Section 190.6, enacted in 1977, required this court to decide the appeal within 150 days of the certification of the "entire record" by the sentencing court. Rule 39.5 expressly required that "[w]hen a judgment of death has been rendered, the entire record shall be prepared." (Former Rule 39.5(c).) The rule defined "entire record" to include the normal record specified in subdivision (a) of former Rule 33, present Rule 8.360; all items which could be requested for inclusion in the record under subdivision (b) of Rule 8.360; any other paper or record filed or lodged with the superior court pertaining to the case including, but not limited to, transcripts of proceedings in the municipal or justice court; and a transcript of any other proceeding reported in the superior court pertaining to the trial of the case. (Former Rule 39.5.) Rule 8.360 includes as part of the normal record a

reporter's transcript of "the oral proceedings taken on the trial of the cause, including motions in limine heard by the trial judge, jury instructions, and proceedings at the time of sentencing, granting of probation, or other dispositional hearing, but excluding the voir dire examination of jurors and opening statements; . . ." (Rule 8.360(a)(2).) Rule 8.360(b) permits either party to request and the court to order included in the record a reporter's transcript of "oral proceedings on motions other than those enumerated in subdivision (a)." (Rule 8.360(b)(2).)

In this case, it is indisputable that appellant has not been provided with the "entire record" or even a record adequate to prosecute this appeal. As specified in detail previously, the record is missing a substantial number of reporter's transcripts of oral proceedings which should have been included either in the normal record under former Rule 33(a) or as additional record under former Rule 33(b).

Mr. Elliott recognizes that this Court has recently determined that:

> An appellate record is inadequate "only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal." The defendant bears the burden of demonstrating that the record is not adequate to permit meaningful appellate review. Inconsequential inaccuracies or omissions are insufficient to demonstrate prejudice. If the record can be reconstructed with other methods, such as "settled statement" procedures, the defendant must employ such methods to obtain appellate review.

(*People v. Young* (2005) 24 Cal.Rptr.3d 112, 125.) In the present case, Mr. Elliott suffered prejudice in his ability to prosecute his appeal. As a

preliminary matter, as discussed above, present counsel's motion to decertify the record for reconstruction purposes was denied. Therefore, "settled statement" procedures were pursued to the extent possible, and the lack of such a statement cannot be held against the defendant.

This case is unique, in that even without such a settled statement, the deficiencies in the record strongly suggest a series of reversible errors that cannot be fully litigated without a complete record. This is precisely the type of record that requires reversal under this Court's precedents.

Clearly, the most troubling omission concerns the fact that it is unclear whether the trial court had jurisdiction to try this case at all. Little more need be said about the impossibility of conducting a proper appeal when the record is missing such basic material as proof that the case has been bound over for trial.[14]

Equally disturbing are the missing transcripts of the conference on guilt phase jury instructions. With respect to the guilt phase instructional conference, the record of the proceedings indicates that the prosecution was specifically prevented from admitting evidence of purported "flight" from at the time the police were searching for Mr. Elliott. (7 RT 1410.) Nonetheless, a flight instruction was given which asked the jury to consider the type of flight that the prosecution was specifically precluded from

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[14] That the absence of proof of such a fundamental matter as jurisdiction cannot be cured is addressed as a separately under Argument II, *infra*.

introducing. (3 CT 807, 11 RT 2157-58.) (See Argument XVI.) Thus, from the bare record in this case, it is clear that instructional irregularities exist in this case. While it is possible to litigate this specific issue without the record on appeal, it is unclear if there are further such errors without an instructional conference. In short, any "presumption of regularity" cannot be applied to the present case.

The missing conference on penalty phase instructions appears to have been at least equally significant. It appears that the defense requested an instruction that the jurors are to avoid any consideration of the relative costs of the death penalty versus life without parole, but this instruction was not given. (3 CT 863.) It is clear from the record that extensive discussions of the relative costs of the death penalty and life without parole occurred during *voir dire*, and that if the jury had been instructed to avoid consideration of this matter, the balance of factors would have weighed in favor of life without parole. However, once again, without a transcript of these proceedings it cannot be determined what discussion took place during the instruction conference. Due to the trial court's failure to adhere to proper and statutorily required procedures in capital cases, any due process or Sixth Amendment errors, or indeed any other instructional errors, have been shielded forever from appellate review.

A transcript of the hearing in which the court selected the jury instructions must be a part of the record pursuant to Rule 8.320(c)(6)

("[t]he reporter's transcript must contain" "any oral opinion of the court"); Rule 8.120(b)(3)(C)) (the record must include "any instruction that a party submitted in writing"); Rule 8.620(a)(1)(D) (the clerk's transcript must include "All instructions submitted in writing, each one indicating the party requesting it.") The record of the charge conference is critical to a proper appeal. Most reversible error occurs through improper instructions given to the jury. Whether defense counsel objected to particular instructions that were ultimately given, and the reasoning behind the inclusion over objection, are necessary for determining additional constitutional errors which very well may have occurred in Mr. Elliott's trial. The record is already clear that, for example, despite being precluded from introducing purported "evidence" of flight during the guilt phase of this trial, the prosecutor's proposed flight instruction was accepted and given to the jury. (11 RT 2157.) (See Argument XVI, *infra.*) Without transcript of the charge conference, appellate counsel has no manner of knowing how such an error could have occurred or the proper bases for challenging such instructional error. As discussed above, there could be numerous defense-requested instructions to which it was entitled, and were improperly denied. Again, with no record of the charge conference, appellate counsel cannot properly bring this appeal.

The proposed juror questionnaire poses similar problems. It is clear from the record that the court excluded certain questions that the

defense requested about potential juror biases relating to the race of the defendant in relationship to the criminal justice system. (9 CT 2417.) Pursuant to *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 192 (hereinafter "*Rosales-Lopez*"), a trial court must "make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups." Without a proper record on appeal, it is impossible to determine whether the manner in which the defense raised additional questions of race which were not part of the ultimate questionnaire were questions that should have been allowed pursuant to *Rosales-Lopez*.

In the alternative, Mr. Elliott submits that in capital cases the error must be deemed reversible per se due to the Eighth Amendment requirement of heightened reliability in capital cases, as well as principles of due process and fundamental fairness. Mr. Elliott has found no California case imposing such a rule of per se reversal. However, other courts applying federal constitutional requirements have vacated death judgments and ordered new trials without any showing of prejudice in cases where the record was similarly inadequate, and appellant submits those cases are persuasive authority for per se reversal when the record in a capital case is substantially less than "entire."

For example, in *Dunn v. State of Texas* (Tex.Crim.App. 1987) 733 S.W.2d 212, the Texas Court of Criminal Appeals reversed a capital

judgment because the record lacked a transcript of *voir dire* proceedings of two venirepersons and portions of a hearing on pretrial motions, and although the defendant had exercised due diligence, the record could not be reconstructed. The State argued that the judgment should not be reversed unless the defendant demonstrated how prejudice resulted from the missing portions of the record, but the court rejected this argument on state law and due process grounds. The court pointed to a state rule of 45 years standing requiring an "entire record," and also stated that "we consider it a fundamental and axiomatic rule of law that 'no man should suffer the penalty of death at the hands of the law until he has been accorded all his legal rights.'" (*Id.*, at pp. 216-217; citing *Pierson v. State* (Tex. Crim. App. 1941) 177 S.W.2d 975, 976.)

Even in non-capital cases, other state and federal courts have held that substantial omissions from the record compel reversal per se. In *United States v. Selva* (5th Cir. 1977) 559 F.2d 1303, the United States Court of Appeals for the Fifth Circuit observed that when substantial portions of the record on appeal are missing in federal cases, the applicable standard of prejudice is determined by whether the defendant has the same counsel on appeal. The court stated that where the defendant has the same attorney on appeal as at trial, "appellant must show that failure to record and preserve the specific portion of the trial proceedings visits a hardship upon him and prejudices his appeal." (*Id.*, at p. 1305.) However, the court

stated that "a different rule obtains in cases involving new counsel on appeal. When, as here, a criminal defendant is represented on appeal by counsel other than the attorney at trial, the absence of a substantial and significant portion of the record, even absent any showing of specific prejudice or error, is sufficient to mandate reversal." (*Id.*, at p. 1306.) The court explained the reason for this rule as follows:

> The wisdom of this rule is apparent. When a defendant is represented on appeal by the same attorney who defended him at trial, the court may properly require counsel to articulate the prejudice that may have resulted from the failure to record a portion of the proceedings. Indeed, counsel's obligation to the court alone would seem to compel him to initiate such disclosure. The attorney, having been present at trial, should be expected to be aware of any errors or improprieties which may have occurred during the portion of the proceedings not recorded. But when a defendant is represented on appeal by counsel not involved at trial, counsel cannot reasonably be expected to show specific prejudice. To be sure, there may be some instances where it can readily be determined from the balance of the record whether an error has been made during the untranscribed portion of the proceedings. Often, however, even the most careful consideration of the available transcript will not permit us to discern whether reversible error occurred while the proceedings were not being recorded. In such a case, to require new counsel to establish the irregularities that may have taken place would render illusory an appellant's right to notice plain errors or defects, and render merely technical his right to appeal.

(*Id.*) (citations omitted.)

The court stated that mere technical defects in the record are not sufficient to justify application of the rule of per se reversal, but that to avoid the rule "[w]e must, however, be able to conclude affirmatively

that no substantial rights of the appellant have been adversely effected by the omissions from the transcript." (*Id.*) The court then listed a number of Fifth Circuit cases in which it had applied the per se reversal rule for what it described as "significant omissions." These included: *United States v. Gregory* (5th Cir. 1973) 472 F.2d 484 (missing *voir dire* and opening statements); *United States v. Garcia-Bonifascio* (5th Cir. 1971) 443 F.2d 914 (missing government's closing argument); *United States v. Upshaw* (5th Cir. 1971) 448 F.2d 1218 (missing defense arguments); *United States v. Rosa* (5th Cir. 1970) 434 F.2d 964 (missing entire transcript); *United States v. Atilus* (5th Cir. 1970) 425 F.2d 816 (missing entire transcript); *Stephens v. United States* (5th Cir. 1961) 289 F.2d 308 (missing *voir dire* and closing arguments).

Other states also apply a rule of per se reversal when substantial omissions appear in the appellate record. In *Lucero v. State of Florida* (1990) 564 So.2d 158, the Florida Court of Appeal reversed a conviction because an *in camera* proceeding to compel disclosure of an informant's identity had not been transcribed. Similarly, the Appellate Division of the Supreme Court of New York reversed a judgment of conviction in the interests of justice because the trial transcript had been lost, and the court was therefore unable to determine whether issues the defendant raised on appeal were preserved for review with objections and whether the people had filed timely notices of its intention to present in-court

identification testimony under state law. (*People v. Briggs* (App.Div. 1990) 557 N.Y.S.2d 797, 798.)

Mr. Elliott submits that the logic of the foregoing cases is compelling. Due process and fundamental fairness require that a rule of per se reversal must be applied whenever the elements missing from the record are at least "substantial." Appellate counsel, often appointed many years after trial, has no means of reviewing a record that does not exist and therefore cannot assure either his client or himself that all issues have been either raised or adequately briefed. It is simply unfair to require a criminal appellant to show specifically how portions of a record which do not exist prevent him from raising issues about which he is forced to speculate. Under these circumstances, to condition an appellant's relief upon a specific showing of how these omissions harm him "would render illusory an appellant's right to notice plain errors or defects, . . . and render merely technical his right to appeal." (*United States v. Selva, supra,* 559 F.2d, at p. 1306.) Moreover, even apart from the requirements of fundamental fairness, the Eighth Amendment requirement of heightened reliability in capital cases compels reversal when substantial portions of the record are missing.

Here it is clear that "substantial" portions have been omitted from the record. Most significantly, the entirety of the discussion between the court and counsel regarding jury instructions at both the guilt and penalty

phases was never reported or transcribed and cannot now be reconstructed. These omissions make it impossible for Mr. Elliott to adequately brief or even raise issues pertaining to competence of counsel, the adequacy of jury instructions, and other matters for which a complete record is required. Errors of federal constitutional dimension may have occurred during the many off-the-record proceedings and conferences, and these issues have been lost through no fault of Mr. Elliott. Accordingly, even without the prejudice in the present case as discussed above, reversal is required without a showing of prejudice.

ISSUES RELATING TO RACE

II. THE PROSECUTOR'S SYSTEMATIC EXCLUSION OF BLACK AND HISPANIC PANELISTS FROM THE JURY VIOLATED APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS.

Mr. Elliott is a black man who was sentenced to death by a jury panel that lacked a single black juror or black alternate. This outcome was not randomly determined. Rather, the prosecutor exercised peremptory challenges to prevent the sole two qualified black venirepersons from serving as jurors. These two potential jurors were imminently qualified to serve, and the prosecutor's explanations for their removal were specious at best. Moreover, the prosecution used peremptory challenges to remove a group of eight Hispanics from the jury without legitimate, race-neutral reasons. At every *Batson/Wheeler* challenge raised by the defense, the trial court failed to remedy the errors. Individually and in combination, "a prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias ... violates the right of a criminal defendant to a trial by a jury drawn from a representative cross-section of the community under Article 1, Section 16 of the California Constitution," as well as Mr. Elliott's equal protection rights under the Fourteenth Amendment of the United States Constitution. (*People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.) Such structural errors require reversal.

A. Factual Background

Long before the parties were called upon to assemble a jury in this case, Mr. Elliott's prior defense counsel had raised an objection to the transfer of the case from Los Angeles to Norwalk. (1 CT 203-206.) The basis of the motion was the fear that a Norwalk jury would not be comprised of a fair cross-section of the population. (1 CT 204.) As his counsel at that time explained in her Opposition to Motion to Transfer from the Central Judicial District to the Southeastern Judicial District, Mr. Elliott was deeply concerned that jurors from towns such as Norwalk would not include members of his own racial group. (1 CT 205.) Just as counsel and Mr. Elliott had feared, the pool from which counsel drew the jurors had only two blacks. (4 RT 794-95, 802-803.)

Jury selection in this case was conducted in three stages. In the first stage, panelists who had not established an excusable hardship[15] were asked to complete a 50-page juror questionnaire which included a series of questions regarding their views on the death penalty. (2 RT 226-227.) The questionnaire requested that the panelists identify themselves by race. (See, e.g., 7 RT 1243.)

Each panelist then moved into the second stage for the death qualification portion of *voir dire*. Based upon their questionnaire answers,

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[15] Those with a hardship or some other obstacle to jury service were excused, in most cases by stipulation of the parties. (3 RT 364-68.)

some panelists were excused by the trial court and others upon the parties' stipulation. (3 RT 364-68.) After the parties had had an opportunity for questions (see e.g. 3 RT 465-510), additional panelists were excused for cause, either upon motion or by stipulation (see e.g. 3 RT 458-63). (3 RT 462-63.)

Panelists who had survived challenges for cause were moved into the third phase of jury selection. (3 RT 464) At that time, the first 12 panelists were seated in the jury box. (4 RT 788.) Peremptory challenges then followed. (4 RT 788-809.)

Each side was allotted twenty peremptory challenges. (4 RT 808-09.) When a panelist was stricken, the next panelist would be called in order from a list that had been given to the parties in advance of the peremptory stage. Therefore, the parties knew which prospective juror would be called to fill the seat in the box after a peremptory strike was used. (4 RT 794.)

When Prospective Juror Patricia Jones was removed from the pool by prosecutorial peremptory strike, the following colloquy ensued:

Defense: We're going to ask the court – or make a motion that based upon *Batson*, that the only black female juror in the entire pool has been kicked off.

Court: That's not true.

Defense: Well, that we're going to get to.

Court: I don't know that.

Defense: We do. And [the prosecutor] does. ¶ And I'm not sure that's even legal, that we know the order of how these people are being called. Because of that, people can engineer their peremptories to avoid having certain jurors called because they know the total number of peremptories.

Court: It's a little late to complain about the system since we've already gone through this for days and you knew in advance that there was going to be a list generated. In fact just this morning you asked to have the list regenerated to include a juror that you liked, and were concerned about the fact that there weren't any black jurors in the first part of the selection. So we re-scrambled the list.

Defense: I understand that, Your Honor. All I'm saying is that I would like an explanation as to why the only black juror who has been called has been excluded.

Court: Under *Wheeler,* it's hardly systematic exclusion. But what's the basis of your exclusion?

Prosecutor: May I see her questionnaire, and I'll tell you exactly why. ¶ I remember her. Because I felt that she was weak on death when I first read her. And I'm kicking off everybody that I feel — that I perceive as being weak on death from the questionnaire. ¶ And since we didn't — I realize I didn't get a chance to really talk to her because we were running at the end of the day. She appeared at the end of the day when we were talking to her. The defense never talked to her about death.¶ So from — all we have as to her feelings on death is what she wrote in this questionnaire. And it's apparent from this questionnaire that she's weak on death.

Court: All right. I think counsel is entitled to exercise her discretion in exercising the peremptories. And I'm satisfied from [the prosecutor's] explanation that she is not excluding her because of race, but because of her answers to the questionnaire.

I would, while we're here, sound a note of caution. I was a little alarmed that you exercised the first several peremptories on Hispanics. And it seemed to me that there was a pattern

developing there that you might have to explain somewhere along the line. ¶ But the same thing. The defense hasn't raised it. I just sound it as a note of caution. And I thought that we should watch that.

(4 RT 794-796.) No discussion of any of Ms. Jones's specific answers to the questionnaire and how they could be characterized as "weak on death" occurred in the discussion.

Shortly thereafter, the prosecution struck another Hispanic juror, at which point the defense again took issue with the race-specific use of the prosecution's peremptories. The defense stated "Your honor, at this point we are making a *Wheeler* motion with regard to Hispanics, women in particular... That's 5 Hispanic women." (4 RT 798.) The court responded by requiring the prosecutor to explain her reasons for excusing the last juror, but none of the prior Hispanic jurors. (*Id.*)

Prosecutor: Your honor, Miss Garcia, as I recall, from when she was on the stand yesterday, came very close to being a challenge for cause. ¶ She was sitting here – in fact, I tried to challenge her for cause. She was sitting next to Miss Roux-Clough, as I recall. And she — I thought I had her originally down for my questionnaire as a challenge for cause. If she had stuck to the answers when she was talked to, it would have gotten her kicked [off]. But she changed her tune as soon as Miss Roux-Clough changed hers. ¶ So unless I got my people mixed up[16] —

Defense: Your honor, I do think at this point it calls for an explanation of not just that challenge, but all the

[16] As discussed in the argument sections that follow, the prosecutor did, indeed, confuse the juror in question with another juror. Ms. Garcia was not in the same panel as Ms. Roux-Clough. (4 RT 633-696, 747-784.)

previous challenges, which I think some of those people were not –

Court: That's not so. Because I sounded a note of caution before and said that I had noticed a pattern, that there were systematic Hispanic names, although a couple of them I noticed appeared to be Hispanic by marriage rather than Hispanic because they were not Hispanic coloring.

But nevertheless [...] I remember the colloquy well with Miss Garcia. She was – waffled back and forth. And we had to go into great detail with her. And she finally qualified – I mean she passed cause by changing her position back again. ¶ And I'm sure you remember the same thing. [...] Since [the prosecutor] said that she is exercising her challenges for people that she perceives to be weak on death, certainly this is a person that would be a loose canon in the jury room as far as the prosecution is concerned.

Defense: Your honor, I am going to raise an objection to the court's classification of these women as possibly being Hispanic by marriage. I'll point out to the court that Hispanic names come in all colors just as any other names. And we don't know. ¶ So that's a conclusion on the Court's part. [...]

After standing corrected on its method of deducing juror ethnicity, the court nonetheless refused to engage in further inquiry into the removal of the other Hispanic jurors:

Court: But I think as far as [the prosecutor's] position is concerned on this current challenge, that she's on solid ground. ¶ And I cautioned her before. And if there are further Hispanic challenges, especially Hispanic women, I think we're going to have to go right back through the list and check all the challenges and do it. But I don't think this is the time, so it's denied at this time.

(4 RT 798-800.) Shortly thereafter, the prosecution used a peremptory to remove the sole black man, Myron Glasper, from the venire. (4 RT 802.) The defense immediately responded, "Your Honor, at this time we're renewing our *Wheeler* motion now based on the exclusion of blacks from the jury, Your Honor. As the court – out of 200 jurors, we had – " The court interrupted with, "I understand. I can't bring in a panel of black jurors for you. So I can't control that. And that part, as far as challenge to the panel, is behind us. ¶ But what's the basis of challenging the only black jurors that have been called?" (4 RT 803.) Despite having been required to explain her removal of Ms. Jones mere moments earlier, the prosecution made the bald-faced representation to the court that the defense, and not the prosecution, had removed the last black juror. (4 RT 793; 803.)

Prosecutor: Well, I believe they made a challenge as to Miss – the first, Miss Jones.

Court: Yes.

Prosecutor: As to Mr. Glasper, first I wanted to take notice of – it can't be put on the record because it's a visual observation, which is Mr. Glasper came into this courtroom each day dressed in t-shirts and jeans. [...] The man had his hair, which is an afro, cut into a bun in the back. I couldn't make heads or tails of what kind – and he had his haircut in little rows that went around his head. ¶ When he was up there, he wouldn't make eye-contact with anybody. He wasn't paying attention.

Defense: I would take heed[17] with her statement that he wasn't paying attention [...] I paid close attention to him

[17] Appellate counsel interprets this statement to mean "I take issue with..."

because I anticipated this man being preempted [sic][18] because he was the only black man in this venire, of these 75 people. I paid close attention to his answers to her where he said he could impose the death penalty. ¶ If she's telling us the way people dress, and then basically she's saying if someone is poor and can't afford a suit and tie –

Court: No, no. That's not it at all. His general appearance and demeanor has nothing to do with money. He could be the wealthiest person in the room. ¶ And that is, his style of hair, and so on, as far as the mainstream is concerned, is bizarre. So we all know that. Whether it's cause for challenge or not – but then for peremptories, there are hunch peremptories, and I think that –

Prosecutor: May I also – I can shore up the record a bit. His feeling as to some of the worst problems in the criminal justice system is, "Sometimes people are tried with lack of evidence; innocent people being convicted. Guilty, known fact, getting away easy." And people with attitudes like that are not going to be open minded.

Defense: Well, all I would say, Your Honor, his clothing was neat. I take heed with the description. He was here every day. His hair was very neat. We're not talking about someone who was dirty and messy. His t-shirts were tucked in. ¶ I don't think there's anything about his general appearance that's been fairly characterized. He wore a t-shirt. It was tucked in and clean every day.

Prosecutor: He looked bizarre.

Defense: In addition, his haircut is not an unusual haircut in the black population.

Court: Oh, I don't think you can justify that, Mr. Ramirez.

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[18] Appellate counsel assumes the record should have been corrected to read "peremptoried."

Defense: Your Honor, ponytails are in style, not just with white people.

Court: No, no, no. I would take note of the fact that his appearance was bizarre enough that court personnel, long before there was any challenge posed, commented about it. People on the staff commented about his odd appearance. So it's something that I just take notice of.

Defense: In Norwalk, in this courthouse, it may be an odd appearance. In central Los Angeles, if that man walked in on a jury panel, I would take heed that he would stand out. ¶ We're entitled to a cross-section of the community. And we're not getting it. We're not getting a cross-section of the community here because based upon her exercising 5 peremptories against Hispanic women, two of the peremptories against black people, we're not getting a cross-section of the community here. This community is 49 percent Hispanic. [...] The 11 in the box don't –

Court: Would you suggest that in order to make things fair that we should abandon our random selection and start calling the only other black people out of order just to get them on the panel?

Defense: There's no such suggestion, Your Honor. What we're saying is mathematically they were excluded. They're not a part of the venire.

Court: Counsel have a right to exercise peremptory challenges without stating reasons. And *Wheeler* says that if there is a pattern of systematic exclusion – and one doesn't make a pattern. We took it up, the very first one that came up. And she justified it. ¶ Now you take it up with the second one that's come up. And the court believes she's justified her feeling about it. [...] I think if he were white and had exactly the same demeanor and hair style and answers, that she would have the same basis for excusing him.

(4 RT 803-806.)

When the prosecution used another peremptory to excuse Ms. Oliva, a Hispanic venireperson, from the pool of alternates, defense counsel, once again, brought to the court's attention the prosecution's pattern of excluding Hispanic women from the jury pool. (4 RT 813.) Despite having previously stated a full *Batson* inquiry would be required if further Hispanics were removed by peremptories, the court declined to ask the prosecutor its reasons for the strike. Rather, it interjected its own reasoning for the strike, stating, "Look at the questionnaire. She says, 'I don't believe in the death penalty.'" (4 RT 813.) Defense counsel pointed out that in *voir dire*, Ms. Oliva stated that in the right case she could impose the death penalty. (4 RT 813-814.) The court continued on with its own reasonings for the removal of Ms. Oliva, concluding "I just – I can't attribute that kind of bad faith to [the prosecutor], that she is dong this on a racial basis or ethnic basis." Counsel reminded the court that "the last time we approached, if she excused another Hispanic female, you were going to ask for an excuse for dismissing her. I think the pattern has developed at this point that the court would certainly be justified in doing that. Again, I submit it to the court." (4 RT 814.) Without any input from the prosecution at all, the court concluded, "Based on her representations and showing in the questionnaire, the objection is disallowed." (*Id.*)

Based on the answers provided by the members of the venire, the racial and ethnic composition of the twelve individuals selected to serve on the jury was: zero (0) African-Americans, constituting 0% of the venire; seven (7) whites, constituting 58% of the venire; four (4) Hispanic/Latinos, constituting 33% of the venire; one (1) Pacific Islander, constituting 8% of the venire; zero (0) Asian-Americans, constituting 0% of the venire; and zero (0) Native Americans, constituting 0% of the venire. (4 Supp. CT 1072, 2 Supp. CT 288, 12 Supp. CT 2919, 2 Supp. CT 400, 10 Supp. CT 2555, 4 Supp. CT 988, 3 Supp. CT 792, 2 Supp. CT 540, 4 Supp. CT 904, 4 Supp. CT 876, 14 Supp. CT 3728, 6 Supp. CT 1603.) The racial and ethnic composition of the four individuals selected as alternates was evenly divided between two whites and two Hispanics. (2 Supp CT 316, 7 Supp. CT 1799, 6 Supp. CT 1547, 7 Supp. CT 1883.)

B. Under The Federal And State Constitutions, The Prosecution Cannot Exclude A Prospective Juror On The Basis Of Race.

In *Batson v. Kentucky* (1986) 476 U.S. 79, 86-89, the United States Supreme Court held that the equal protection clause of the United States Constitution guarantees a defendant that the state will not exclude members of his race from the jury venire on account of race.[19] *Batson* recognized

[19] In *Powers v. Ohio* (1991) 499 U.S. 400, 402, the Supreme Court eliminated the requirement that the defendant and the stricken juror share the same race.

that denying participation in jury service on account of race not only harms the accused but also undermines public confidence in the fairness of our system of justice by unconstitutionally discriminating against excluded jurors. (*Id.* at p. 87.)

Batson set forth a three-step process for determining whether a peremptory challenge is race-based in violation of the constitution. Those steps were recently reaffirmed by the United States Supreme Court in *Johnson v. California* (2005) 125 S.Ct. 2410:

> First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations omitted.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations omitted.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citations omitted.]

(*Id.* at p. 2416.) This three-part structure has been endorsed by this Court for the litigation of state constitutional claims. (*People v. Snow* (1987) 44 Cal.3d 216, 222; *People v. Wheeler* (1978) 22 Cal.3d 258.)

The first stage of the *Batson* analysis – the *prima facie* case – contains its own three-step process:

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury

> selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstance raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

(46 U.S. 76, 96.)

The Supreme Court held that a defendant satisfies the sufficiency requirement of *Batson*'s first step by producing evidence merely sufficient to permit the trial judge to draw an inference of discrimination. (*Johnson v. California* (2005) 545 U.S. 162, 169.) Thus, "the threshold for making a prima facie *Batson* claim is quite low [.]" (*Boyd v. Newland* (9th Cir. 2006) 455 F.3d 897, 903.) The United States Supreme Court defined "inference" as "a conclusion reached by considering other facts and deducing logical consequence from them." (*Johnson v. California, supra*, fn. 4 (citing Black's Law Dictionary 781 (7th ed. 1999).) The *Batson* Court stated that a court should consider "all relevant circumstances" in drawing an inference. (*Batson v. Kentucky, supra,* 476 U.S. at 96-97.)

With regard to the third step of the *Batson* analysis, it is important to note that if the prosecutor's reasons for striking a juror are *not plausible*, then the State has not met its burden. But even if the explanation *is plausible*, it may still not overcome the inference of purposeful discrimination if the State has not raised similar concerns with non-struck jurors, or has otherwise demonstrated an intent to discriminate: "It is not enough that the district court considered the government's [race]-neutral

explanations 'plausible.' Instead, it is necessary that the district court make a deliberate decision whether purposeful discrimination occurred." (*United States v. Alanis* (9th Cir. 2003) 335 F.3d 965, 969.) In determining whether the challenger has shown intentional discrimination, the court must conduct a "sensitive inquiry" into such *circumstantial and direct evidence of intent as may be available*. (*Id.* at fn. 3 [citing *Batson*, 476 U.S. at p. 93], emphasis added.) Such an inquiry will necessarily require looking beyond the proffered reasons to determine whether they hold up under closer scrutiny. Thus,

> [i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack panelist who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's third step.*

(*Miller-El v. Dretke* (2005) 125 S.Ct. 2317, 2325, emphasis in original.)

Nor may the trial court uphold the strike by looking past the prosecutor's proffered reason and substituting *the court's own reason*. (*Id.* at 2332 ["If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false."].) Needless to say, the court's substitution of its own reason "does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions." (*Id.*)

In *People v. Wheeler* (1978) 22 Cal.3d 258, decided eight years before *Batson*, this Court presaged *Batson* by holding that a defendant's right to a jury drawn from a representative cross-section of the community under Article I, section 16 of the California Constitution was violated by the use of peremptory challenges to remove prospective jurors on the sole ground of group bias. (*Wheeler*, *supra*, 22 Cal.3d at pp. 276-277.) Group bias was defined as "a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic or similar grounds." (*People v. Gonzalez* (1989) 211 Cal.App.3d 1186, 1191, citing *People v. Johnson* (1989) 47 Cal.3d 1194, 1215 and *People v. Wheeler, supra*, 22 Cal.3d at p. 276.)

Wheeler set forth procedures similar to those later adopted in *Batson*: One who believes his opponent is using peremptory challenges for improper discrimination must object in timely fashion and make a prima facie showing[20] that prospective jurors are being excluded because of race

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[20] *Wheeler* held that the moving party "must show a strong likelihood" that peremptory challenges were being used against persons associated with a specific group and that the trial court could find a prima facie case if a "reasonable inference [arose] that peremptory challenges [were] being used on the ground of group bias alone." (*People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281.) In *People v. Johnson* (2003) 30 Cal.4th 1302, 1313, this Court found that *Wheeler's* "strong likelihood" standard did *not* set a higher standard than *Batson's* "reasonable inference" standard, for establishing a prima facie case, and that the two terms were interchangeable. However, the United States Supreme Court has rejected that view, holding that "California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima facie case . . . *Batson* itself

or group association. (*People v. Wheeler, supra*, 22 Cal.3d at p. 280; see, e.g., *People v. Davenport* (1995) 11 Cal.4th 1171; *People v. Crittenden* (1994) 9 Cal.4th 83, 115; *People v. Garceau* (1993) 6 Cal.4th 140, 170.) As is also required by *Batson*, if the trial court finds a prima facie case, the burden shifts, and the party whose peremptory challenges are under attack must then provide a race or group-neutral explanation, related to the particular case, for each suspect excusal. (See, e.g., *People v. Turner* (1994) 8 Cal.4th 137, 164-165; *People v. Fuentes (II)* (1991) 54 Cal.3d 707, 714.) Once the challenged party, in this case the prosecution, has stated its reasons for each of the peremptory challenges, the trial court has a duty to make "'a sincere and reasoned attempt to evaluate the prosecutor's explanation' and to clearly express its findings" in light of all the circumstances. (*People v. Silva* (2001) 25 Cal.4th 345, 385-386 [citations omitted]; accord *Batson*, *supra*, 476 U.S. at p. 98.) If the trial court makes such a "sincere and reasoned" effort to evaluate the justifications offered, its conclusions are entitled to deference on appeal. (*People v. Ervin* (2000) 22 Cal.4th 48, 75; *People v. Arias* (1996) 13 Cal.4th 92, 136.) However, where an insufficient inquiry is made and the prosecution's reasons are either unsupported by the record or inherently implausible, the trial court's unsupported acceptance of the prosecution's reasons is not entitled to

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. . . provides no support for California's rule." (*Johnson v. California, supra*, 124 S.Ct. at p. 2416.)

deference. (*People v. Silva, supra*, 25 Cal.4th at pp. 385-386; see *People v. Montiel* (1993) 5 Cal.4th 877, 909.) Ultimately, justifications for a particular peremptory challenge remain a question of law and thus are properly subject to appellate review. (*People v. Turner* (1994) 42 Cal.3d 711, 720, fn 6.)

A trial court's failure to engage in such a careful assessment of the prosecution's stated reasons is itself reversible error. (*People v. Silva, supra*, 25 Cal.4th at p. 386; *People v. Fuentes, supra*, 54 Cal.3d at p. 721;[21] see *Purkett v. Elem* (1995) 514 U.S.765, 768 [third step in *Batson* process requires trial court to determine whether facially non-discriminatory reasons are implausible or pretextual]; *United States v. Alcantur* (9th Cir. 1996) 897 F.2d 436, 438.)

In the present case, the trial court erroneously concluded that no *prima facie* case had been made after six Hispanics were dismissed by prosecutorial peremptories. This finding was made despite the court's own

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[21] This Court carved out an exception to the requirement that a trial court make explicit and detailed findings regarding the prosecution's use of peremptory challenges. In *People v. Reynoso* (2003) 31 Cal.4th 903, 929, the Court held that a trial court is not required to make specific finding in instances where the trial court decides to credit the prosecution's demeanor-based reasons for exercising a peremptory challenge. Appellant submits that in this case, the prosecution's stated challenges were not demeanor-based. To the extent it could be argued the reasons were demeanor-based, appellant further submits that the *Reynoso* exception is contrary to *Batson* and its progeny and should be reconsidered. Moreover, as explained below, the record indicates that the juror whose demeanor was in question was not what the prosecution represented.

promise to require an explanation if a sixth Hispanic juror was removed. (4 RT 800.)

The trial court did properly find that Mr. Elliott had presented a *prima facie* case of discrimination against blacks and against one Hispanic Juror and moved to step two, asking the prosecutor to explain her challenges. (4 RT 795, 798, 803.) However, in the third step of the analysis, the trial court failed to carefully analyze all of the evidence which was before it, and failed to apply the correct standards for evaluating the legitimacy and sincerity of the prosecutor's reasons. In addition, in at least one instance, the trial court substituted its own reason, rather than evaluating the actual reason given by the prosecutor. (4 RT 814.) As a result of its failure to apply the proper standards and consider all of the evidence which was before it (not just the evidence which supported the prosecutor), the trial court erroneously concluded that the prosecutor was not "doing this on a racial basis or ethnic basis." (*Id.*)

C. This Court Must Conduct A Full And Fair Comparative Juror Analysis To Evaluate Whether The Prosecutor's Reasons Were Pretextual.

In evaluating the prosecutor's reasons for excluding the black and Hispanic panelists, the trial court was obligated to consider each struck panelist individually, using all of the available tools to determine whether (1) the prosecutor's reasons were supported by the record and, if they were, whether (2) the reasons given were ones that "actually prompted the

prosecutor's exercise of the particular peremptory challenge." (*People v. Fuentes, supra*, 54 Cal.3d at p. 720.) To fulfill this obligation, a consistent and fairly-applied comparative juror analysis was required. Although this Court has held that trial judges are not required to undertake such an analysis on their own, and that a reviewing court should not attempt its own comparative analysis for the first time on appeal (*People v. Johnson, supra,* 30 Cal.4th at 1325), *Miller-El*'s holding, *supra*, renders *Johnson's* restrictions no longer applicable.[22] In fact, this Court has assumed that in light of *Miller-El*, comparative juror analysis was appropriate even if it were being conducted for the first time on appeal. (*People v. Cornwell* (2005) 37 Cal.4th 50, 71.)

In *Miller-El,* the Court relied on "side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve," (*Miller-El, supra,* 125 S.Ct. at pp. 2319-2320) as part of its holding that two of the prosecutor's strikes were racially motivated. The dissent objected to the majority's reliance upon the juror comparisons, as well as the disparate questioning of black and white panelists by the prosecution, on the grounds that such evidence had not been "put before the [state]

[22] Although the United States Supreme Court did not grant certiorari in *People v. Johnson, supra*, on the issue of whether a comparative juror analysis should be conducted for the first time on appeal (*Johnson v. California* (2005) 125 S.Ct. 2410), *Miller-El* makes it clear that comparative juror analysis is the proper way for an appellate court to decide a *Batson* claim, regardless of how the facts were argued below, as long as the *evidence* used in the analysis was available to the lower court.

courts." (*Id.* at p. 2347, dis. opn. Thomas, J.) However, the majority noted that the evidence upon which the comparisons were made, namely the transcript of *voir dire*, was unquestionably before the state courts, and therefore properly relied upon by the petitioner as well as the Court itself.

Thus *Miller-El* makes it clear that in deciding whether the prosecution's reasons for striking prospective jurors are racially motivated, the reviewing court must look to the "totality of the relevant facts." (*Id.* at p. 2324.) As long as the evidence relied upon to make that determination is part of the appellate record, the reviewing court has the authority and the obligation to consider all theories based upon that evidence.

As the *Miller-El* majority explained:

> If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand, hence *Batson's* explanation that a defendant may rely on "all relevant circumstances" to raise an inference of purposeful discrimination.

(*Id.* at p. 2325.) Moreover,

> [i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step.

(*Id.*)

Applying the reasoning and analysis of *Miller-El* to the present case, this Court must consider all of the evidence which had been available

to the trial court in deciding whether appellant has established purposeful discrimination, including the jury questionnaires. Not only were the jury questionnaires available to the trial court and part of the record on appeal, the trial court *relied upon the prosecution's characterization of matters within the juror questionnaires* in ruling on the challenges for cause and in deciding the *Wheeler/Batson* motion.

"While a comparison of stricken whites with stricken blacks is relevant to a *Batson* claim, a comparison of stricken blacks to seated whites also is appropriate." (*Hollingsworth v. Burton* (11th Cir. 1994) 30 F.3d 109, 112.) Had the court considered the rest of the record which showed that the black panelists were struck for reasons that were *not being applied to white panelists*, the pretext would have been apparent. The trial court's analysis was thus unfairly skewed in favor of the prosecution.

A full comparative analysis by this Court is therefore mandated by *Miller-El, supra.* Even before *Miller-El*, the use of comparative analysis has been the rule, rather than the exception, among the federal circuit courts,[23] and has been employed in many jurisdictions to review, for the first time on appeal, the grounds upon which a trial court has based a ruling

[23] See, e.g., *Jordan v. Lefevre* (2d Cir. 2000) 206 F.3d 196, 201; *Caldwell v. Maloney* (1st Cir. 1998) 159 F.3d 639, 653; *Devose v. Norris* (8th Cir. 1995) 53 F.3d 201, 204 (quoting *Doss v. Frontenac* (8th Cir. 1994) 14 F.3d 1313, 1316-17 ; *Splunge v. Clark* (7th Cir. 1992) 960 F.2d 705, 709; *People v. Randall* (Ill.App. 1996) 671 N.E.2d 60; *Mattison v. State* (Ga. 1994) 451 S.E.2d 807; *Holmes v. Great Atl. & Pac. Tea Co.* (La.App. 1993) 622 So.2d 748; *State v. Reliford* (Mo.App. 1988) 753 S.W.2d 9.)

pursuant to *Batson*.[24] In the present case, as in *Miller-El*, it cannot be argued that appellant "did not 'fairly presen[t]' his *Batson* claim to the state courts." (*Miller-El, supra*, 125 S.Ct. at p. 2327, fn. 2, quoting *Picard v. Connor* (1971) 404 U.S. 270, 275.) Thus the claim of discriminatory use of peremptory challenges by the prosecutor, as well as the evidence supporting that claim, were all squarely before the trial court and properly before this Court on appeal.

This Court should therefore consider "all relevant circumstances," including the powerful "side-by-side comparisons," (*Miller-El, supra*, 125 S.Ct. at p. 2325), which establish that the prosecutor's *proffered reasons* were not the *real reasons* that the black panelists were removed.

D. The Prosecutor's Disparate Treatment Of Black Panelists Belies Her Claim That They Were Struck For Racially-Neutral Reasons.

The removal of a prospective black juror, Patricia Jones, survived an insufficiently conducted *Batson* challenge on the basis of the prosecution's description of her as being "weak on death." However, the record makes

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[24] *See, e.g., Riley v. Taylor* (3d Cir. 2001) 277 F.3d 261, 273-294 [conducting comparative analysis of struck black jurors with unstruck white jurors for first time on appeal]; *United States v. Chinchilla* (9th Cir. 1989) 874 F.2d 695, 698-699 [appellate court may overturn the finding of the trial court where a comparison between the answers given by prospective jurors who were stricken and those who were not fatally undermines the prosecution's credibility]; *Young v. State* (Tex. Crim. App. 1992) 826 S.W.2d 141, 146 ["this type of analysis is significant, maybe even more so, on appeal when the appellate court is reviewing the trial judge's findings as to purposeful discrimination"].)

clear that Ms. Jones was neutral on her view of the death penalty. Not only did Ms. Jones' removal fail to pass *Batson* muster, it also disregarded clearly-established law that such removal is only justified when a potential juror is truly unable to follow the law. Because Ms. Jones was neither "weak on death" nor unable to follow the law, the trial court erred in allowing the prosecution to use a peremptory strike to remove her from the jury.

Myron Glasper, the sole black man in the venire, was also removed by prosecutorial peremptory. The reasons given for his removal were specious at best. Mr. Glasper gave uniformly even-handed answers to the questions posed of him in the questionnaire and in *voir dire*. The prosecutor's characterizations of Mr. Glasper's appearance, buttressed by the trial court's comments on his appearance, are belied by the record. In short, both Ms. Jones and Mr. Glasper were death-qualified jurors for whom no explanation can exist for their removal other than race.

1. Patricia Jones

In her juror questionnaire, Ms. Jones self-identified as a 47 year old black woman who was born and had been raised in Panama. (5 CT 1243.) She had attended both trade school and college, (5 CT 1244), and had been working as a loan officer and Notes and Exchange Supervisor for Bank of America since 1970. (5 CT 1246.) She was removed by peremptory on

the basis of the prosecutor's assertion that her questionnaire answers showed that she was "weak on death." (4 RT 795.)

The trial court apparently determined that defense counsel had made out a *prima facie* case by requiring the prosecutor to proffer "the basis of [her] exclusion" of the sole black woman in the venire. (4 RT 796.) Such a determination was proper, as the facts in this case make out a *prima facie* case under both State and Federal law. Mr. Elliott established a *prima facie* case by establishing all three factors the *Batson* court determined to be relevant in raising an inference of discrimination. (46 U.S. 76, 96.) First, Mr. Elliott is "a member of a cognizable racial group, and that the prosecutor ... exercised peremptory challenges to remove from the venire members of the defendant's race," (*Id.*), as Mr. Elliott is black, as was Ms. Jones. (5 CT 1243; 4 RT 793) Next, Mr. Elliott "is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" (*Batson* at 96.) Finally, the facts surrounding jury selection in this case and "other relevant circumstance[s] raise[d] an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." (*Id.*)

> No more was required to raise the inference, as the high court did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which were impossible for the defendant to

> know with certainty – that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfied the requirement of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination occurred.

(*Johnson*, 125 S.Ct at 2417.) Further factors considered in determining whether a prima facie case is made out all weigh in favor of the trial court's conclusion that a prima facie case had been established. In the recently decided *People v. Bell* (2007) 54 Cal.Rptr 453, this Court reiterated the following factors for guiding a *prima facie* analysis:

> Though proof of a prima facie case may be made from any information in the record available to the trial court, we have mentioned "certain types of evidence that will be relevant for this purpose. Thus the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic-their membership in the group-and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, ... the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention."

(*Id.*, citing *Wheeler* at 280.) Ms. Jones' removal meets each of these criterion. First, Ms. Jones' strike in itself resulted in half the black jurors being removed. (4 RT 793, 802-03.) Next, other than being black, Ms.

Jones was "heterogeneous as the community as a whole." Third, the prosecutor did not even engage in a "desultory *voir dire*" – the prosecutor failed to ask Ms. Jones a single question during *voir dire*. (3 RT 486-506.) Finally, Mr. Elliott is black, as is Ms. Jones, and "his alleged victim is a member of the group to which the majority of the jurors belong." (*Bell* at 465.)

In finding that a *prima facie* case had not been made out in *Bell*, this Court also noted that members of the defendant's "parallel" group ultimately served on the jury, having defined the "parallel" group as African American males. However, in the present case, no such members of his "parallel" group were permitted to serve. (4 RT 802; *Bell* at 466.) Thus, the trial court properly moved beyond the first stage of *Batson* to require the prosecutor to explain her reasons for removing Ms. Jones from the venire.

At the second stage of the *Batson* test, the prosecutor equivocated when providing an explanation as to why she struck Patricia Jones. At first, the prosecutor could not remember why she struck Patricia Jones from the venire. She asked to see Patricia Jones's questionnaire, explaining that once she has an opportunity to look at it, "I'll tell you exactly why [Ms. Jones was struck from the venire]." (4 RT 795.)

Upon reviewing the questionnaire, the prosecutor explained that she excluded Patricia Jones "[b]ecause I felt that she was weak on death," (*Id.*),

without citing to any answer which provided any proof of her assertion. Rather, the prosecutor generally explained that "I'm kicking off everybody that I feel — that I perceive as being weak on death from the questionnaire." (*Id.*)

By accepting this contention on its face, the court abdicated its responsibility under *Batson*'s third step to determine whether it was truly race-neutral or pretext for discrimination. Had the court required the prosecutor to refer to the questionnaire, the prosecutor would have found no support for her assertion that Ms. Jones was "weak on death." Rather, the questionnaire unequivocally shows that Ms. Jones was even-handed and utterly neutral in her answers regarding the death penalty.

a. Side-By-Side Comparisons Between Patricia Jones and Non-Black Jurors Establish that the Prosecutor Engaged in Purposeful Discrimination.

Even a cursory examination of the juror questionnaires undermines the prosecutor's claim that she struck Patricia Jones and every other individual who appeared "weak on death." Each answer Ms. Jones provided relating to the death penalty was substantively indistinguishable to those provided by non-black individuals who were allowed to serve on the jury.[25] "If a prosecutor's proffered reason for striking a black panelist

[25] To assist the Court, charts listing the exact wording of each question, each person's answers, and all citations to the Clerk Transcript are attached

applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Miller-El, supra,* 125 S.Ct. at 2325.)

On the juror questionnaire, there are twenty-seven questions which explore whether a prospective juror is able to administer the death penalty. Of these twenty-seven questions, eleven requested yes or no answers. (*See Appendix 1.*) Of these eleven, Patricia Jones answered ten (10) identically to non-black jurors or alternates. (*See Appendix 1.*)

Of the remaining question requiring a yes or no answer, Patricia Jones did not answer Question 119 ("[S]hould you be selected to sit as a juror on this case, do you feel you are able and willing to completely put aside any thought or concern relating to penalty issues while you deliberate guilt or innocence on these charges? Yes ___ No___") (Supp. CT 1767.) Juror Noyer, a white woman who served on the jury, also left this question blank. (Supp. CT 792, 816.)

With respect to the fifteen questions that ask for an opinion, it is impossible to differentiate between Ms. Jones' answers and those given by the jurors and alternates who ultimately served on the panel. (*See Appendix 2.*) For example, Question 99 asks, "What is your opinion regarding the death penalty?" (*See, e.g.,* 2 Supp. CT 308.) Ms. Jones expressed ambivalence about the death penalty in her answer by stating, "I feel a little

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as *Appendix 1* and *Appendix 2.*

uneasy with the death penalty, never really gave it a deep thought." (7 Supp. CT 1763.) This ambivalence, however, was mirrored in the answers of Sandra Saiza, a Hispanic juror, who stated, "I don't know if I could sentence someone to the death penalty." (14 Supp. CT 3728, 3748); Sandra Gollaz, a Mexican-American juror, who stated, "I don't think it serves its purpose" (4 Supp. CT 988, 1008); Christina Garza, a Hispanic alternate who opined, "I am not sure[,] never had to really think about it, depends on case" (2 Supp. CT 316, 336); and Rebecca Lara, a Hispanic juror, who stated, "Unsure." (10 CT 2555, 2575.)

Question 105 asks "What do you think of the Biblical saying 'an eye for an eye?'" (*See, e.g.,* 2 Supp. CT 310.) Ms. Jones answered, "It's not always true in all cases." (7 Supp. CT 1765.) This observation is echoed and even expressed much more strongly by others including Peter Durant, a Caucasian juror, who said "I don't believe in it and feel it is an unproductive policy. There seems to be no other good coming from this than that of satisfying our pangs of vengeance." (2 Supp. CT 400, 422); Linda McGee, a Caucasian juror, who said "I think that was true in Biblical times, but not always for today." (4 Supp. CT 904, 926); Gay Cormack, a white juror, who said, "I don't agree with it." (11 Supp. CT 2919, 2941); and Gary Salazar, a Hispanic juror, who said, "Does not apply to everyt[h]ing." (6 Supp. CT 1603, 1625.)

Question 110 asks "Overall, in considering general issues of punishment, which do you think is worse for a defendant: Death [or] Life in prison without the possibility of parole. Please explain." (*See, e.g.,* 2 Supp. CT 311.) Ms. Jones checked "Life in prison without the possibility of parole" and explained "With death it[']s over. Life in prison is like a living death." (7 Supp. CT 1766.) Seven people who were chosen to serve on the jury also selected life imprisonment over death. (*See Appendix 2.)* In addition, a number of jurors provided a substantially similar explanations including Gary Salazar, a Hispanic juror, who commented, "Nobody likes being lock[ed] up until you die—freedom gone." (6 Supp. CT 1603, 1626.) Linda McGee, a Caucasian juror, who said, "Knowing you have lost all — never to regain a full life" (4 Supp. CT 904, 927); Sandra Gollaz, a Mexican-American juror, who stated, "A person would hurt more by knowing he/she would never be free" (4 Supp. CT 988, 1011); Joy Boardman, a white juror, explained, "Having to live forever with your crime." (2 Supp. CT 288, 311).

In sum, the prosecutor did not point out any specific answer that Patricia Jones gave on her questionnaire to conclude that she was "weak on death" because she could not do so. A side-by-side comparison shows that every single answer provided by Ms. Jones matched answers by non-black panelists who served as jurors or alternates in both form and substance. Here, the prosecutor's "proffered reason for striking a black panelist applies

just as well to an otherwise-similar nonblack who [was] permitted to serve," thereby serving as strong evidence of the discriminatory motives in the removal of Patricia Jones. (*Miller-El, supra,* 125 S.Ct. at 2325.)

Other answers to Ms. Jones' questionnaire belie the assertion that she would not make a good juror for the prosecution. When asked to opine upon "our most significant crime problems," Ms. Jones listed the two crimes charged in Mr. Elliott's case – murder and robbery. (5 CT 1259.) When asked what should be done about "these crime problems," Ms. Jones answered, "stiffer punishment." (*Id.*) Nor was there any indication that Ms. Jones would be an unwilling or disengaged juror – rather, she specifically stated that she would like to sit on the jury because, "This is my first time, it could be a very educational experience." (5 CT 1268.)

Thus, the trial court erred by upholding the peremptory challenge without requiring the prosecutor to state some basis for her assertion that Ms. Jones was weak on death, and by failing to compare the questionnaire answers of Ms. Jones to non-black individuals who served on the jury. Even a perfunctory review of the questionnaires would have shown that the prosecutor dismissed Ms. Jones solely on the basis of race.

b. The Prosecutor's Earlier Objection to Reliance on a White Individual's Questionnaire Answers Renders Her Reliance on Patricia Jones' Answers Implausible.

Neither the prosecutor nor the defense asked Patricia Jones a single question regarding her views on the death penalty. (3 RT 465–510.) All of the information known about her views was contained in the four corners of the questionnaire. If something within the questionnaire answers led the prosecutor to fear that Ms. Jones was weak on death, the Supreme Court "expect[s] the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike." (*Miller-El, supra,* 125 S.Ct. at 2327). Indeed,

> the State's failure to engage in any meaningful *voir dire* examination on a subject the State alleges it is concerned about is evidence suggesting that the explanation is a sham and a pretext for discrimination.

(*Miller-El, supra*, 125 S.Ct. at 2328, quoting *Ex Parte Travis* (Ala. 2000) 776 So.2d 874, 881.) Here, the prosecutor's claim that she wanted to remove Patricia Jones based on questionnaire answers is undermined by the prosecutor's failure to ask Patricia Jones a single question in light of the prosecutor's earlier objection to dismissing a white prospective juror based on his questionnaire answers standing alone.

Earlier in *voir dire*, the defense had tried to dismiss Terrance Knott, a prospective white juror, based on three answers on his questionnaire. (3 RT 617–20.) The defense argued that Mr. Knott's questionnaire answers

indicated a predisposition toward applying the death penalty in all cases and possessed an impermissible bias that black people are more likely to commit crimes.[26] (3 RT 616–19.) The prosecutor strongly objected to dismissing a prospective juror based on questionnaire answers alone. (3 RT 619.) She accused the defense as "trying to just slime by" by relying "on the bald face of this [questionnaire]." (*Id.*). In that situation, the prosecutor demanded an opportunity to explore his answers more thoroughly, explaining that "if we made more of an inquiry into this individual, we would probably get a clearer picture of him." (*Id.*) The trial court agreed, and allowed the prosecutor to ask questions, which the trial court believed rehabilitated Mr. Knott. (3 RT 620–28.)

Viewed in this context, the prosecutor's complete reversal of her position regarding the value of questionnaire answers is highly suspect. A prosecutor's disparate treatment of white and black individuals is proof of "purposeful discrimination." (*Miller-El, supra,* 125 S.Ct. at 2325.) Given the fatal combination of not asking Ms. Jones a single question and the prosecutor's disparate deference to the questionnaire answers given by

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[26] In response to Question 99's request for his "opinion regarding the death penalty," Mr. Knott had answered: "We need more of it!" (Supp. CT 1371); in response to Question 51, "Do you think Afro-Americans are more likely to commit crimes than other racial groups?," answered, "yes" (Supp. CT 1363.); and in response to Question 117 "Do you feel the death sentence is imposed [options listed]," checked "too seldom" and explained: "Use a gun in a crime and kill someone, if found guilty, you should die." (Supp. CT 1375).

white and black prospective jurors, it was unreasonable for the trial court to conclude that the prosecutor was genuinely motivated by Ms. Jones's questionnaire answers when she struck her from the jury.

c. *The Trial Court Erred by Uncritically Accepting the Prosecutor's Explanation Without Considering Evidence of Purposeful Discrimination.*

At the third *Batson* stage, the trial court immediately confirmed the prosecutor's explanation, finding, "I think Counsel is entitled to exercise her discretion in exercising the peremptories. I'm satisfied from [the prosecutor's] explanation that she is not excluding [Ms. Jones] because of race, but because of her answers to the questionnaire." (4 RT 795-796.)

The trial court erred by deferring to the prosecutor's generalized, unsupported claim the questionnaire showed that Ms. Jones was "weak on death." "If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain* [*v. Alabama* (1965) 389 U.S. 202]." (*Miller, supra,* 125 S.Ct. at 2325.) As explained by the Supreme Court, "Some stated reasons [by the prosecutor for exercising peremptory challenges] are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand." (*Miller-El, supra,* 125 S.Ct. at 2325.)

Following this directive, the trial court's thorough examination of the record would have revealed that (1) a side-by-side comparison between the questionnaire answers establishes that every answer provided by Patricia Jones is identical to non-black individuals who were selected to be jurors and alternates; (2) with respect to a white panelist, the prosecutor had disavowed the reliability of questionnaire answers; and (3) the prosecutor's disingenuous denial of having challenged Ms. Jones – mere moments after having done so – indicated a consciousness of guilt and a strong desire to avoid having to proffer race-neutral reasons for the strike (of which there were none). As to this last point, the prosecutor's unmistakable fabrication provides important insight into her true intentions in removing Ms. Jones.

At the third *Batson* prong, then, the trial court erred by granting an erroneous level of deference to the prosecutor's claim of a race-neutral reason for dismissing Patricia Jones. The "Constitution forbids striking even a single prospective juror for discriminatory purpose." (*United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902). This impermissible removal of Patricia Jones from the jury panel is sufficient to vacate Mr. Elliott's conviction.

d. The Trial Court Erred by Removing Ms. Jones Without Evidence That She Could Not Follow the Law.

In anticipation that Respondent may assert that the prosecutor's actions did not violate *Witherspoon v. Illinois* (1968) 391 U.S. 510, 521, the

following argument establishes that the trial court failed to follow clearly established law in accepting that the prosecutor's vague contention that Ms. Jones was "weak on death" was sufficient to remove her from the venire.

Since 1985, the Supreme Court has held that the "standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment" is whether the juror's views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Gray v. Mississippi* (1987) 481 U.S. 648, 658 [quoting *Wainwright v. Witt* (1985) 469 U.S. 412, 424] [internal quotation marks from *Witt* omitted]].

"The Supreme Court insisted that capital jurors not be struck for cause unless they are unable to follow the court's instructions." (*Brown v. Lambert* (9th Cir. 2006) 451 F.3d 946, 948.) Under this standard, jurors "who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law [citations omitted]." (*Id.)* The Supreme Court explained that it required a showing of a failure to follow the law before removing a juror because excluding jurors on their views alone would exclude too many otherwise eligible jurors. "Thus, it is—and was at the time of [Mr. Elliott's] trial in 199[2]—clearly established that excusing a juror for cause in a capital case

is unconstitutional, absent evidence that the juror would not follow the law." (*Brown, supra,* 451 F.3d at 948).

Assuming that Ms. Jones was in fact "weak on death," (a contention that is disputed in light of the fact that every answer she gave on her questionnaire was given by a non-black person selected to serve on the jury), the trial court improperly removed her from the venire. There is nothing in the record about her ability to apply the law because she was never given an opportunity to explain her views. Neither the defense nor the prosecution asked her a single question regarding her views of capital punishment or her willingness and ability to follow all instructions that are given to her. (RT 231–819, 465–510.)

However, the defense did pose questions to the pool at large about the ability to impose the death penalty. A lengthy segment of defense counsel's questions to Ms. Jones' panel involved determining whether any jurors would either automatically impose the death penalty under the facts of this case, or automatically vote for life in any death penalty case. When defense counsel posed such questions, in the form of "would anyone here automatically vote for life..." (3 RT 467-68, 474, 476), and while other jurors in the pool did respond to such questions, Ms. Jones did not raise her hand.

The Ninth Circuit has concluded that the Washington Supreme Court erred by upholding a juror's removal whom the prosecutor had contended

was "too reluctant" to impose capital punishment. (*Brown*, 451 F.3d at 949.) The Ninth Circuit concluded that the state court had erred by failing to give appropriate weight to the juror's commitment to follow the law. (*Id.*)

Likewise, in this case, there is no evidence that Ms. Jones would have failed to follow the law in deciding Mr. Elliott's conviction and sentence. Absent this constitutional minimum, the trial court erred by allowing her exclusion without evidence that her personal views would in fact interfere with her duties. In such circumstances, the error was structural and the proper remedy is to vacate the sentence. (*See Grey v. Mississippi* (1987) 481 U.S.648, 659-60.)

Accordingly, even assuming that the prosecutor introduced sufficient evidence that Ms. Jones was "weak on death," the prosecutor introduced no evidence that Ms. Jones would be unable to follow directions when sitting as a juror. Absent such a showing, the trial court erred and Mr. Elliott's sentence should be vacated. (*Brown,* 251 F.3d at 953 -954.)

2. *Myron Glasper*

Mr. Glasper was a 22 year old black man who lived in south central Los Angeles at the time of Mr. Elliott's trial. (5 CT 1494-95.) He had attended community college, and was working with the Los Angeles Unified School District as a Campus Aide. (5 CT 1497.)

During *voir dire,* the following exchange occurred when the Prosecutor asked Mr. Glasper to elaborate on his written answer to Question 110, which asks, "Overall, in considering general issues of punishment, which do you think is worse for a defendant: Death __ Life in prison without the possibility of parole ___ Please explain:" (9 Supp. CT 2438.)

Prosecutor: You said you somewhat believed in the death penalty. But you felt if somebody got life without the possibility of parole, that would give their family less grief; and you didn't really want to punish the family. . . . What did you mean by that?

Glasper: After sitting here listening to the questions, I think differently. I have to keep an open mind. ¶ When I wrote that, like I said, I believe in the death penalty; and the family of the person being executed goes to — goes to — they grieve.. . . ¶ If the person is given life without parole, they have time to sit and think about what they have done. ¶ It weighs both sides, actually.

Prosecutor: Okay. There are some factors that weigh towards life and some factors that weigh towards death?

Glasper: Exactly.

Prosecutor: As you sit there now, do you think you would be more influenced by any of the factors on either side?

Glasper: No, I wouldn't.

Prosecutor: You would wait until you heard all the evidence?

Glasper: Yes.

(3 RT 599–600.) Despite these even-handed and thoughtful answers to both the questionnaire and during *voir dire*, the prosecutor peremptorialy struck Mr. Glasper from service. (4 RT 802.)

a. The Trial Court Properly Determined that a Prima Facie Case of Discrimination had been Made Out by the Defense.

As with Ms. Jones, the trial court properly determined that a *prima facie* case of discrimination had been made out when the defense objected, stating, "Your Honor, at this time we're renewing our *Wheeler* motion now based on the exclusion of blacks from the jury..." This determination was proper, as every factor discussed by this Court in *Bell* was, once again, met. While it is true that only two blacks were removed from the jury at this point, they were the only two blacks in the entire jury pool.[27] Like Ms. Jones, the only matter distinguishing him from the others was his race, and therefore he was otherwise "heterogeneous as the community as a whole." (*Wheeler* at 280.) While the prosecutor did not bother to engage Ms. Jones in even "desultory" *voir dire*, Mr. Glasper was asked extensive questions based on his questionnaire. However, the answers to these questions

[27] In *Bell*, this Court found that removal of 2 of 3 African American women was not indicative of discrimination, because "the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible." The next consideration – that a significant number of peremptories be used against this group, is also impossible, as there were only two black to be removed. However, in this case, the removal of both blacks from the pool, in combination with all the other factors, renders the removal of all blacks from service suspect.

resolved any fears that the prosecutor could have had about Mr. Glasper being a biased or otherwise unfit juror. (3 rt 591, 599-600.) Finally, Mr. Elliott is a member of the group excluded – blacks – and the victim of the crime is a member of the racial group that comprised the majority of the jury. (1 RT 168-169.) Again, the *Bell* Court's concern that members of the defendant's "parallel" group ultimately served on the jury is inapposite here — in the present case, no such members of his "parallel" group were permitted to serve. (4 RT 793, 802; *Bell* at 466.)

b. The Prosecutor Failed to Provide A Racially-Neutral Reason For Striking A Black Man From the Venire

At the second *Batson* step, the prosecutor initially provided three reasons for her action: (1) "Mr. Glasper came into this courtroom each day dressed in T-shirts and jeans"; (2) "(t)he man had his hair, which is an Afro, cut into a bun in the back"; and (3) "he wouldn't make eye contact with me." (3 RT 803.) Defense counsel objected to the characterization of the record. The defense claimed that Mr. Glasper's (1) "clothing was neat"; (2) "his hair was very neat"; and (3) because the defense "paid close attention" to Mr. Glasper's conduct, "the record [does not] indicate[]" that Mr. Glasper was inattentive to the prosecutor. (3 RT 803-804.)

The prosecutor did not refute the defense counsel's account of Mr. Glasper's appearance and conduct. Rather, the prosecutor then added a

fourth reason, stating that Mr. Glasper's answer to Question 77 of the questionnaire evidenced his lack of open-mindedness. (3 RT 804.)

The trial court upheld the prosecutor's removal of Myron Glasper because "based on answers to the questionnaire, I do not feel that there's any showing that she excused him because—that he happened to be black. . . ." (3 RT 806.) This finding has no support in the record. Indeed, it is contrary to what the record demonstrates – that no race-neutral reason for excusing Mr. Glasper was demonstrated.

c. Contrary to the Prosecutor's Claim, The Record Establishes That Myron Glasper Has An Open Mind

1. The Answer to Question 77 Demonstrates An Open Mind

The prosecutor claimed that Mr. Glasper's answer to Question 77 was problematic because "people with attitudes like that are not going to be open-minded." (3 RT 804.) The plain meaning of the answer, however, indicates that Mr. Glasper is free from any result-oriented bias and does not have a closed mind. When asked for the three "most important problems in the current criminal justice system," Mr. Glasper answered, "Sometimes people are tried w/ lack of evidence. Innocent people being convicted. Guilty (known fact) people getting away easy." (5 CT 1511.)

This answer evinces nothing but an open mind, and a willingness to weigh evidence carefully before reaching a particular result. This mindset

is precisely the type of juror that the State of California seeks. For instance, the trial court gives the following pre-trial admonition to jurors: "People and defendants have a right to expect that you will conscientiously consider and weigh the evidence" and "you must not form or express any opinions on the case until the matter is finally submitted to you." (CALJIC 0.50). These instructions mirror Mr. Glasper's commitment to carefully weigh and consider all evidence that is presented to him.

2. Other Questionnaire Answers Establish that Mr. Glasper Has An Open Mind

Moreover, when directly asked about his ability to be an impartial juror, Mr. Glasper on repeated occasions affirmed that he had an open mind with respect to considering evidence, applying the death penalty, and issues relating to race. When asked in the questionnaire to describe the qualities that would make him an impartial juror, Mr. Glasper repeatedly stated the import of keeping an open mind and weighing the evidence presented by both sides. (9 Supp. CT 2428, 2431.) In response to Question 53's query, "What is it about yourself that makes you feel you can be an impartial juror?," Mr. Glasper answered, "Keeping an open[] mind, observing evidence given, and using rational decision making." (9 Supp. CT 2428.) In response to Question 70, "Do you feel that you can be a fair and impartial juror in a case where a firearm was used to commit a crime," Mr. Glasper checked "entirely" and explained, "Keeping an open[] mind,

observing both sides." (9 Supp. CT 2431.) (emphasis added). In response to Question 56's query, "Can you think of any reason that you might not be an impartial juror, if selected to serve on this case," Mr. Glasper answered "no." (9 Supp. CT 2428) (emphasis in original).

With respect to queries of whether a juror would vote a particular way regardless of evidence set forth in Questions 101 through 104 and 109, Mr. Glasper answered every question to indicate that he did not have a particular presumption towards or against the death penalty and would apply a penalty based on the evidence presented to the jury. (9 Supp. CT 2436–38.) When asked to "describe [his] reaction to the [media's representation of the death penalty]," Mr. Glasper stated, "This [the death penalty] is something that has its pro and cons as everything does, depending on the crimes committed. I agree w/ some[,] disagreed w/ others." (9 Supp. CT 2438, 2439.)

With respect to race, in response to Question 51A, "Overall, do you feel that Afro-Americans are treated fairly in our courts?," Mr. Glasper checked "sometimes." (9 Supp. CT 2427-28.) In response to Question 52, "Can you think of any reasons you might be biased or prejudiced either for, or against, Afro-Americans?," Mr. Glasper answered "No." (9 Supp. CT 2428.)

Throughout his questionnaire, Mr. Glasper took great efforts to thoughtfully volunteer that he had an open mind, and that he intended to

serve on the jury with an open mind about the death penalty, issues of race, evaluation of evidence, and imposition of sentence.

3. *Voir Dire* Establishes that Myron Glasper Had an Open Mind

If the prosecutor truly had doubts over Mr. Glasper's ability to keep an open mind, she is instructed to "have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike." (*Miller-El, supra,* 125 S.Ct. at 2327). In this case, the prosecutor used the opportunity to do so. When Myron Glasper was given an opportunity to explain his questionnaire answers, he expressly and repeatedly asserted his ability to be an open-minded juror.

During *voir dire,* the prosecutor asked Mr. Glasper to clarify what he meant when he wrote that the defendant's family would suffer more if a defendant was sentenced to death. (3 RT 599.) Mr. Glasper responded, "After sitting here listening to the questions, I think differently. I have to keep an open mind" and clarified that his written answer "weighs both sides." (3 RT 599–600.) In a follow up question, Mr. Glasper affirmed that he would not be "influenced by any of the factors on either side" and "would wait [to reach a verdict] until [he] heard all the evidence." (3 RT 600.) There is absolutely nothing in the *voir dire* to indicate that Mr. Glasper would be a closed-minded juror. (3 RT 599–600.)

4. Myron Glasper Provided the Same Answers to Question 77 as did White Jurors.

Mr. Glasper's answer to Question 77's query regarding "the three (3) most important problems in the current criminal justice system?" indicated that a problem with the criminal justice system includes making mistakes, whether the process wrongfully convicts an innocent person or wrongfully acquits a guilty person. (9 Supp. CT 2432.)

White individuals who were selected to serve on the jury expressed similar sentiments that mistakes are among the three most important problems in the criminal justice system. For instance, Joy Boardman, a white juror, agreed that "Criminals [are] set free." (2 Supp. CT 288, 305). Brenda McCracken, a white juror, stated, "Convicted criminals get out before their sentence is over." (2 Supp. CT 540, 557.) And prospective juror Frank Parth, who the prosecution accepted but was removed by defense peremptory, answered the "system allows too much leniency for technical violations resulting in reversals; unequal access to legal representation." (4 CT 1092.) Prospective juror Laura Coble, who was also accepted by the prosecution but removed by the defense, also expressed general concerns about "sentencing rules" in her answer to Question 77. If anything, Mr. Glasper's concerns about the errors in the administration of justice were more even-handed than those expressed by Jurors McCracken and Boardman, and more indicative of an open mind.

When a prosecutor dismisses a black individual while leaving similarly-situated white individuals to serve on the jury, "that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Miller-El, supra*, 125 S.Ct. at 2325.) "[T]he plausibility [of the prosecutor's race-neutral explanation] is severely undercut by the prosecution's failure to object to other panel members who expressed views much like" Mr. Glasper. (*Miller-El, supra*, 125 S.Ct. at p. 2329.) Indeed, a "prosecutor's motives may be revealed as pretextual where a given explanation is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge." (*McClain v. Prunty* (9th Cir. 2000) 217 F.2d 1209, 1220.)

Here, the prosecutor's alleged concern about Mr. Glasper's questionnaire answers was refuted by her obvious lack of concern about similar answers from white and Hispanic jurors she did not seek to dismiss. Under *Batson*'s third step, the trial court was required to note that while the prosecutor focused considerable attention on Mr. Glasper's allegedly non-open minded answer in the questionnaire, she completely ignored the truly one-sided answers raising the same concerns in the questionnaires of Joy Boardman, Brenda McCracken, Laura Coble, and Frank Parth. Thus, the trial court erroneously denied the *Wheeler/Batson* challenge with respect to Myron Glasper.

5. The Trial Court Erred By Concluding that the Prosecutor had a Race-Neutral Reason for Removing Mr. Glasper from the Jury.

In evaluating the prosecutor's reasons for removing Mr. Glasper, the trial court reasoned that the prosecutor may "exercise peremptory challenges *without stating reasons*." (4 RT 806.) (emphasis added). Under this level of deference, the trial court uncritically accepted the prosecutor's proffered reasons for dismissing Mr. Glasper because they looked, on the surface, to be neutral.

In *Johnson* and *Miller-El*, the Supreme Court clarified that the three-part *Batson* test is "designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." (*Johnson v. California* (2005) 25 S.Ct. 2410, 2418 n.7 [hereinafter *Johnson*].) Under *Johnson* and *Miller-El,* the trial court was required to consider that (1) the prosecutor's first attempt to avoid a *Batson* challenge was to egregiously misrepresent the record; (2) the prosecutor removed the only black individuals who were in the venire; (3) the prosecutor's claimed reason for removing Mr. Glasper is contrary to what he said on his questionnaire and in *voir dire*; (4) Mr. Glasper's supposed fatal answer on the questionnaire was echoed by white jurors; and (5) the prosecutor's reliance on appearance as a neutral reason for removing Mr. Glasper does not rebut the cumulative evidence of purposeful discrimination. When properly scrutinized, all of the relevant

circumstances establishes that the trial court erred and that prosecutor failed to provide a race-neutral reason for removing Mr. Glasper from the venire.

6. Applying the Proper Standard of Review, The Trial Court Erred by Failing to Find That There Was No Credible Reason For Removing A Black Man From The Venire.

The U.S. Supreme Court has recognized that prejudiced actors express their bias through sophisticated and subtle means. In evaluating whether a prosecutor has exercised a peremptory strike with purposeful discrimination, impermissible bias is gleaned from her pretextual and fictitious reasons. (*See Batson, supra*, 476 U.S. at 93 [holding that "a court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available"]) (internal quotations and citations omitted.) As set forth below, all of the prosecutor's reasons for removing a black man from the venire are fantastical misrepresentations of the record, contrary to the record, or without legal support.

First, the defense claimed that the prosecutor's removal of Myron Glasper showed an emerging pattern of purposeful discrimination by removing black individuals from the venire. The prosecutor initially rebutted this charge of racial bias by misstating the record. Despite having removed Patricia Jones from the venire no more than minutes earlier,[28] the prosecutor erroneously claimed that "Well, I believe [the defense] made a

[28] A mere eight pages of transcript separate the two events. (4 RT 796-802.)

challenge to Miss — the first [excluded black juror], Miss Jones." (4 RT 803.)

The prosecutor's fantastical attempt to claim that the defense removed the first black juror only minutes earlier discredits her credibility and her motivations. "Implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." (*Purkett v. Elem* (1995) 514 U.S. 765, 768 [per curiam].) Here, where the prosecutor's first line of defense to the charge of impermissibly removing blacks from the pool was utterly fictitious, and can lead to no other inference than that of discrimination.

Second, Mr. Elliott is African-American. Of the individuals who were selected to serve on the jury, none were African-American. The jury was comprised of seven white jurors, four Hispanics, and one Pacific Islander. (4 CT 1047, 6 CT 1772, 9 CT 2301, 10 CT 2622, 2650, 13 CT 3602, 3770, 6 CT 1744, 7 CT 1993, 12 CT 3462, 13 CT 3518, 13 CT 3378.) Of the individuals who were selected as alternates, none were African-Americans.

Of the only two prospective black jurors who were called to the panel, the prosecutor used two peremptory challenges to remove both. Although this statistic does not affirmatively prove purposeful discrimination, "the two challenges against African-Americans do not stand alone. Under *Batson*, [a reviewing court] must consider 'all relevant

circumstances' surrounding the challenges [citations]." (*Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1079 (*Fernandez*)). In this case, the removal of all the possible African-American jurors from the venire is a critical factor that must be included in determining whether the prosecutor was motivated by impermissible race-based considerations.

Furthermore, the prosecutor misrepresented Mr. Glasper's ability to serve on the jury based on his answer to Question 77. As shown in this and other questionnaire answers, as well as in his exchange during *voir dire*, Mr. Glasper consistently and emphatically stated that he had an open mind. "[W]hen illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall of the plausibility of the reasons he gives." (*Miller-El, supra,* 125 S.Ct. at 2332). The trial court therefore erred in failing to note that the record sharply and repeatedly belied the prosecutor's purported reason for Mr. Glasper's removal.

Moreover, Mr. Glasper identified one of the problems in the current criminal justice system to be mistakes made in convicting innocent people and freeing guilty ones. This concern was also expressed by two white jurors who stated that they were concerned with guilty people who were mistakenly freed. "If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step." (*Miller-El, supra,*

125 S.Ct. at 2325.) The trial court therefore ignored evidence of purposeful discrimination when evaluating the prosecutor's proffered reasons.

The prosecutor's remaining reasons for dismissing Mr. Glasper were based on his appearance. The prosecutor claimed that Mr. Glasper was wearing a t-shirt, his hair was "bizarre," and he was inattentive to the prosecutor. The defense counsel, on the record, directly contradicted this assessment of Mr. Glasper's appearance and conduct, explaining that, "his clothing was neat," his "hair was very neat," he was not "dirty and messy.... I don't think there's anything about his general appearance that's been fairly characterized. . . ." (4 RT 804.) Notably, the prosecutor did not rebut the corrections to the record. Rather, she offered another reason to remove Mr. Glasper based on his questionnaire answers, which, as discussed above, the reason is without merit.

As a matter of law, the trial court erroneously accepted Mr. Glasper's appearance as a seemingly "neutral reason" to remove him from the venire. However, a trial court must do more than simply accept any facially neutral reason. If prosecutors were required to proffer nothing more than facially neutral reasons, "it is difficult to imagine how any defendant could prevail on a *Batson* claim. . . .The Supreme Court's exhaustive review of the record in *Miller-El* forecloses such an approach." (*Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1109.)

Thus, there are ample inferences and evidence to establish that the prosecutor engaged in purposeful discrimination in removing Mr. Glasper from the jury. The prosecutor's additional explanations for removing Mr. Glasper because he wore a t-shirt, had his hair in a ponytail or bun, and allegeldy was inattentive is not sufficient to overcome the inferences and evidence of bias. Indeed, the stated reliance on Mr. Glasper's appearance is not "the type of reason that weighs against an inference of bias." (*Williams, supra,* 432 F.3d at 1109.) Accordingly, the trial court erred by concluding that the prosecutor presented a race-neutral reason for removing Mr. Glasper from the jury. Taking into account all relevant circumstances, the record establishes that the prosecutor removed Mr. Glasper based on purposeful discrimination. Controlling case law thus compels this Court to vacate Mr. Elliott's conviction.

E. The Prosecutor's Removal of Several Hispanic Jurors Cannot Be Justified on Non-Racially Motivated Grounds.

As a preliminary matter, Mr. Elliott, an African-American, is properly raising a *Batson* challenge to the prosecutor's exclusion of Hispanic jurors. In *Powers v. Ohio* (1991) 499 U.S. 400, 409–16, the Supreme Court has held that "a criminal defendant may object to race-based exclusion of jurors whether or not the defendant and the excluded jurors are of the same race." *(Fernandez v. Roe* (9th Cir. 2002) 286 F.3d

1073, 1078 [allowing a Hispanic defendant to raise a *Batson* challenge to black and Hispanic jurors].)

1. Mary Garcia was Removed Because the Prosecution Falsely Represented to the Court that She was a Different Juror.

The trial court properly moved past the *prima facie* stage of the *Batson* analysis and required that the prosecution explain its reasons for removing Ms. Garcia. Under the factors recently reiterated in *People v. Bell,* a *prima facie* case had clearly been made out. (*See also Wheeler, supra* 22 Cal.3d at 280-281.) As discussed below, the prosecutor had used a disproportionate number of peremptories against Hispanics, and Hispanic women in particular. (4 RT 798, 813.) Ms. Garcia's answers to the questions posed to her in *voir dire*, as well as in the questionnaire, show that "in all other respects [than her ethnicity was] heterogeneous as the community as a whole." (22 Cal.3d at 280-281.) While the prosecutor did engage in more than desultory questions, the prosecutor clearly confused Ms. Garcia's answers with another Hispanic juror.[29] Moreover, the court itself had previously stated that it "was a little alarmed that [the prosecutor] exercised the first several peremptories on Hispanics. And it seemed to me that there was a pattern developing there that you might have to explain

[29] Mr. Elliott concedes that he is not a member of the Ms. Garcia's excluded group. However, he "need not be a member of the excluded group in order to complain of a violation of the representative cross section rule..." (*Id.*)

somewhere along the line." (4 RT 796.) Therefore, the trial court properly determined that the removal of Ms. Garcia was indeed that point in time, and that a *prima facie* case had been made out requiring the prosecutor to justify her removal of Ms. Garcia. (4 RT 798.)

When asked to provide a race-neutral reason for the peremptory challenge, the prosecutor stated that "she . . . came very close to being a challenge for cause"; and that "[s]he was sitting next to Miss Roux-Clough." (4 RT 798.) The trial court also purported to remember the colloquy with Mary Garcia as nearly resulting in her removal for cause. (RT 799.) In fact, Ms. Garcia was neither seated next to nor even in the same group as prospective juror Roux-Clough. (4 RT 633-34, 762.) The trial court and the prosecutor were apparently thinking of another juror, as their descriptions of Ms. Garcia were utterly inaccurate. The record makes clear that the court and the prosecutor were confusing Ms. Garcia with either prospective juror Erlinda Lara or Sandra Saiza. Ms. Lara identified as Filipino, and Ms. Saiza identified as Hispanic (14 Supp. CT 3798; 8 Supp. CT 1993.) Despite their characterizations to the contrary, nothing in her answers in either *voir dire* or in the questionnaire involved "waffling" or being "weak on death." (RT 687–688.)

On *voir dire,* defense counsel asked the panel including Ms. Garcia and another juror, Erlinda Lara, whether "anyone sitting here that would never vote for death." Ms. Lara and Ms. Garcia both raised their hands. (4

RT 638.) Counsel first clarified with Ms. Garcia, asking whether she could think of a situation in which she "would vote for the death penalty." (4 RT 638.) Ms. Garcia answered "yes." (*Id.*) The Defense counsel clarified by asking whether, as a jury foreperson, could she sign her name to a verdict of death. (*Id.*) Ms. Garcia responded, "yes." (*Id.*)

Ms. Garcia's responses to the prosecutor's questions were equally consistent and anything other than "weak on death." When the prosecutor requested her position "with regards to the death penalty," Ms. Garcia explained that "I am for it. Of course, depending on the case and circumstances." (4 RT 687.) The prosecutor then asked how she would "feel about having to judge somebody," to which Ms. Garcia answered, "I would be judgmental." (*Id.*) When asked if there was "[a]nything about that that would give you pause or hesitation, you wouldn't want to do it?," Ms. Garcia answered, "No." (*Id.*)

When the Prosecutor asked Ms. Garcia whether she believed life without the possibility of parole is the more "severe punishment" over death, Ms. Garcia answered, "it would depend on each individual." (*Id.*) The prosecutor explained that as a legal matter, a capital sentence is a more severe penalty than life without the possibility of parole, (4 RT 687–88) and asked, "Understanding that; how do you feel about being told to do that?" (4 RT 688.) Ms. Garcia answered, "I would say death." (4 RT

688.) No further questions — by the prosecution, defense, or court —were asked of Ms. Garcia. (4 RT 688–696.)

It appears from the record that the prosecutor and court had confused Ms. Garcia with Erlinda Lara, who was questioned directly after Ms. Garcia about having raised her hand in response to the defense question about her ability to impose the death penalty. Ms. Lara repeatedly went back and forth about her ability to impose the death penalty. (4 RT 638-643.) From time to time during the lengthy exchange with the court and defense counsel, Ms. Lara would state that she would not be able to impose the death penalty under any circumstances, and then state that "they might convince me, but it might bother me in the future." (4 RT 638-639.) Ms. Lara ultimately stated that she would never impose the death penalty. (4 RT 642.) In response to the judge's questioning about her having changed her position from her questionnaire, Ms. Lara stated that her answers in court were "the same as in my questionnaire." (4 RT 642.) However, as the trial court pointed out to her, in her questionnaire Ms. Lara had stated that there were circumstances in which she would be able to vote for the death penalty. (*Id.*)

It appears, then, that when the trial court remembered Ms. Garcia as being the person who "waffled back and forth. And we had to go into great detail with her," he was recalling the lengthy exchange with Ms. Lara. (4 RT 799.) Ms. Lara is the only juror from Ms. Garcia's panel who could

have been characterized by the judge as a potential "loose canon in the jury room as far as the prosecution is concerned." (*Id.*)

The prosecutor also may have confused Ms. Garcia with Ms. Saiza. The jurors were apparently seated in alphabetical order during the questioning of Ms. Roux-Clough's panel. (4 RT 750-768.) During this part of the questioning, the following vernirepersons were repeatedly questioned in alphabetical order: Morris, Padilla, Perez, Rice, Roux-Clough, Saiza, Tan, Timian, and Zepetella. (*Id.*) Ms. Saiza self-identified as Hispanic. (7 CT 1993.) Ironically, Ms. Saiza was ultimately seated on the jury. (4 RT 788-809, 13 RT 2760.)

Purposeful discrimination is not limited to racial animus. Rather, any attempt by a prosecutor to remove a juror based on a protected characteristic of race or gender is impermissible under the Fourteenth Amendment's Equal Protection Clause. (*See Miller-El, supra,* 125 S.Ct. at 2343 [Breyer, J., concurring]). Thus, even if the prosecutor's mistake was inadvertent (a generous conclusion given the prosecutor's treatment of black individuals), and Ms. Garcia was removed because she was mistaken for a different Hispanic juror, she was still removed on the basis of her race or ethnicity.

Despite the prosecutor's partial admission that she may have been speaking about a different juror, ("So, unless I got my people mixed up — ," 4 RT 799) the court compounded the error by inserting its own flawed

memory of the venirepersons into the discussion. The trial court agreed with the prosecutor, stating that, "I remember the colloquy well with Miss Garcia. She was — waffled back and forth. And we had to go into great detail with her." (4 RT 799.) However, as discussed above, nothing in the record supported this statement. The court's conclusion that she would be a "loose cannon in the jury room as far as the prosecution is concerned" was utterly unwarranted, as well. (4 CT 799.)

The record is clear, then, that when the defense questioned the removal of Ms. Garcia from the venire, the response held no support in the record. The trial court failed to examine the record's contrary evidence and claimed, in error, to have remembered words that Ms. Garcia never, in fact, said. Thus, the trial court erred in finding that the prosecutor had a race neutral reason for removing Mary Garcia.

The trial court's inattention to the record is reversible error. By failing to require the prosecutor to provide "actual answers to suspicions and inferences that discrimination may have infected the jury selection process," (*Johnson, supra*, 125 S.Ct. at 2418 n.7), the court allowed a Hispanic juror to be removed without any basis in the record. "It does not matter that the prosecutor might have had good reasons. . . .what matters is the real reason they were stricken." (*Paulino v. Castro* (9th Cir. 2004) 371 F.3d 1083, 1090.) No matter the motivation, whenever a juror is targeted based on protected characteristics, "the very integrity of the courts is

jeopardized," (*Miller-El, supra,* 125 S. Ct. at 232), harming "litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." (*J.E.B. v. Ala. ex rel. T.B.* (1994) 511 U.S. 127, 140.) The trial court therefore clearly erred by refusing to undertake the proper *Batson* inquiry with respect to the reasons why the prosecutor removed Mary Garcia. (*Montiel v. City of Los Angeles* (9th Cir. 1993) 2 F.3d 335, 340), and reversal is required.

2. *The Trial Court Erred in Failing to Find a Prima Facie Case Had Been Made out wit Respect to the 5 Hispanics Who Had been Removed from the Venire.*

Although the Defense raised a *Wheeler* motion "with regards to the pattern that's developed with regards to Hispanics, women in particular" and observed that the past five Hispanic women[30] had been struck from the venire, (4 RT 798), the prosecutor response encompassed only her reasons for removing Mary Garcia. Defense counsel reiterated his request for "an explanation" for the prosecutor's reasons for striking the entire group of Hispanics from the venire, (4 RT 799), and the court responded:

> That's not so. Because I sounded a note of caution before and said that I had noticed a pattern, that there

[30] Trial counsel slightly misstates the record. Although there were five Hispanic jurors removed from the venire, four were women and one was a man. (*See Appendix 3.*) When first making his objection, Mr. Ramirez notes this distinction. (4 RT 798–800.) However, it appears that as counsel and the court discuss this argument, the parties inaccurately refer to the objection as involving five Hispanic women, not four Hispanic women and one Hispanic man. (4 RT 798–802.) For present purposes, the distinction is immaterial.

> were systematic Hispanic names, although a couple of them I noticed appeared to be Hispanic by marriage rather than Hispanic because *they were not Hispanic coloring*.

(4 RT 800) (emphasis added.)

Defense counsel objected to the Court's classification of the five dismissed potential jurors as "being possibly Hispanic by marriage" and noted that "Hispanic names come in all colors." (4 RT 800.) The court retreated from its position on the ethnicities of the jurors in questions, and assured counsel that "if there are further Hispanic challenges, and especially Hispanic women, I think we're going to have to go right back through the list and check all the challenges and do it." (*Id.*) Yet when another Hispanic woman was removed by the prosecutor's peremptory and the defense reminded the court of its promise to address the situation, (4 RT 814), the court refused to do so. (*Id.*) By so doing, the trial court ignored statistical evidence showing a pattern of removal of jurors based on race, which, standing alone, was sufficient to require the prosecutor to provide race-neutral reasons for her actions. A proper *Batson/Wheeler* analysis would have shown that the prosecutor was attempting to use peremptories to racially engineer the jury composition.

a. Trial Court Applied the Wrong Legal Standard to Determine If There Was Prima Facie Showing of Discrimination

This case went to trial in 1992, prior to the announcement of *Johnson* and *Miller-El.* Thus, it is likely that the trial court erroneously required a defendant to show a "strong likelihood" of discrimination to make out a *prima facie* case under the then-prevailing *Wheeler* standards. (*Johnson, supra*, 125 S.Ct. at 2416–17.) Although the trial court did not expressly refer to which standard it was applying, its actions must be reviewed under the current law that has clarified that "a defendant satisfies the requirements of *Batson's* first step 'by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.'" (*Williams, supra,* 432 F.3d at 1106 [quoting *Johnson, supra,* 125 S.Ct. 2417].) "Where it is unclear whether the trial court applied the correct standard, we review the record independently to 'apply the high court's standard and resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror' on a prohibited discriminatory basis." (*People v. Bell* (2007) 54 Cal.Rptr.3d 453, 464-465.) Viewed from this standard, all relevant evidence establishes that Mr. Elliott established a *prima facie* showing of discrimination.

b. The Trial Court Ignored Evidence of Statistical Disparity

The court's first error involves its failure to consider the obvious statistical disparity in the ultimate composition of the jury. "[A] defendant

can make a prima facie showing [of discrimination] based on a statistical disparity alone." (*Williams, supra*, 432 F.3d at 1107.) Also, in evaluating the number of the prosecutor's strikes against non-white jurors, the "bare facts" of the record are sufficient to establish that the trial court erred by not requiring the prosecutor to explain the pattern. (*Id.*)

At the time that the defense objected, the prosecutor had exercised peremptory challenges to exclude five out of a possible ten Hispanic jurors. (4 RT 796.) Moreover, the prosecutor had stricken a woman named "Perez" who identified herself on her questionnaire as "Caucasian." (6 Supp. CT 1491, 3 RT 791.) At this point in time, the prosecutor had stricken 50% of the potential Hispanic jurors (54% if the prosecutor believed that Ms. Perez was Hispanic). Even the more conservative figure is sufficient as a matter of law to establish a *prima facie* showing of discrimination for purposes of the first *Batson* step. (*See United States v. Lorenzo* (9th Cir. 1993) 995 F.2d 1448, 1453–54 [three of nine (33%) of Hawaiian jurors stricken]; *United States v. Bishop* (9th Cir. 1992) 959 F.2d 820, 922 [two of four (50%) African-American jurors stricken].) The trial court therefore erred by not requiring the prosecutor to explain her reasons for removing the Hispanic individuals from the venire.

By the end of jury selection, the prosecution used a total of eight out of 21 peremptories against Hispanics (38%). When considered in combination with the two peremptories against blacks, almost half of the

prosecutor's peremptories were used against minorities. By contrast, defense counsel struck only one Hispanic juror, and four persons identified as "other." Only four Hispanics ultimately served on the jury, despite the fact that the population of Norwalk was characterized by the defense as "49 percent Hispanic." (RT 806.) These statistics bear out that the prosecution "has struck most or all of the members of the identified group from the venire." (*Wheeler, supra,* at 280-81.) The record also makes plain that the prosecutor "used a disproportionate number of [her] peremptories against the group." (*Id.*)

Indeed, the trial court itself had "sound[ed] a note of caution" regarding the removal of Hispanic jurors, stating, "I was a little alarmed that you exercised the first several peremptories on Hispanics. And it seemed to me that there was a pattern developing there that you might have to explain somewhere along the line... I just sound it as a note of caution. And I thought that we should watch that." (4 RT 796.) Despite this initially *sua sponte* recognition of the plain statistical evidence of discrimination, which was ultimately confirmed by the subsequent peremptories against several more Hispanics, the court refused to remedy this flagrant *Batson* violation.

b. The Prosecutor Failed to Ask A Hispanic Venireperson a Single Question Before Using a Peremptory Strike Against Him

A *prima facie* showing of racially motivated peremtory challenges "may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory *voir dire*, or indeed to ask them any questions at all." (*People v. Bell* (2007) 40 Cal.4th 582, citing *Wheeler, supra,* 22 Cal.3d at 280-281).

In this case, the prosecution removed prospective Juror Esquivel without asking him a single question. Mr. Esquivel was removed by prosecutorial peremptory despite responses to defense questions that he would consider both penalties and make an independent judgment. (3 RT 585, 588-89.) Mr. Esquivel's discussion in defense-initiated *voir dire* provides no evidence against his ability to serve as an impartial, death qualified juror. The complete failure to ask any questions of Mr. Esquivel belies any assertion that concerns about his position on the death penalty existed. As such, the only explanation for Mr. Esquivel's removal is his ethnicity, which is clearly prohibited under *Batson* and *Wheeler.*

c. The Trial Court Erred by Concluding that the Prosecutor Was Not Motivated by Race by Dismissing Individuals Because They Were "Hispanic By Marriage" and Not "Hispanic Coloring."

To justify its failure to proceed to the second step of *Batson,* the trial court impermissibly offered its own speculation that the prosecutor's

actions were innocent because the removed jurors appeared "Hispanic by marriage" and not of "Hispanic coloring." (4 RT 799.) Without commenting on the logic of the trial court's explanation, "it does not matter that the prosecutor may have had good reasons to strike the prospective jurors. What matters is the ***real*** reason they were stricken." (*Paulino, supra*, 371 F.3d 1090 [emphasis in original].) Morevoer, the trial court failed to keep its promise to question the prosecutor's motives upon removal of further Hispanics, simply stating that "I just – I can't attribute that kind of bad faith to [the prosecutor], that she is dong this on a racial basis or ethnic basis." (4 RT 814.) Similar to the error in *Paulino*, this trial court impermissibly offered its own explanation instead of "requir[ing] an actual explanation from the prosecution." (*Id.*)

The trial court should have proceeded to *Batson's* second step, because, after this point in time, the prosecutor proceeded to use its subsequent three peremptory challenges against two Hispanics and one black man. (4 RT 802, 808, 809.) By the end of the venire, the prosecutor exercised a total of 17 peremptories, seven of which struck Hispanics and two of which struck African-Americans. (*See Appendix 3* for a citation to the record of each juror's race and each party's peremptory challenge.) Within this group, the prosecutor exercised peremptory challenges to exclude seven out of a possible thirteen (53.8%) of the Hispanic jurors and two of its challenges to remove all (100%) of the black individuals. (4 RT

788–91; *see also Appendix 3* for citations to the record for the race of each juror.)

F. The Trial Court Erred In Denying the *Wheeler/Batson* Motions.

In denying Mr. Elliott's multiple *Wheeler/Batson* motions, the trial court either failed to require the prosecutor to provide reasons, or, when required, gave them undue, unfounded deference. Although the court justified its rulings based on its own readings and the prosecutor's representations of the jury questionnaires, it failed to consider those same questionnaire answers in scrutinizing the explanations the prosecutor gave for striking black panelists. As Mr. Glasper and Ms. Jones' questionnaires and *voir dire* demonstrate when compared to non-black seated juror's questionnaires and *voir dire*, the prosecutor's stated reasons were "inherently implausible in light of the whole record." (*Turner, supra*, 42 Cal.3d at p. 720, fn. 6; *People v. Gonzalez, supra,* 211 Cal. App.3d at p. 1193; *People v. Granillo* (1987) 197 Cal.App.3d 110, 120.)

Similarly, the court and prosecutor's confusion of Ms. Garcia with another juror typifies the hazards of reducing a juror's identity to race or ethnicity. Moreover, despite its own acknowledgement of clear statistical evidence of discrimination against Hispanics, the court refused to engage in a *Batson* analysis of the prosecutor's pattern of removing Hispanics. The

trial court erred by never requiring the prosecutor to explain her actual motivations for her peremptory challenges of Hispanics, impermissibly "relying instead on its own speculation as to what might have been the prosecutor's reasons." (*Paulino, supra,* 371 F.3d at 1092.)

These and other abdications of the judicial duty to determine the true motivations for peremptory challenges deprived Mr. Elliott of his right to a trial by a jury drawn from a representative cross-section of the community under Article I, Section 16 of the California Constitution and under the Fourteenth Amendment of the United States Constitution. Reversal is required if only one prospective juror is excluded for race-based reasons. (*People v. Silva, supra*, 25 Cal.4th 345, 386.) In this case, where multiple black and Hispanic jurors were so excluded, *Batson* and its progeny require reversal of Mr. Elliott's convictions and judgment of death.

III. THE TRIAL COURT ERRED BY FAILING TO INTERVENE TO REMEDY INAPPROPRIATE RACE-BASED CONSIDERATIONS FROM INFECTING THE TRIAL.

A. Factual Background

Defense counsel attempted to remove Prospective Juror Knott for cause because in answer to the questionnaire which asked, "Do you think Afro-Americans are more likely to commit crimes than other racial groups?" Mr. Knott answered, "yes." (3 RT 616.) The trial court denied the request because, at a bench conference, the trial court stated that Mr. Knott's statement did not constitute cause because there are "statistical studies that would back that up." (3 RT 616.)

Defense counsel disagreed with the trial court and continued to attempt to remove Mr. Knott for cause. (3 RT 617.) The defense argued that it was imperative that someone who has an express racial bias against African-Americans not serve on the jury. (3 RT 617.) The defense contended that this is especially true because the one prior strike of a black person by the prosecutor left only two other black people in the entire venire. (3 RT 617.) The trial court adamantly disagreed with this argument by claiming a strange impotence to remedy the situation. The trial court stated, "And—so I can't be concerned with the racial make-up of this jury because you are losing a black person for cause, therefore, I should lean over backwards and excuse white people just on that basis." (3 RT 617.)

At a different point in the *voir dire*, the trial court denied the defense's *Wheeler* motion to have the prosecutor explain her pattern of striking Hispanic women from the venire (a legal argument independently raised as a *Batson/Johnson* error in Argument II). (4 RT 798–800.) The trial court stated there was no pattern because the women appeared "Hispanic by marriage" rather than being "Hispanic colored." (4 RT 799.)

B. The Trial Court's Own Limited View of the Potential for Bias in Court Proceedings Allowed Inappropriate Race-Based Considerations to Infect the Juror Questionnaire and Venire Selection.

The trial court's bald speculation that black people commit more crimes than white people and speculation over the fact that excused jurors lacked "Hispanic coloring" were presented as fact, despite the lack of evidence to support these matters. (4 RT 800.) The trial court also refused to take any responsibility for the likelihood that the venire was going to be completely lacking in African-American jurors. Standing independently, some of these comments constitute separate legal errors that have been addressed in this brief. Cumulatively, however, these issues combine to strongly suggest that the trial court's own biases prevented it from preventing inappropriate race-based considerations from infecting the trial.

The following discussion with the bench is instructive here. A bench conference was held about the defense-proposed juror questionnaire

questions regarding potential juror biases based on the race of the victim in relationship to the race of the defendant. The Court was reluctant to allow all of the defense's questions about race in the criminal justice system to come into the questionnaire:

> But the way you phrased the question seems to me that – I don't know. *Perhaps I have some biases of my own.* I just had occasion to see the Martin Luther King museum in Memphis, Tennessee, a very moving and powerful experience; and I have very strong feelings about the progress of Afro-Americans in the country based on the exhibits there and what happened in the deep south, *contrasted, I think, with California to a certain extent.*

(1 RT 167-68.) (Emphasis added.) In redacting some questions about race, the court further stated:

> I think that on this subject you have just got too much in there that you are putting emphasis where it isn't really called for. Because it isn't as though this were some – if the theory of this case were some kind of hate crime that was racially motivated, or there were particular racial overtones that caused this crime to be committed that would not have been committed before, for racial aspects, then I think you would be entitled to probe into that in great detail.

(1 RT 169.) Here, the court failed to recognize that the race of the victim in this case (white) in relationship to the race of Mr. Elliott (black) required probing into juror biases in great detail without the crime being classified as a hate crime.

These comments from the court appear to explain why the trial court refused to intervene to cure inappropriate race-based considerations that

infected the selection of the jury. The trial court apparently believed that racism is confined to the South and the 1950s, and this view limited the court's ability to respond to matters arising in its own courtroom.

One such matter requiring the court's attention was the request for removal for cause of prospective Juror Knott by the defense. Prospective Juror Knott's answers to the questionnaire showed his susceptibility towards racial bias. (10 CT 2886.) Mr. Knott admitted that he had "some racist or ethnic attitudes," stated that he was raised in an atmosphere that was not free from bias, and specifically admitted that he harbored bias against people of Vietnamese origin and "gang members." (*Id.*) He noted that "everyone" he knew exhibited "racial, sexual, religious, and/or ethnic prejudice," and stated that he felt that "Afro-Americans were more likely to commit crimes." (*Id.*) The following colloquy gives ample evidence that the court's own attitudes curtailed its ability to see the dangers of allowing a juror such as Mr. Knott to serve.

> The Court: Wait a minute. Wait just a minute now. Let's go — Do you think they're more likely to commit crimes than other racial groups?
>
> Defense: Yeah.
>
> The Court: Okay. There have been statistical studies that would back that up. So let's leave the race part out of it, and let's just talk about how many people there are in a statistical group in the community, and what's the proportion of crime. And he can say that without being a racist at all. ¶ Let's go to the next question.

Defense: Your Honor, my client is a black man. He's accused of killing a while man. We have no black – we're going to lose one of the only two male black jurors in the entire panel. We have a while man who is sitting here as a juror who things black people are more likely to commit crimes.

The Court: Mr. Mayfield [the black juror who will be excused for cause] has nothing to do with Mr. Knott.

Defense: But it has to do with the composition of the jury.

The Court: It does not. It does not. ¶ If all of the other people in this whole panel were black – we're talking about Mr. Knott now. And – so I can't be concerned with the racial make-up of this jury because you are losing a black person for cause, therefore, I should lean over backwards and excuse white people just on that basis.

Defense: This man has expressed an opinion that he thinks black people are more likely to commit crimes than white people, not that a higher percentage of them do, your honor. That's not the question. The question, are blacks more likely to commit crimes, that's a predisposition toward black people.

The Court: Okay. But you see, his following questions, he says, "Would you say you were raised in an atmosphere free from bias? No. My mother grew up in Texas. Have you been exposed to persons who exhibit or have exhibited racial, sexual, religious, and/or ethnic prejudice? Yes. If so, please explain. Everyone I know." ¶ Okay. I think somebody who has that kind of candor is a heck of a lot more honest person [sic] than someone who just slavishly gives the indicated answer.

(3 RT 616-618.)

Defense counsel then attempted to argue for removal for cause based his questions about race in conjunction with Mr. Knott's position that he

would automatically vote for the death penalty under any circumstance in which a shooting resulted in a murder. (3 RT 618-619.) The court ultimately acquiesced that there may be some reason to question Mr. Knott's ability to serve on the jury, but not because of his answers to questions about race: "I think — I'm not impressed with your argument about race at all. But now when he says, 'Regarding the death penalty, we need more of it,' that indicates to me a bias of someone is who is anxious to get in there and strike a blow for —" The prosecution interrupted to request that Mr. Knott be asked more questions. Mr. Knott's answers to further questioning resulted in the court finding that he had been sufficiently rehabilitated. (3 RT 620-628.)[31]

Indeed, when presented with the allegations that the prosecutor had allowed impermissible factors to enter into her decision to remove a black woman, the trial court simply glossed over the issue. This allowed the prosecutor to remove the black woman for unspecified vague allegations that some of her answers were "weak on death" (4 RT 795) – allegations which, as addressed under Argument II, *supra,* were not born out in the record. When presented with allegations that the prosecutor removed a black man from the jury, the trial court defended the prosecutor by saying

[31] Notably, no further questions were allowed of Mr. Mayfield, the black prospective juror who was removed on the basis of his questionnaire answers. (3 RT 620-621.)

that there were "hunch peremptories" and she was entitled to act on her hunches without more. (4 RT 804.)

When justifying the removal of a Hispanic woman that the record shows both the trial court and prosecutor did not accurately remember as the alleged problematic juror, the trial court rushed to the prosecutor's defense by asserting that he "remember[ed] the colloquy well," when the record in fact showed both he and the prosecutor were mistaken. (4 RT 799.) The trial court also denied a pattern of removing five Hispanic people for the fatuous reason that they were "Hispanic by marriage" rather than "Hispanic coloring"— a justification that has no basis in law or fact. (4 RT 799.) Notably, the court's assumption disregarded the self-identification of these jurors as Hispanic. (4 CT 1103, 1131, 1187; 5 CT 1383, 6 CT 1523, 10 CT 2846.)

The Supreme Court has recognized that prejudiced actors express their bias through sophisticated and subtle means. For instance, in evaluating whether a prosecutor has exercised a peremptory strike with purposeful discrimination, impermissible bias is ascertained from his inability to produce anything but pretextual and fictitious reasons for dismissal of a particular juror. (*See Batson v. Kentucky* (1986) 476 U.S. 79, 93 (holding that "a court must undertake a sensitive inquiry into such circumstantial and indirect evidence of intent as many be available") (internal quotations and internal citations omitted); *Purkett v. Elem* (1995)

514 U.S. 765, 768 (*per curiam*) ("Implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination.")).

The impartiality of the trial judge is a basic due process right held by all criminal defendants. (*Tumey v. Ohio* (1927) 273 U.S. 510, 533; *In re Murchinson* (1955) 349 U.S. 133, 136.) Cumulatively, the trial court erred by infecting the trial with a bias that fails to remedy race-based errors. Such acts and omissions by the trial court "infected the trial with unfairness" and thereby "made the resulting convictions a denial of due process." *Darden v. Wainwright* (1986) 477 U.S. 168, 181. The trial court's acts and omissions thus exhibit bias that warrant providing Mr. Elliott with a new trial. U.S. Const.Amend. 14, Cal. Const. art. I, §§ 7-15. (Due process requires notice and opportunity for a hearing before an impartial tribunal.)

EVENTS WHICH INFECTED THE JURY & DELIBERATIONS

IV. THE PROSECUTOR'S PROFFER AND THE COURT'S ADMISSION OF UNSUPPORTED ALLEGATIONS OF THREATS TO THE PERSONAL SAFETY OF AN IMPORTANT GOVERNMENT WITNESS, COUPLED WITH INSINUATIONS THAT THE JURORS THEMSELVES MAY BE IN DANGER, CONSTITUTED PROSECUTORIAL MISCONDUCT AND VIOLATED MR. ELLIOTT'S DUE PROCESS RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT AS WELL AS CALIFORNIA EVIDENCE STANDARDS.

A. Statement of Facts

Janet Delaguila, an employee of Lucky's Market at the time of the robbery and shooting that carries the death penalty special circumstances in this case, testified to the following: 1) she had previously been employed at a dry cleaners where Mr. Elliott had been a regular customer for two years; 2) she had seen Mr. Elliott in the Lucky's Market two days before the shooting and recognized him from the cleaners, and 3) she identified Mr. Elliott as the shooter in the Lucky's Market murder. (6 RT 1048- 1050.) The prosecution relied heavily upon her testimony in closing arguments. (11 RT 2110.) There was no other witness who claimed to have known Mr. Elliott in another setting and who also claimed to have seen him in the Lucky's Market the day of the shooting.

During the cross examination of Janet Delaguila, defense counsel questioned her about whether or not she had received any benefits in exchange for her testimony. (6 RT 1081.)

Q. [By defense counsel] Now, are you receiving any benefits from Lucky's or anybody else with regards to this incident?

A. [Janet DelAguila] No.

Q. You are not—They are not giving you a free car?

A. No.

Q. They don't lease a car for you?

A. They are leasing it. It's not free.

Q. You pay for it?

A. Yes, I do.

(*Id.*)

On redirect examination, the prosecution did not address this issue. (6 RT 1092 - 1100.) Nor was it discussed on re-cross examination. (6 RT 1101-1103.) The parties announced they had nothing further to ask the witness and Ms. Delaguila was told to step down. (6 RT 1103.)

At this point, however, the prosecutor asked to "reopen on redirect for one brief matter that I forgot to clear up." (6 RT 1104.) During this belated redirect examination, apparently going back to the initial cross examination, the prosecutor led the witness through a series of questions repeatedly telling the jury that a job relocation and car were provided to Ms. Delaguila for her "personal safety" after she had identified Mr. Elliott as the perpetrator in the Lucky's incident.

Q. [By prosecutor] Ms. Delaguila, you told Mr. Ramirez that Lucky's Market leased a car for you, is that right?

A. [Janet Delaguila] Yes.

Q. And why did they lease a car for you?

A. Because I needed a car for transportation.

Q. And was this because your place of employment had to be relocated after this incident?

A. Yes.

Q. And did you do this for your personal safety?

A. Yes.

Mr. Ramirez [defense counsel]: Objection, your honor. It's irrelevant.

The Court: I'm sorry. You brought it up, Mr. Ramirez. And I think counsel is entitled to clear up the matter.

Q. [By prosecutor]: And in terms of your employment, were you moved from the Lucky store in Bellflower after you positively identified the defendant in this matter?

Mr. Stein [defense counsel]: Objection to the phrasing of the question.

The Court: The objection is well taken as far as the phrasing of the question. The word "after you made the identification," leave out the adverbs and adjectives.

Q. [By prosecutor]: Miss Delaguila, were you moved from the Lucky Store after you identified the defendant as the person running from the store?

A. Yes.

Q. And were you moved to another Lucky's—Another place of work within the Lucky's Corporation?

A. Yes. [...]

Q. And this was done for your safety?

A. Yes, it was.

Q. And that is why they allowed you to lease a car from them?

A. Yes.

(6 RT 1103-1105.)

There was no evidence concerning any alleged threats to Ms. Delaguila's personal safety. There were no instructions informing the jury as to how it may evaluate the insinuation that the defendant had threatened the personal safety of a witness.

This was not the first time that the prosecution sought to elicit generalized, unsubstantiated fear of Mr. Elliott from the jurors. Earlier, during *voir dire*, when questioning prospective juror Abeyta in front of a panel of jurors, the prosecutor asked the following:

> Let me ask you something hypothetically, and I think you will see what my point is. Once again, this has absolutely—I cannot stress this enough. This has absolutely nothing to do with this case.
>
> Let's say you sat on a jury, and you perceived—as you were sitting on the jury listening to evidence and everything, *you perceived some danger to yourself in coming back with a verdict one way or the other.* [¶] Would that affect your decision?

(4 RT 682-683) (emphasis added).

Defense counsel immediately objected and the Court responded with, "Yes. I think that's inappropriate." (4 RT 683.) However, no further

admonishment of the prosecutor was administered in this case, and no curative instruction was given to remedy the implication that Mr. Elliott was a danger to the jurors.

B. The Court's Conclusion That The Defense Had Opened The Door To The Admission Of The Insinuation That Mr. Elliott Had Threatened The Personal Safety Of a Witness Was Inaccurate.

As an initial matter, the court was simply factually inaccurate in its denial of the defense objection to the introduction of the insinuation of threats when it concluded that the defense had "brought it up" and therefore, the prosecution was entitled to "clear up" the matter. (6 RT 1104.) In fact, the record is clear that defense counsel's inquiry on cross examination was regarding benefits to the witness for her testimony, not fears she may have had or threats she may have received. The defense never came near the subject of job relocation or the necessity of a new car resulting from a fear for her personal safety. The issue was fully resolved when the witness unequivocally stated that she was paying for the lease and that she was expecting no reward for her testimony and was receiving no benefit in exchange for it. The prosecutor injected a new issue when she began asking leading questions regarding the witness's perceived threat to her personal safety and insinuating Mr. Elliott had launched these threats after she had identified him in the Lucky's Market murder. In short, the

court's reason for the ruling that the defense had "opened the door" was erroneous.

C. Admission of the Evidence about Ms. Delaguila's Safety Was Erroneous Because it Did Not Meet the California Standard For Admissibility Of Threats To a Witness.

In the alternative, the Prosecutor's leading statements regarding the witness's perception of threats to her personal safety do not meet the standard for admissibility of evidence relating to threats against a witness. California courts allow evidence of threats to a witness under two theories. "First, if it is relevant on the question of the witness' credibility. [Citations Omitted.] Second, it may be admissible as tending to show a defendant's consciousness of guilt if the threats are sufficiently linked to the defendant. [Citations Omitted.] (*People v. Lybrand* (1st Dist. Div. 3 1981) 115 Cal.App.3d 1, 15-16.) In the present case, the evidence neither went to the issue of the witness' credibility as there is nothing to indicate that she was particularly nervous or apprehensive about testifying, which may require some explanation to the jury, nor was the evidence presented in any way linked to Mr. Elliott. In order to determine whether or not a witness had been nervous at trial, appellate courts have looked to incoherence in testimony, delay in the witness's response to questions, a request for a short recess for a witness to gain composure. (*Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 971.) This testimony was improperly admitted over a defense objection.

In *People v. Olguin*, the court found that evidence of threats by a third person, when not connected to the defendant, was admissible because it was relevant to the issue of witness credibility. (*People v. Olguin* (4th Dist. Div. 3 1995) 31 Cal.App.4th 1355, 1368.) However, this evidence was deemed permissible in part because the jury had been specifically instructed to limit the evidence to "the witness's state of mind, attitude, actions, bias, prejudice, lack of presence thereof." (*Id.)* No limiting instruction of any kind was given in this case. Moreover, the *Olguin* court held that not only should the jury be notified that a witness is afraid, but the jury is entitled to the facts necessary to evaluate the witness' fear such as the source, form and content of a threat. (*Id.*) None of the procedural safeguards necessary for admission of this evidence were observed here. As such, it should not have been admitted.

Similarly, there is no evidence that defendant was connected to any hypothetical danger to this witness at all. The California courts have held that evidence purporting to show attempted witness tampering is only admissible when the defendant was either present at the attempt or there is proof that the defendant authorized such conduct. (*People v. Hannon* (1977) 19 Cal.3d 588, 596-600; *People v. Weiss* (1958) 50 Cal.2d 535, 551-554.) In *Weiss*, the Court held that testimony of a threatening phone call was not admissible when there was no evidence that the phone call was in any way connected to or authorized by the defendant. (50 Cal.2d at 553.)

It has continuously been held that evidence of threats or tampering with witnesses or evidence is only allowed when *directly connected to the defendant.* (*People v. Perez* (3rd Dist. 1959) 169 Cal.App.2d 473, 477-478; *People v. Bell* (1st Dist. Div. 3 2004) 118 Cal.App.4th 249, 256.) There was no such evidence here. The testimony was inappropriate and highly prejudicial and prevented Mr. Elliott from receiving a fair trial.

For Evid. Code, § 352 purposes, prejudice refers to evidence that uniquely tends to evoke an emotional bias against the defendant without regard to its relevance on material issues. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) A trial court's erroneous admission of prejudicial material does not require reversal, however, unless it is reasonably probable the defendant would have obtained a more favorable outcome had the evidence been excluded. (Evid.Code, § 353, subd. b; *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Watson* (1956) 46 Cal.2d 818, 836.) However, this Court has also held that if the trial court's error lightens the prosecution's burden of proof, the *Chapman* "harmless error" analysis applies. (*People v. Garceau* (1993) 6 Cal.4th 140, 186.)

The erroneous introduction of utterly unsubstantiated threats to the safety of a key government witness simply incites jurors and places a heavy burden of protecting the witness by convicting the defendant. By placing this consideration in the minds of the jurors, it may have the effect of lightening the prosecution's burden of proof. It may also violate the

Fourteenth Amendment due process clause if it renders the trial fundamentally unfair. (*McKinney v. Rees* (9th Cir.1993) 993 F.2d 1378, 1383-1386 [erroneous introduction of propensity evidence violates due process]; *United States v. Brown* (9th Cir. 2003) 327 F.3d 867, 871-872 [Court found that the introduction of propensity evidence required reversal, despite an admonition.].) In this situation, the conviction must be reversed unless the state can establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

1. The Insinuation of Threats against Ms. Delaguila Lightened the Prosecution's Burden of Proof.

This Court has recognized that when the erroneous admission of irrelevant and prejudicial evidence lightens the prosecution's burden of proof, admission of such evidence violates the defendant's due process rights under the United States Constitution. (*People v. Garceau* (1993) 6 Cal.4th 140, 186.) In this situation, the conviction must be reversed unless the state can establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Appellant respectfully asserts the admission of the insinuation of threats against Ms. Delaguila violated his Fourteenth Amendment right to due process. Due process requires that a criminal defendant receive a fundamentally fair trial. (*Lisenba v. California* (1941) 314 U.S. 219, 236; *Chambers v. Florida* (1940) 309 U.S. 227, 236-237.) Fundamental fairness

is not provided when a California State court conviction is based upon improperly admitted evidence or unfairness on the part of the State in the use of the evidence. (*Blackburn v. Alabama* (1960) 361 U.S. 199, 206; *Spencer v. Texas* (1967) 385 U.S. 554, 564.) When a State court's evidentiary rulings are "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.)

When threats against a witness, whether fabricated or actual, are erroneously introduced to show that the defendant sought to intimidate potential witnesses and to viciously retaliate against anyone who speaks to the police or who testifies against him, it has the natural and inescapable effect of causing any individual juror to develop concern for the witness's safety and consider this in the adjudication of guilt.

The prosecution's burden of proof is lightened and convictions become easier because the jury, in its desire to punish the accused for threatening a witness, is then willing:

a) To believe a questionable prosecution witness without thoroughly evaluating his credibility;

b) To overlook or simply reject any legitimate defense evidence simply because it is just that ... defense evidence; and

c) To look past the evidence and determine the outcome of the trial based on their concern for the safety of the witness if they acquit the defendant.

These concerns would have resulted in the juror's desire to punish Appellant because of the implication that he threatened Ms. Delaguila, and not just because of what he may have done. Each juror, trying his/her best to follow the court's instructions and to be just and fair, would not have been consciously aware of the intensity of the impact this concern for Ms. Delaguila would have had on the juror as he/she deliberated, in good faith, the fate of the accused.

Further, this same difficulty would have arisen even if the trial court gave the jury an instruction that they were to limit their consideration of the leased car to show that she was not receiving any benefit from her testimony, and to not consider why she may have needed to be relocated. The jurors would consciously do their best to follow the limiting instruction. But, given the highly inflammatory evidence of intimidation, and the natural concern for the person who is being allegedly intimidated, a limiting instruction would have had little or no impact on the jurors.

When these concerns for the safety of Ms. Delaguila were transferred to Mr. Elliott, it would have undeniably lightened the prosecution's burden of proof and deprived Appellant of his Fourteenth Amendment right to due process in a California State court. (*People v. Garceau* (1993) 6 Cal.4th 140, 186. See also, *Arizona v. Fulminante* (1991) 499 U.S. 279; *Delaware v. Van Arsdall* (1986) 475 U.S. 673.)

Whatever evidentiary weaknesses existed in the prosecution's case that linked Mr. Elliott to the killings would have been forgiven by the jury's emotional insistence upon punishing Mr. Elliott based on the implication that he had threatened Ms. Delaguila, and to protect Ms. Delaguila from further retaliation.

2. *The Trial Court Failed to Ensure that the Evidence Possessed Even Greater Reliability than Normal Because This Was a Capital Case.*

In addition, both the Eighth Amendment and the due process clauses of the Fifth and Fourteenth Amendments require greater reliability in all the stages of a capital trial than is required in non-capital trials. (*Beck v. Alabama (1980)* 447 U.S. 635, 637.) Courts must take extra precautions to ensure that a juror's decisions are not influenced by "irrelevant" considerations (*Zant v. Stephens* (1983) 462 U.S. 862, 885) or are the product of "an unguided emotional response" to evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328).

If Mr. Elliott's death verdict was achieved based on irrelevant factors, it was constitutionally unreliable and a violation of his Fifth, Eighth and Fourteenth Amendments. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Ferrier v. Duckworth* (7th Cir. 1990) 902 F.2d 545 [irrelevant photographs of blood spattered crime scene could render trial fundamentally unfair].)

The admission of unduly inflammatory evidence is "an irrelevant consideration" and often leads to "an unguided emotional response" by the jury. It undermines the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638), and it deprives Appellant of the reliable individualized capital sentencing determination guaranteed by the Eight Amendment. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

In this regard, Mr. Elliott asserts that the trial court's admission of the above described inaccurate, irrelevant, and inadmissible "evidence" of threats against Ms. Delaguila, which was highly inflammatory in violation of § 352, amounted to "an irrelevant consideration" that undoubtedly led to "an unguided emotional response" by the jury. This undermined the reliability of Appellant's conviction for this capital offense and deprived Appellant of the individualized capital sentencing determinations guaranteed by the Eight Amendment, as applied to California by the Fourteenth Amendment.

Appellant's Fourteenth Amendment due process rights were also violated if the state trial was conducted "in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice." (*Chavez v. Dickson* (9th Cir. 1960) 280 F.2d 727, 735; *Osborne v.*

Wainwright (11th Cir. 1983) 720 F.2d 1237, 1238-1239 [remanding for habeas hearing to determine whether admission of gruesome photographs constituted fundamental unfairness violating due process].)

Where the probative value of evidence is so substantially outweighed by its inflammatory content, the admission of such evidence violates a defendant's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution. (*Lesko v. Owens* (3rd Cir. 1989) 881 F.2d 44, 50-52 (and cases cited therein).)

Finally, to the extent the error was solely one of state law, it nevertheless violated Appellant's right to due process by depriving him of a state-created liberty interest. Thus, California deprived Appellant of his due process rights which are guaranteed by the Fourteenth Amendment of the United States Constitution if the court does not follow its own statutory provisions, particularly where those provisions provide important procedural safeguards against unreliable capital verdicts. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347; *Hewitt v. Helms* (1983) 459 U.S. 460, 466; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1296-1303.)

D. Mr. Elliott Was Denied His Right To Fundamental Fairness Under the Fourteenth Amendment By the Admission of The Insinuation of Threats To The Safety of An Important Prosecution Witness.

In *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, the court ruled that appellant was denied his right to fundamental fairness under the

Fourteenth Amendment during his trial for aiding a bank robbery because he was prejudiced by the prosecution's solicitation of threat evidence from a co-defendant, then a witness for the state, that was not linked to appellant. There the prosecutor asked a series of questions regarding the witness's safety similar to the questions asked of Ms. Delaguila in this case. The court particularly objected to the use of a leading question concerning anonymous threatening phone calls. (For example, "Are you afraid for your girlfriend and your aunt if you testify?" *Dudley, supra,* at 973.) In *Dudley*, over a defense objection, the trial court admitted the threats to explain the nervous demeanor of the witness, leaving the jury to speculate as to the content and source of the threat. The 7th Circuit found there was nothing in the record to show the witness was particularly nervous and "such evidence becomes so prejudicial to a defendant that no jury could be expected to apply it solely to the question of credibility of the witness before it and not to the substantial prejudice of the defendant." (Citations omitted.) (*Dudley, supra*, at 970.)

In *Oritz-Sandoval v. Gomez* (9th Cir. 1996) 81 F.3d 891, 898, the Ninth Circuit recognized that the introduction of threats against a witness could result in the denial of due process and the granting of a habeas petition citing to *Dudley* where, "... the trial court admitted evidence of threats unconnected to the defendant, permitting the jury to infer that the defendant had made the threats. The court described the unconnected

threats as an 'evidentiary harpoon.'" (*Oritz-Sandoval, supra,* at 898 (citations omitted).) In *Oritz-Sandoval*, the 9th Circuit distinguished *Dudley* because in *Oritz-Sandoval* there was no doubt the threat came from the defendant, the threat was not particularly inflammatory and there was a limiting instruction. This Court has also distinguished *Dudley* on some of these same grounds, none of which are present in this case. For example, where the trial court admonishes the jury regarding unattributed threats, this Court has found no error. (*People v. Williams* (1997) 16 Cal.4th 153, 212 citing *People v. Wharton* (1991) 53 Cal.3d 522, 566, fn 9.) This Court has also distinguished *Dudley* where to have excluded the evidence of threats would have "grossly distorted the record." (*People v. Williams*, *supra*, at 212.) None of the necessary safeguards were present here nor does the record indicate these insinuations were necessary for any purpose but to prejudice the defendant.

In *Dudley*, at least the jury heard that the threats came in the form of a phone call. Here, in a situation even more detrimental to the defense, the jury learned that as a result of her identification of Mr. Elliott, Ms. Delaguila required a new mode of transportation and a job relocation to ensure her personal safety. It never learned, however, the source, form, or content of the threats. The only logical conclusion for the jury here was these were threats of a very serious nature indeed to warrant such

precautions and/or for this witness to have perceived such danger. The introduction of this evidence is highly inflammatory.

The testimony of Janet Delaguila was particularly important to the government's case as she was the only witness who claimed to have known Mr. Elliott prior to identifying him. (6 RT 1048-1050.) The prosecution relied heavily upon her testimony in closing argument. (11 RT 2110.)

The insinuation of threats to Janet Delaguila's personal safety serve to bolster her testimony unfairly as they can only be construed as consciousness of guilt on the part of Mr. Elliott. Moreover, there is the highly inflammatory suggestion that he would endanger the safety of yet another innocent victim to the point of the necessity of job relocation and providing a new mode of transportation. These allegations have the ring of a witness protection type of situation, both serving to highlight her testimony and give it credibility beyond its actual value. "The potential of unfair prejudice from the introduction of threats is 'severe.' [Citations omitted.] There is danger that a jury, upon hearing threats made by the defendant against witnesses, may decide on the improper basis that defendant is a 'bad man.'[Citations omitted.]" (*Oritz-Sandoval v. Gomez* (9th Cir. 1996) 81 F.3d 891, 898.)

Mr. Elliott acknowledges the rule that jurors are assumed to follow the law. (*Greer v. Miller* (1987) 483 U.S. 756, 764.) However, in reality, each juror had been given another subconscious reason to convict without

regard to the evidence in this case. To each juror, Ms. Delaguila was now in danger, and they held the responsibility to protect her from further harm. Taken together, the implications that Ms. Delaguila had reason to be in fear for her life made it impossible for Appellant to receive a fair trial. (See *People v. Maestas* (1993) 20 Cal.App.4th 1482; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.) An error of this magnitude is far from harmless and requires reversal of Mr. Elliott's conviction.

E. The Prosecutor Engaged In Misconduct When She Knowingly Solicited Unsupported Evidence Through Leading Questions to Insinuate that Mr. Elliott Had Threatened The Personal Safety Of An Important Witness For The Prosecution.

As this Court has repeatedly recognized,

> [E]vidence of an anonymous threat not connected with the defendant 'should at once be suspect as ... an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut satisfactorily because he does not know the identity of the pretender.'

(*People v. Williams* (1997) 16 Cal.4th 153, 212 (citing *People v. Mason* (1991) 52 Cal. 3d 909, 946, quoting *People v. Weiss*, *supra*, 50 Cal. 2d at 554).) Here, the introduction of this highly inflammatory information is particularly suspect for several reasons. For example, there was no discovery provided to the defense or testimony at trial regarding threats to Ms. Delaguila. Moreover, there is no evidence that she testified in a state of fear. That is, there are no pauses in the record for her to gain composure

or other such indicia of fear. (6 RT 1046-1106.) The prosecutor waited until all the questioning had been completed and the witness had been excused before she recalled her for a "brief matter" the prosecutor claimed she "forgot to clear up" (6 RT 1104.) And, finally, when the witness was asked by the prosecutor, "Why did they lease a car for you?" and she responded simply, "Because I needed transportation." (6 RT 1104.) It is here that the most telling exchange occurred. Unsatisfied with the witness's response, the prosecutor then engaged in a series of leading questions, repeatedly telling the jury in her own words that the witness's place of employment was relocated for her personal safety and it was necessary for a car to be leased for her personal safety both which occurred after she made the identification of Mr. Elliott. (6 RT 1104-1105.) This prosecutorial testimony was clearly misconduct and was severely prejudicial to Mr. Elliott.

Prosecutorial misconduct violates due process when it has "a substantial and injurious effect or influence in determining the jury's verdict." (*Oritz-Sandoval v. Gomez* (9th Cir 1996) 81 F.3d 891, 899).) The potential injury to a defendant by the accusation, even if by insinuation, of threats to a witness is severe.[32] The leading questions here left the jury to

[32] The presentation of this evidence compounded the earlier error of failing to cure the statement made by the prosecutor during *voir dire* suggesting that the jurors themselves might be in danger. See subheading F, below.

speculate as to the content and form of these threats and must be assumed to have had a substantial and injurious influence on the jury's decision.

"Viewed in the context of the entire trial, each of these errors prejudiced [the Appellant's] 'substantial rights' and 'seriously affected the fairness, integrity, or public reputation of' his trial." *United States v. Combs* (9th Cir. 2004) 379 F.3d 564, 576. As such, the prosecutorial misconduct in this case requires reversal under both state and federal law.

F. The Prosecutor Violated Mr. Elliott's Due Process Rights By Gratuitously Insinuating That Prospective Jurors May Be In Danger.

When questioning prospective juror Abeyta in front of the panel of prospective jurors, the prosecutor asked the following:

> Let me ask you something hypothetically, and I think you will see what my point is. Once again, this has absolutely—I cannot stress this enough. This has absolutely nothing to do with this case.
>
> Let's say you sat on a jury, and you perceived—as you were sitting on the jury listening to evidence and everything, *you perceived some danger to yourself in coming back with a verdict one way or the other.*
>
> *Would that affect your decision?*

(4 RT 682-83) (emphasis added).

Defense counsel immediately objected and the court responded with, "Yes. I think that's inappropriate." (4 RT 683.) No attempts to cure the implication that Mr. Elliott was somehow a danger to the jurors was made

by the trial court. Nor did the trial court firmly admonish the prosecution for its shameless tactic of planting fear in the minds of the venire members.

The prosecutor's question had no legitimate purpose. The disclaimer that the question had nothing to do with the present case was nothing more than a thinly veiled attempt to plant a fear of Mr. Elliott in the juror's minds. Defense counsel immediately saw the real purpose of the question and objected. (4 RT 683.) Without any hesitation, the trial court saw where the prosecutor was headed and deemed the question and tactic "inappropriate." (*Id.*) However, the trial court failed to provide instructions to the prospective jurors that such concern is inappropriate and the prosecutor was impermissibly suggesting that the jurors and prospective jurors are in danger if they fail to convict Mr. Elliott. The harm of the question thus remained—the venire was infected with doubt and concerns for their own safety. Such a misplaced fear interferes with the requirement for a jury to evaluate evidence fairly and to consider only the facts in evidence. By suggesting that the prospective jurors were in danger, the prosecutor was able to shift the focus on the impermissible consideration of whether the prospective jurors would be adversely impacted if they acquitted Mr. Elliott.

Under the Sixth Amendment to the Constitution, a "[t]rial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a

public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472–73). The use of fear violates this protection. The proper remedy for a tainted venire is to vacate the conviction and remand the matter for a new trial free from structural error. Because the prosecutor achieved her objective of implanting fear, Mr. Elliott was not convicted by an impartial jury and the proper remedy is a new trial.

* * *

In this case, the prosecution improperly used cross examination to elicit from the witness unsubstantiated insinuations that she was somehow in danger due to her testimony in this case. It required repeated efforts on the part of the prosecution to ferret out this irrelevant and highly prejudical implication. Over defense objection, the trial court allowed this "evidence" to remain in the minds of the jurors, inflaming them and placing into their consideration the safety of Ms. Delaguila if they were to acquit Mr. Elliott. This proffer and admission of unsupported allegations of threats to the personal safety of an important government witness, standing alone as well as coupled with the implication that the jurors themselves were in danger, violated Mr. Elliott's due process rights under the Fifth, Eighth, and

Fourteenth Amendments as well as California evidence standards, and therefore warrants a new trial in this case.

V. THE TRIAL COURT AND THE PROSECUTION REPEATEDLY DIMINISHED THE JUROR'S RESPONSIBILITY IN DELIBERATING UPON BOTH GUILT AND PENALTY, RENDERING MR. ELLIOTT'S CONVICTION VIOLATIVE OF THE EIGHTH AMENDMENT'S PROHIBITION AGAINST UNRELIABLE SENTENCING DECISIONS.

Throughout *voir dire*, the trial court and the prosecution made several comments which diminished the jury's sense of responsibility for imposing the death penalty.

A. Factual Background

In front of a panel of prospective jurors that included Juror Saiza who actually sat on the jury at the penalty phase (4 RT 763, 13 RT 2759), prospective juror Timian expressed her ambivalence about sentencing someone to death based on circumstantial evidence. (4 RT 773–74.) Prospective juror Timian explained that she was concerned that innocent people may be wrongfully executed. (*Id.*) Her concern arose from her involvement in a college project in which she learned about specific criminal defendants who were executed and later found to be innocent. (4 RT 774.)

The prosecutor asked whether these cases occurred in California and "in the last 50 years or in the last ten years." (4 RT 774.) The prospective juror answered that although she was uncertain of the dates, "it's a frightening thought to put someone to death and then, whoops." (4 RT 774).

The prosecutor, in front Juror Saiza, responded by assuring the prospective juror that wrongful executions do not occur in California:

> Let me tell you here, because you're addressing a concern that *the judge is going to tell you now we have laws set up, and we have all these safeguards and procedures in place [to protect against wrongful executions].*
>
> We have this kind of a system, things that have developed and evolved over the last 20, 30, 40 years that weren't in place possibly when you did these studies [of wrongful executions] and did all of that.
>
> And these are all things—this is why we're going through all of this, and this is why the People have a certain burden. This is why the burden is on the People, and all these things. *And in the state of California you'll find that the laws are different than other states, where maybe they don't have as many safeguards as they do here.*

(4 RT 774–75) (emphasis added).

The defense objected on the basis that the prosecutor had represented to the prospective jurors that the state of California had guarantees against wrongful executions. (4 RT 776.) In a comment made to the prospective juror pool assembled, the court overruled the objection and bolstered the prosecution's representations:

> Well, I think the whole problem [explaining Prospective Juror Timian's ambivalence] is a misunderstanding about circumstantial evidence...
>
> *We do have many safeguard in place [to protect against wrongful executions]; ...*
>
> [W]hat is required [to convict someone] is evidence that is so convincing that it leaves your mind in that condition that you can say you feel an abiding conviction to a moral certainty of

> the truth of the charge. That's a reasonable doubt. And if the proof doesn't come up to that point, then you find the defendant not guilty or you find the point to be proved not true.
>
> *So I really don't think that [putting to death an innocent person] is a concern that [the jurors] have to be worried about in this courtroom.*

(4 RT 776–77) (emphasis added). Beyond this excerpt, the court did not enumerate specific substantive or procedural rules that protected against wrongful executions in the presence of this panel which included Juror Saiza. (4 RT 776–785.)

Earlier during *voir dire*, prospective juror Erlinda Lara told defense counsel that she could not think of any case for which she could "vote for the death penalty." (4 RT 636-38) The court interrupted, reminding Ms. Lara that, in her questionnaire, she had stated the opposite. (4 RT 640–41.) Ms. Lara responded, "I think [it] is not my position to do that decision. I think [it] is [the judge's]. . . [responsibility to sentence a defendant to death]." (4 RT 641.)

The court answered in open court:

> Let me clarify that, as well. Nobody is going to have to impose the death penalty, but the jury has to make the decision. Nobody is going to tell you what to do. Nobody is ever going to tell you [that] you have to impose the death penalty. . . . If the Jury comes back with a sentence of death, *then at a later time it would be my responsibility to actually impose a death sentence,* to actually say the words. . . But in order to prompt the words that I say, it's your decision.

(4 RT 641) (emphasis added).

This entire dialogue took place in the presence of at least four jurors who actually served on the penalty phase jury, Jurors Cormack, Lara, Gollaz and Alvarez. (4 RT 633-94, 13 RT 2759-61.)

B. The Prosecution and the Court Impermissibly Informed Prospective Jurors That California Has "Extra Safeguards" That Prevent Wrongful Executions From Occurring Diminishing Juror Responsibility In Reaching A Verdict.

Under *Caldwell v. Mississippi* (1985) 472 U.S. 320, 339–40, the Supreme Court established that a trial court will violate a defendant's Eighth Amendment rights if the judge comments on the case in a way that diminishes the jurors' responsibility for the sentencing decision. Judicial or prosecutorial commentary that diminishes the juror's responsibility "so affect[s] the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment," (*Id.* at 340), and the Art. I §17 of the California Constitution. (*People v. Farmer* (1989) 47 Cal.3d 888, 922 ("the jury was misled as to its discretion and responsibility in fixing the appropriate penalty, and hence ... the judgment of death must be set aside under *Caldwell*...."), overruled on another ground in *People v. Waidla* (2000) 22 Cal. 4th 690, 724, fn. 6.) Specifically, *Caldwell* is relevant to situations in which the jury has been misled "as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." (*Darden v. Wainwright* (1986) 477 U.S. 168, 184, n.15.) This Court has recognized that "*Caldwell* simply requires that the

jury not be mislead into believing that the responsibility for the sentencing decision lies elsewhere." (*People v. Ledesma* (2006) 39 Cal.4th 641, 725.)

The trial court violated this principle in spades. The trial court informed the prospective jurors, including Juror Saiza, that the State of California has special safeguards that prevent the system from executing an innocent individual. By stating that, "I really don't think that [putting to death an innocent person] is a concern that you have to be worried about in this courtroom," (4 RT 777), the trial court specifically misinformed the panel that there are protections that guarantee that (1) the jury could only convict the guilty; and (2) innocent people are not convicted in his courtroom. This statement serves to excuse the jurors from their responsibility of determining whether the defendant before them is in fact guilty. In short, there can be no greater dimunition of jury responsibility than instilling the false belief that an innocent man cannot be executed in California.

Moreover, a prosecutor's remarks to the venire constitute a "denial of due process" when the prosecutor's comments "infect[] the trial with unfairness" and thereby "ma[k]e the resulting convictions a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181). The prosecutor violated Mr. Elliott's due process rights by assuring the venire that California has different laws and different procedures that guarantee against wrongful convictions.

This case is distinguishable from *People v. Osband* (1996) 13 Cal. 4th 622, 694 in which a prosecutor simply agreed during *voir dire* with a prospective juror that the death penalty had not been imposed in California in twenty years. There was no promise in *Osband* that the defendant in that case would not actually be executed. Rather, there was simply a factual observation that executions had not occurred in a very long time. (*Id.)* Here, by contrast, the prosecutor stated that any instance of a wrongful conviction is a relic of time or could only occur in another state, and reassured the jury that it could not happen here. [33]

By so doing, the prosecutor impermissibly immunized the present panel from realizing the import of its decision to impose the death penalty. The prosecutor's false promises to the prospective jurors downplayed the value of any doubt they may have felt about guilt of the defendant and the proportionality of the sentence. By implying that any verdict reached in California would necessarily be the right one, the prosecutor impermissibly interfered with Mr. Elliott's right to fair trial. And here, as in *Caldwell*, "the trial judge 'not only failed to correct the prosecutor's remarks, but in fact openly agreed with them.'" (*Romano v. Oklahoma* (1994) 512 U.S. 1,

[33] Mr. Elliott requests that this Court take judicial notice that The California Commission on the Fair Administration of Justice was created by Senate Resolution No. 44 of the 2003-04 Session of the California State Senate in order "[t]o study and review the administration of criminal justice in California to determine the extent to which that process has failed in the past, resulting in wrongful executions or the wrongful conviction of innocent persons."

7.) This diminution of the jury's sense of responsibility undermines the Eighth Amendment's heightened need for "the responsible and reliable exercise of sentencing discretion" in capital cases. (*Caldwell, supra,* 472 U.S. at 329). While this interference alone is sufficient to vacate his sentence, this misinformation coupled with the judge's comments that the jury's verdict was not the ultimate cause of the defendant's execution, discussed below, certainly gave rise to a *Caldwell* violation which warrants reversal.

C. The Trial Court Impermissibly Diminished Prospective Jurors' Responsibility For Imposing The Death Sentence By Implying That Jurors Are Not Responsible For Any Execution.

The California Supreme Court has long held that a trial court may not encourage "the jury to consider extraneous and improper factors" (*People v. Gainer* (1977) 19 Cal.3d 835, 842 [hereinafter *Gainer].*) This Court has de novo review over allegations that a trial court infected the trial in a manner that offends California law and the U.S. Constitution. (*Gainer, supra,* 19 Cal.3d at 842.)

In this instance, a prospective juror expressed ambivalence about being able to "vote for the death penalty." (4 RT 636-38.) The prospective juror explained that she does not want the responsibility of sentencing an individual to death because that is a decision properly belonging to a judge. The judge assured her — and the other prospective jurors who were

assembled — that her concerns were misplaced because she was mistaken regarding the role that the jury has in causing the death of a defendant. The judge misled the prospective juror, in the presence of four jurors that went on to sentence Mr. Elliott, by claiming that he was responsible for imposing the sentence: "at a later time it would be *my responsibility* to actually impose a death sentence." (4 RT 641.) (emphasis added).

The judge's assurances violate *Caldwell v. Mississippi* (1985) 472 U.S. 320, 339–40. In *Caldwell*, the Supreme Court prohibited a trial court from misleading the jury regarding its role in the sentencing process. Specifically, "the jury must not be misled regarding the role it plays in the sentencing decision." *Romano v. Oklahoma* (1994) 512 U.S. 1, 7; *See also People v. Hayes* (1999) 21 Cal.4th 1211, 1282.) By suggesting that somehow the jury's decision was advisory and that the jury's decision would not be the proximate cause of sentencing a defendant to death, the court misled the four jurors that went on to sentence Mr. Elliott to death as to their actual responsibility in rendering capital punishment. The trial court neither advised the venire of the fundamental importance of having a jury impose capital punishment nor of the tremendous deference that a trial court has for the jury's decision. (*See, generally, Ring v. Arizona* (2002) 536 U.S. 584.) By obscuring and downplaying the fact that a jury is responsible for imposing capital punishment on the defendant it convicts

and sentences to death, the court impermissibly diminished the juror's responsibility for the consequences of its decision.

This error is sufficient to vacate Mr. Elliott's sentence. Moreover, a *Caldwell* violation is the unavoidable conclusion when this Court considers this error in conjunction with the false promises of the impossibility of wrongful executions in California. Here, one juror operated under the false belief that the verdict of death could never lead to the execution of an innocent man in California. Moreover, four jurors operated under the false belief that the judge, and not they, would be ultimately responsible for Mr. Elliott's death sentence. This is precisely the kind of dimunition of juror responsibility that *Caldwell* protects against. As such, Mr. Elliott's conviction and sentence must be reversed as a violation of the Eighth Amendment of the Federal Constitution and Art. I §17 of the California Constitution, and his case remanded for a new trial.

ERRORS RELATING TO THE EVIDENCE

VI. MR. ELLIOTT'S CONVICTION WAS BASED ON HIGHLY UNRELIABLE EVIDENCE AND MUST THEREFORE BE REVERSED.

The sole information used to convict Mr. Elliott was eyewitness identification and fingerprints found on movable objects in the getaway van. The eyewitnesses accounts in both the Lucky's and the Boys Market incidents were utterly inconsistent. Not only did the witnesses disagree on every aspect of the perpetrator's appearance, the identifications were tainted by suggestive line ups, photo arrays, composite sketches, and the passage of time. And, most damning to the jury's determination of guilt is the undisputed fact that while the perpetrator in both cases was right-handed, Mr. Elliott is left-handed. Finally, as discussed under Argument VII, the fingerprints purportedly belonging to Mr. Elliott were identified via dubious methodology. In short, each piece of evidence placed before the jury was so lacking in indicia of reliability that, individually and collectively, the evidence was insufficient to support a finding of guilt in this case.

A. Legal Standards

The United States Supreme Court established that proof of a criminal charge beyond a reasonable doubt is constitutionally required. In *In re Winship* (1970) 397 U.S. 358, 364, the court held that the Due Process

Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In considering the sufficiency of evidence implying the defendant's connection with the crime, an appellate court is required to determine whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. (*People v. Bassett* (1968) 69 Cal.2d 122, 139; *People v. Redmond* (1969) 71 Cal.2d 745, 755). In *People v. Hall* (1964) 62 Cal.2d 104, 112, the court stated that "[t]o justify a criminal conviction, the trier of fact must be reasonably persuaded to a near certainty. The trier must therefore have reasonably rejected all that undermines confidence."

The *Bassett* Court defined the standard for challenging the sufficiency of the evidence in criminal appeals. The appellate court can only make a determination based on "substantial" evidence whether the record is sufficient. "Substantial" evidence is defined as "reasonable in nature, credible, and of solid value." (*People v. Bassett*, 69 Cal.2d 122, 139). This Court further supported *Bassett's* holding in *People v. Redmond* (1969) 71 Cal.2d 745, 755. The court in *Redmond* found that in order to set aside the trial court's judgment based on the insufficiency of the evidence there must be no indication that there is sufficient substantial evidence to support the trial court's judgment. However, the evidence must raise more than a strong suspicion of the defendant's guilt. This Court stated that

suspicion is not evidence, and is not a sufficient basis for an inference of fact. (*Id.*)

Though this "substantial evidence" test is frequently invoked in holding insufficient the evidence of identity purporting to connect the defendant with the crime, it is equally applicable to all elements of the prosecution's case. (*People v. Bassett* (1968) 69 Cal. 2d 122, 139.) As *Bassett* points out, this rule has been applied in numerous cases involving the sufficiency of evidence as to matters other than identification.

In deciding whether the evidence to convict at trial was sufficient, the appellate court must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Redmond* (1969) 71 Cal.2d 745, 755). Thus, the test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact. On appeal, the court will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. (*People v. Daugherty* (1953) 40 Cal. 2d 876, 884).

B. The Eyewitness Identifications Were Inconsistent and Unreliable

1. The Lucky's Incident

Mr. Elliott was convicted of the Lucky's Market murder and robbery based on eyewitness testimony that was significantly inconsistent. The state called seven witnesses who, at the time of the incident, described widely divergent characteristics of the perpetrator. (5 RT 876, 878, 939, 969, 6 RT 991, 1025, 1032, 1087, 1093, 7 RT 1172.) The majority of these descriptions did not match the characteristics of Mr. Elliott at the time this incident occurred. The only characteristic of the perpetrator in which the predominately white and Hispanic witnesses were in agreement was that the perpetrator was a black male. Such a result is understandable given that the eyewitnesses were only able to view the perpetrator for a matter of seconds as he ran past them during the stressful and chaotic incident. (5 RT 967, 6 RT 989, 997, 1002, 1028.) Other than the race of the perpetrator, the variation in descriptions of hair, height, age, clothing, eyes, and facial hair calls into question the validity, credibility and sufficiency of this evidence. And when two witnesses did agree on any one characteristic, they disagreed about other identifying characteristics, such as whether the perpetrator was wearing glasses, or his height. In short, no two witnesses' description of the perpetrator matched in enough characteristics to present a clear picture of a perpetrator who resembled a single person.

The descriptions of the perpetrator's hair varied significantly among certain witnesses. While State witness Gerald Lindsay testified that the perpetrator's hair was short and curly, about ¾ to 1 inch long (5 RT 878), the State's key witness Janet Delaguila describes his hair as long, shoulder length, curled with activator, with a wet-look. (6 RT 1086.) Later in her testimony, she changed this description to hair close to the head, but also long and dangly and shaggy just in the back. (6 RT 1095.) And while State witness Lawrence Diehl stated the perpetrator had a little bit of hair coming out the back of his neck, just kind of around his shoulder, (7 RT 1163), he and Delaguila's description part ways on the issue of height – Deihl placed him at 5'7", while Delaguila saw someone between 5'10" and 5'11". (6 RT 1065, 7 RT 1172.) By contrast, State witness Michael Fiamengo stated the perpetrator's hair was short curly hair, an inch long, was natural and in a neatly trimmed afro the day of the incident. (5 RT 969, 970, 981.) While State witness Albino Martins testified similarly – that the perpetrator's hair was kind of short, about ¾ of an inch or an inch and ¼ in a "really tight curl," (6 RT 991, 1003), he and Fiamengo disagreed about whether the perpetrator was wearing glasses. (6 RT 957-58, 1007.)

In describing the perpetrator's height, Mr. Lindsay testified the perpetrator was 5'10" or 5'11", (5 RT 873), Mr. Fiamengo testified the perpetrator was about 5'10" (5 RT 975) and Ms. Delaguila testified the perpetrator was less than 6' tall, between 5'10" and 5'11". (6 RT 1064,

1065.) Lindsay and Fiamengo parted ways on eye color – Lindsay testified that the perpetrator's eyes were blue or hazel, while Fiamengo found the eyes to be dark brown. (5 RT 876, 975.) However, Delaguila stated that he was wearing a white shirt, and Lindsay stated that he was wearing a colored windbreaker. (5 RT 872, 6 RT 1063.) By contrast, Mr. Diehl, the State witness closest to the perpetrator at 3 feet away, testified that the perpetrator's height was 5'7". (7 RT 1171, 1172.)

On the date of the homicide/robbery at Lucky's Market, Marchand Elliott was 20 years-old. (12 RT 2480-2481, 13 RT 2608.) However, the descriptions of the age of the perpetrator varied from early 20's to as old as 32 years old. (6 RT 1037-1038, 1064.) Mr. Lindsay estimated the age of the perpetrator to be middle 20's and told police that the perpetrator was mid 20's or 28. (5 RT 875, 876.) The day of the incident State witness Cheryl Pitzer told police that the suspect was 28-30 years old or 28-32 years old. (6 RT 1032, 1037, 1038.) Mr. Diehl describes the perpetrator as under age 30. (7 RT 1172.) While, Ms. Delaguila told police officers that the perpetrator was in his early 20's, (6 RT 1064), she also described the perpetrator as having pockmarked skin, and no other witness could corroborate this characteristic. (6 RT 1065-66.) Witness Pitzer specifically testified that the perpetrator did not have any visible scarring on his face. (6 RT 1032.)

The State witnesses descriptions of the perpetrator's clothing were inconsistent or not given. According to Mr. Lindsay, the perpetrator was wearing a colored windbreaker, dark pants, and sneakers. (5 RT 872.) State witness Howard Sands stated the perpetrator was wearing dark colored pants, and he thought the jacket was tan, over a white shirt. (6 RT 1115.) Ms. Pitzer testified the perpetrator was wearing a white or off white jacket. (6 RT 1026.) Ms. Delaguila does not remember anything distinctive about the clothes, other than a white shirt. (6 RT 1063.) And while her description of a white shirt matches Mr. Sands', again, there was no commentary by Sands on any type of scarring on the face as described by Delaguila. Mr. Fiamengo and Mr. Martins could not recall what the perpetrator was wearing, and Mr. Diehl did not give any description of clothing. (5 RT 968, 6 RT 999.)

The testimony regarding whether the perpetrator was wearing glasses and regarding his eye color was equally inconsistent. State witness Lindsay testified the perpetrator was wearing glasses with a gold wire frame. (5 RT 872.) He testified to the color of the perpetrator's eyes as light colored, perhaps blue or hazel. (5 RT 876.) Fiamengo testified that he saw both eyes and about ¾ of the face of the perpetrator, and that the eyes were dark brown and that he had a clear view through the glasses. (5 RT 967, 975.) Pitzer testified the perpetrator was wearing gold rimmed glasses. (6 RT 1026, 1031, 1038.) Delaguila described the perpetrator as

wearing glasses with a gold frame and clear glass. (6 RT 1055, 1064.) Sands testified the perpetrator was wearing glasses. (6 RT 1112, 1115.) However, state witness Martins stated he saw the facial characteristics "very good" and testified he did not see glasses. (6 RT 1002.) He testified the person did not have glasses. (6 RT 1007.) Mr. Elliott's aunt, Peggy Peterson, testified she has known Marchand since his birth and he has never worn glasses. (9 RT 1726.)

With regard to facial hair, Lindsay denied seeing any facial hair on the perpetrator. (5 RT 880.) Fiamengo testified the person did not have facial hair the date of the incident. (5 RT 981.) Pitzer did not notice any facial hair and recalled he did not have a visible beard. (6 RT 1032.) However, Delaguila testified the perpetrator had stubble, "like a five o'clock shadow." (6 RT 1087.) She also is the only person that testified the perpetrator had pock marks on his face. Later on, during re-direct examination, Ms. Delaguila altered her testimony to describe the pock marks as acne blemishes. (6 RT 1087, 1093.)

The state witness's descriptions of the perpetrator are further compromised due to several factors that affect eyewitness identification, including the distance between the witnesses and the perpetrator on the day of the incident, the length of time the witness viewed the perpetrator on the day of the incident, and the inaccuracy of observation made in presence of a dangerous weapon. Sands only vaguely got a look at the perpetrator for a

matter of seconds while sitting in the drivers' seat of the armored car outside of the store. (6 RT 1111, 7 RT 1213.) Lindsay was 25 feet from the path where the perpetrator ran, and, at his closest, 20 feet from the perpetrator. (5 RT 869, 871.) Martins estimated that he was 34-40 feet away from the man and viewed only the left profile as the perpetrator ran to the back of the store at a medium speed. (6 RT 990, 997.) He only saw the perpetrator for "a matter of seconds." (6 RT 1002.) Delaguila saw the perpetrator running by and could not approximate the distance she was from him. (6 RT 1061.) Pitzer testified she saw the right side and then the full front of the perpetrator's face at a distance of 20-25 feet away from. (6 RT 1020, 1021.) Pitzer told officers she was unsure whether she could identify the person because she was not sure if she were to see the face again that she would recognize it. (6 RT 1035.) Diehl admitted he was looking at the gun, and that at the time, he was thinking about the fact that the perpetrator had a gun. (7 RT 1168, 1169.) Diehl was closest to the perpetrator at 3 feet away. (7 RT 1171.)

Thus, there were considerable discrepancies in the physical description of the perpetrator given by the eyewitnesses. To summarize, the most notable were of **hair** (short and curly, 5 RT 878, 969, 6 RT 991, 1025; neatly trimmed afro, 5 RT 981; hair was long, curled with activator, with a wet look, shoulder length, 6 RT 1086; hair was longer, down the nape of his neck, 7 RT 1184), **age** (mid 20's or...28, 5 RT 876; suspect was

28-30 yrs old, 6 RT 1032; early 20's, 6 RT 1064; under 30, 7 RT 1172), **eyes** (light colored eyes, perhaps blue or hazel, eyes were blue or hazel, not brown, 5 RT 876, 939; eye color was dark brown, 5 RT 975), **glasses** (wearing at the time gold wire framed glasses, 5 RT 872, 6 RT 1026, 1055, 1064; the person did not have glasses, 6 RT 1007), **height** (5'7" 7 RT 1172; between 5'10"-5'11" 6 RT 1065), **clothing** (wearing a colored windbreaker, dark pants, blue or black, and sneakers, 5 RT 872; white or off white jacket, 6 RT 1026), and **facial marks** (skin of this person was not smooth, it had pock marks, 6 RT 1087, later testimony changed to "active acne," 6 RT 1093; no scarring on the face, 6 RT 1032). Moreover, where any two witnesses can be found to agree on certain characteristics, they disagreed on others. These differences in description reveal the questionable nature of the identifications made by these eyewitnesses.

The defense called Dr. Scott Fraser, an expert in the accuracy of eyewitness memory and identification. He testified about reliable psychological research indicating that eyewitness identification is inaccurate when such factors as cross-racial bias, increased stress levels, weapon focus, memory decay, suggestiveness or bias in lineups, and distinctive cues are taken into account. (10 RT 1958-2031.) Dr. Fraser testified about the impact of cross-racial bias, which is one of the most reliable findings in the field. Cross-racial bias is the phenomenon in which people are able to identify members of their own race significantly better

than they can identify individuals of different races. (10 RT 1966-1967.) As an example, in a predominately white or Hispanic group who witnessed a murder/robbery committed by a black person, Dr. Fraser testified that the white group would have lower rates of accuracy of identification. (10 RT 1967.) He also stated that "when we are extremely frightened at a crime scene, for example, we know we are not processing how a person's nose and ears and eyes look. We are worried about whether we are going to live," causing rates of accurate identification and recall to drop radically. (10 RT 1971.)

Dr. Fraser also testified to the fact that memory for complex stimuli, like faces, is affected by the passage of time and has a rapid drop off in accuracy four to six hours after the witnessed event. (10 RT 1975.) Notably, the witnesses at Lucky's Market were not called upon to make an identification until March 13, 1990, fifteen months after the incident occurred.

Another area of eyewitness identification that has been the subject of research is the confidence with which the eyewitness makes a selection. Dr. Fraser testified that the correlation between confidence in the selection and the probability it was correct is zero – that is, no correlation. (10 RT 2023.) "People who are absolutely certain in their identification are just as likely to be incorrect or wrong as are people who are unsure or ambivalent,

and vice versa." (10 RT 2025.) Thus, the certainty of some of the eyewitness identifications of Mr. Elliott does not render them accurate.

Moreover, the state eyewitnesses identified Mr. Elliott based on a suggestive, prejudicial and unreliable lineup that should have been excluded from testimony. At the March 13, 1990 lineup, state witness Gerald Lindsey identified Mr. Elliott. This was approximately fifteen months after the incident. (5 RT 885-886.) Mr. Lindsey stated that he saw the composite of the perpetrator in a newspaper before he identified Mr. Elliott. (5 RT 882.) He also could not remember if he was shown photographs of Mr. Elliott before or after he identified him at the live lineup. (5 RT 878.)

State witness Albino Martins identified Mr. Elliott in the lineup on March 13, 1990, approximately 15 months after the incident. (6 RT 994-995.) Mr. Martins explained that he had seen the left profile of the perpetrator for "a matter of seconds." (6 RT 990, 1002.) Mr. Martins made his identification while standing approximately 34 feet away from the running perpetrator. (6 RT 990.) He stated that Mr. Elliott had a different hairstyle from the perpetrator's. (6 RT 995.)

State witness Cheryl Pitzer saw the perpetrator for "just a few seconds" as she was standing "probably about 20, 25 feet" away from him. (6 RT 1028, 1021.) At the time of the incident, Ms. Pitzer told the police that she was uncertain if she could identify the perpetrator. (6 RT 1035.)

In March 1990, fifteen months after the incident, Ms. Pitzer nonetheless identified Mr. Elliott as the perpetrator. (6 RT 1044.) Prior to attending the live lineup, Ms. Pitzer had seen Mr. Elliott's photograph on two television news reports relating to the robbery and on a wanted poster that was in the Lucky's store. (6 RT 1026, 1036, 1042.)

State witness Janet Delaguila identified Mr. Elliott, also at the much delayed March 1990 lineup. (6 RT 1057-58.) Prior to attending the lineup, Ms. Delaguila was shown several photo packs containing photos of Mr. Elliott at her private residence by Detective Yarbrough. (6 RT 1078.) Ms. Delaguila identified the perpetrator as Mr. Elliott after Detective Yarbrough provided her with the name. (6 RT 1053, 1079, 10 RT 1984.)

At the March 1990 lineup, state witness Lawrence Diehl did not identify Mr. Elliott as the perpetrator, despite having been closest to the perpetrator at a mere three feet away. (7 RT 1151, 1171.) Over defense counsel's objection, he answered that Mr. Elliott resembled the person he chose at the lineup. (7 RT 1151-52.) However, in December 1991, nearly three years after the incident, he was shown a series of photographs and identified Mr. Elliott as being the perpetrator. (7 RT 1151, 1177.) Mr. Diehl was not aware that he had selected two different people as the perpetrator until it was pointed out to him by the prosecution. (7 RT 1164-65, 1178, 1182.) Indeed, in court, Mr. Diehl initially believed that he had identified the same person in the live and photographic lineups. (7 RT

1151.) Mr. Diehl's later identification is not surprising given that Mr. Elliott was the only person from the March 1990 lineup whose photo was depicted in the photographs shown to Mr. Diehl in December 1991. (8 RT 1419.)

State witness Michael Fiamengo identified Mr. Elliott in a photo pack in December 1991, approximately three years after the incident. (5 RT 979.) Mr. Fiamengo had seen the perpetrator for "maybe two or three seconds" as he was running past him in the store. (5 RT 957.) Mr. Fiamengo could not recall if he was shown photographs of Mr. Elliott before or after the identification. (5 RT 980.)

Detective Yarbrough testified that he chose the fillers who were similar in appearance for the lineup in March 1990 so no one person stood out. He claimed he did this to not unfairly influence the witnesses to identify the defendant in this case. (8 RT 1540.) However, in preparing the photograph packs, Mr. Elliott's photo was the only person from the March 1990 lineup in the photos chosen by Yarbrough. (7 RT 1419.) Also, in putting together the photo pack People's Exhibit 36, Yarbrough knowingly chose the photo of Mr. Elliott that had been published in the news media. (11 RT 2037.) Indeed, defense witness Russell Moss told Yarbrough that when he chose Mr. Elliott's photo in December 1991 it was based on the media photographs. (8 RT 1665.) Moss had not been able to identify Mr.

Elliott from photos he was shown two days after the incident. (8 RT 1663-1664.)

Additionally, Dr. Fraser testified to the composition of the six photos in the pack marked People's Exhibit 36. This photo was the photo that had been released to the new media, and was not surprisingly the photo used by most of the eyewitnesses to identify Mr. Elliott in December of 1991. (10 RT 1985-1986, 11 RT 2037.)

Court: Isn't your [Ramirez's] question basically, what is his [Fraser's] opinion of the fairness, based on the descriptions that were given of a light-skinned black person with jheri curls, what is his opinion of the fairness of this exhibit [People's Exhibit 36]?

Fraser: I wouldn't use the word "fairness" because the term – it's a term we don't use in science. What I can say is the number of alternatives, based on my experience of constructing these and evaluating them, is that there are two candidates, perhaps three, of these 6 that have jheri curls.

And then when you add in the quality of the lightness of the skin color, it becomes not a 2-pack or 2 or 3-pack, but a 1-pack because the alternative number 3 [Mr. Elliott] has lighter skin color in this particular photograph.

(10 RT 1985-1986.)

These factors should have led to the exclusion of the eyewitness identifications of Mr. Elliott. The unreliability of these identifications also weighs heavily against the sufficiency of the evidence that was required to convict Mr. Elliott. As such, his convictions for all crimes relating to the Lucky's incident should be reversed.

2. The Boys Market Incident

The eyewitness evidence of the perpetrator provided by the state witnesses in the Boys Market robbery was insufficient to uphold the conviction of Mr. Elliott because it was not of the "solid value" necessary to meet the criteria of substantial evidence. Three of the four witnesses did not see the face of the perpetrator. (7 RT 1319, 1350, 1361.) The single witness that did see the perpetrator's face testified he was not focusing on the perpetrator's face because he was focusing on the two guns that the perpetrator held, one of which was held to his head. (8 RT 1450.) The only eyewitness testimony about the physical characteristics of the perpetrator related to height, hair, skin complexion, and clothing. However, there was little agreement among the eyewitness testimony on all of these physical characteristics. Discrepancies were found with regards to height, skin complexion, and clothing.

The armored car guard and victim, Joseph Swal, testified he did not see the perpetrator's face and only saw the back of the perpetrator as the man was running away. (7 RT 1318, 1319, 1324.) Swal believes it was a man because of the way the person talked. (7 RT 1323.) Swal described the perpetrator as having hair down to his shoulders, like a jheri curl or curly hair. (7 RT 1320.) The height of the perpetrator was around 5'7" or 5'8", not too tall. (7 RT 1323, 1337.) He only recalled the perpetrator was

wearing a dark jacket, not the shoes or the pants, and could not be positive if the perpetrator was wearing a hat. (7 RT 1336.) Swal testified he believed the person to be a black man with dark skin, darker than himself. (7 RT 1323, 1340.)

Like Mr. Swal, State witness Wilson Colon never saw the perpetrator's face, having only seen the perpetrator's back, (7 RT 1360, 1361, 1385). Colon testified that he never saw the perpetrator's face or eyes. (7 RT 1385.) Colon was able to look at the perpetrator for about a minute and a half from 20 feet away, (7 RT 1369, 1371), from the vantage point of his balcony office. (7 RT 1358-59.) Colon testified that the perpetrator had on jeans and a cap or hat, differing from the description Swal gave. (7 RT 1360, 1369.) He testified the hair of the perpetrator was like his own, a jheri curl, only longer. (7 RT 1360.) Colon testified that the perpetrator was taller than his 5'8" stature, stating he was 6'0" or 6'1". (7 RT 1361.) This is a 2-4 inch difference from the description Swal gave. Colon told police that the perpetrator was a black man, but did not recall if he told them it was a dark-complexioned black man. (7 RT 1367.)

State witness Pierre Jacobs also did not ever see the face of the perpetrator. (7 RT 1350.) He knows the person was a man because the voice was that of a man. (7 RT 1353.) He testified the perpetrator wore a black jacket. (7 RT 1352.) He could not describe the perpetrator's height, weight or build. (7 RT 1354.) He could not recall if he told police officers

that the person had a dark complexion or dark skin. (7 RT 1353.) Jacobs testified he could not tell anything about what the person looked like. (7 RT 1353.)

State witness Ardis Irvine saw the perpetrator as he approached him with guns in both hands. (8 RT 1437.) Irvine testified he was focusing on the gun, not the person. (8 RT 1450.) Irvine's description of the perpetrator given to the police was jheri curl hair to his shoulders with droopy eyes, taller than him and he is 5'6 ½". (8 RT 1440.) Consistent with Swal, but inconsistent with Colon, Irvine denied that the perpetrator was wearing any head covering. (8 RT 1462.) At trial, Irvine testified he could not describe how much taller the perpetrator was than him or what part of the perpetrator's face Irvine saw because he was focusing on the gun. (8 RT 1450.) At one point, Irvine indicated how traumatic the incident was for him when he asked defense counsel "If someone put two guns to your head what are you going to look at? His face or how tall he was?" (8 RT 1450.) Irvine also could not describe the perpetrator's build stating he doesn't remember because it was three years ago. (8 RT 1464.)

Based on the eyewitness evidence above, it is clear that there is not substantial evidence of guilt, "evidence that reasonably inspires confidence and is 'of solid value,'" and that it cannot properly be concluded that "the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

3. The Conviction of Mr. Elliott Must be Set Aside Because it is Based on Unreliable and Inaccurate Eyewitness Identifications.

The United States Supreme Court has recognized that "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." (*United States v. Wade* (1967) 388 U.S. 218). The Court noted "the high incidence of miscarriage of justice" caused by such mistaken identifications, and warned that "the dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest." (*Id.* at pp. 228-229.) This warning is applicable in Mr. Elliott's case because the witness' opportunity for observation was only a matter of seconds during a stressful incident, and certainly qualify as "insubstantial."

The identifications by the eyewitnesses in Mr. Elliott's trial were not reliable and thus, should not have been admitted because the identifications violate Mr. Elliott's due process rights. The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 106.) The discrepancies in descriptions of the perpetrator noted above indicate that the eyewitness's memories of the perpetrator are unreliable and call into

question the accuracy of these identifications. Additionally, the psychological research findings Dr. Fraser testified to are still accepted findings in the field of memory. Two leading researchers in the field of memory and eyewitness identification, Gary Wells and Elizabeth Loftus, published a chapter in 2003 *Eyewitness Memory for People and Events,* citing the many wrongly convicted individuals whose convictions were based on eyewitness identification. The authors mentioned the phenomenon of cross-racial bias stating there is good evidence that people have more difficulty identifying persons of another race than their own race. Loftus concluded on the subject that "it has been observed so many times" that "it seems to be a fact." (Rutledge, John P. *They All Look Alike: The Inaccuracy of Cross Racial Identifications.* 28 Am. J. Crim. L. 207, 211 (2001), citing Loftus, Elizabeth. *Eyewitness Testimony 9.*) The last half-century's empirical study of cross-racial identifications has shown that eyewitnesses have difficulty identifying members of another race. (28 Am. J. Crim. L. 207, 211.) As one federal judge explained, "We are painfully aware of miscarriages of justice caused by wrongful identification. Those experienced in criminal trial work or familiar with the administration of justice understand that one of the great problems of proof is posed by eyewitness identification, especially in cross-racial identification ... ." (*Brown v. Davis* (6th Cir. 1985) 752 F.2d 1142, 1146.) The eyewitnesses in Mr. Elliott's case were predominately white and Hispanic, which decreases

the level of accuracy for positive identification of a black man, particularly with the additional factors of the chaos of the event and weapon presence.

The researchers also note memory for events is malleable. The process for recollection is reconstructive, and sources of information that are used to reconstruct are not only from the event itself but also from the post-event information gleaned in various ways after the event occurred. In particular, post-event viewings of a suspect's likeness, either by photograph or in person, can help to make someone look familiar later. This enhanced familiarity can lead to a false identification of the suspect as the person who committed the crime. Many of the identifications made of Mr. Elliott were made after exposure to prior photos or likenesses of Mr. Elliott, making his face familiar to the eyewitnesses. (5 RT 979-80, 6 RT 1026, 1036, 1078.) This exposure came from the photos in the news media or through photo-packs that were deliberately composed with the photo the media used, reinforcing familiarity for the eyewitnesses. (11 RT 2037.)

A 1996 study found that twenty-eight convictions predicated upon eyewitness identifications have been overturned as a result of DNA evidence. Another study implicated mistaken eyewitness identifications as the cause of more than 60% of the five hundred wrongful convictions studied. (28 Am. J. Crim. L. 207, 209 (2001).) Mr. Elliott's due process rights were clearly violated by these suggestive, prejudicial and unreliable identification procedures and thus, his conviction must be overturned.

C. The Fingerprint Evidence Throughout This Case Was Either Non-Existent or Unreliable.

1. None of the Fingerprint Evidence from Boys Market Matched Mr. Elliott's Fingerprints.

At the close of defense evidence, counsel stipulated that the fingerprints found on October 31, 1988 from the contents of a shopping cart thought to be used by the perpetrator at Boys market on a Kit Kat wrapper and a Good 'n·Fruity candy did not belong to Mr. Elliott. In addition, the fingerprints found in a Dodge Van, the alleged getaway vehicle, did not belong to Mr. Elliott, according to the Los Angeles Sheriff's Department. (11 RT 2070.)

Thus, the paucity of evidence in the Boys Market robbery makes clear that the evidence used to convict Mr. Elliott was not sufficient to reach the standard of sufficiency and the conviction must be overturned.

2. The Fingerprint Evidence from Lucky's Market Was Unreliable.

Deputy Sheriff Ronald George, a latent fingerprint examiner, testified at Mr. Elliott's trial that nine fingerprints had been recovered in the abandoned getaway van from the Lucky's incident. (7 RT 1252, 1259, 1265.) All of the fingerprints were found on removable items found in the van. (7 RT 1248, 1249, 1264.) However, it was not determined based on the testimony at trial how and when these removable items were put in the

van and when the fingerprints were made on the items. (7 RT 1193, 1268.) The van was stolen on December 9, 1988, but not processed for fingerprints until December 15, 1988. (7 RT 1228-29, 1247.)

A Rubbermaid container lid was found in the van. (7 RT 1194, 1248.) Two fingerprints were found on the Rubbermaid container lid and these were determined by Deputy George to match Mr. Elliott. (7 RT 1248, 1252, 1254-55.) Six fingerprints were found on a Star tabloid newspaper. (7 RT 1249, 1259.) Three of the six fingerprints from the Star tabloid were determined by Deputy George to match Mr. Elliott. (7 RT 1259-60.) The other three Star tabloid prints were never matched to anyone. (7 RT 1264, 1267, 1292-93.) These fingerprints were the only physical evidence to link Mr. Elliott with the Lucky's crime and these are questionable, as they were found on removable items in the getaway van, not on the van itself or in the Lucky's market.

One fingerprint found on a newspaper on the dash of the getaway van was matched to Steven Bernard Young. (7 RT 1265.) In ruling the evidence that Steven Young was involved in similar supermarket murder/robberies was inadmissible for a third party defense, the court stated that:

> The only evidence that remotely connects Mr. Young to this – to the scene is the fact that on a piece of newspaper in the stolen van that was discovered near the crime, his fingerprint was found there. And there is no evidence before us as to when that fingerprint was left. That

> fingerprint could have been placed on that newspaper a week before, two weeks before, anything else.

(8 RT 1519-1520.)

This reasoning was used to limit the discovery sought by defense counsel on the police investigation of Steven Young in connection with the crimes charged in this case. However, the court's statement is equally true of the fingerprint evidence of Mr. Elliott. Thus, this fingerprint evidence is not substantial and is insufficient to uphold Mr. Elliott's conviction.

Additionally, in making his fingerprint match, Deputy George stated in response to a question by the court that "none of the fingerprints [he] identified [as Mr. Elliott's] had less than 10 points of comparison." (7 RT 1257.) However, this testimony was directly contradicted by his answers on cross-examination: After being asked about the fact that Mr. Elliott's fingerprint from the lid had only eight characteristics, Deputy George testified that he does not count the exact number of characteristics before making an opinion in this case. (7 RT 1284.) The witness admitted that the fingerprint from the lid matching Mr. Elliott "did not have a whole lot of characteristics, but it had enough characteristics for me." (*Id.*) The court then terminated defense counsel's cross-examination as an "unconscionable waste of the court's time" unless defense counsel made an offer of proof that they will call an expert to say the print is not Mr. Elliott's. (7 RT 1286.)

As discussed in detail under Argument VII, *infra*, this termination of cross-examination violated Mr. Elliott's Fifth and Sixth Amendment rights. By limiting cross-examination, Mr. Elliott was prevented from bringing out critical facts regarding Deputy George's insufficient methodology used to make his determination that the fingerprints on the moveable items found in the van matched Mr. Elliott's rolled prints. For example, the fact that the latent and rolled fingerprints had fewer than eight matching characteristics (7 RT 1287) would have provided remarkable impeachment value if the jury could have learned that "[a]n average human fingerprint contains between seventy-five and 175 ridge characteristics." (*Epstein, Robert. Fingerprints Meet Daubert: The Myth of Fingerprint "Science" is Revealed* (2002) 75 S.Cal.L.Rev. 605, 608 (citing Fed. Bureau of Investigation, U.S. Dep't of Justice, *The Science of Fingerprints* (rev. ed. 1998).)

Thus, based on the expert's contradictory testimony and the court's violation of Mr. Elliott's constitutional rights, the fingerprint evidence was rendered unreliable and insufficient such that Mr. Elliott's conviction must be reversed.

D. The Perpetrator in Both the Lucky's and Boys Market Incidents Was Right-Handed, and Mr. Elliott Is Left-Handed.

1. The Lucky's Incident

The perpetrator in the Lucky's Market incident shot the victim Patrick Rooney with his right hand. (6 RT 1113, 1120, 7 RT 1140.) According to the testimony of Howard Sands, who testified he saw the attack occur, the perpetrator shot the victim through the side of his head using his right hand and a silver gun. (*Id.*) None of the other state witnesses saw the attack occur, only the perpetrator running away. Detective John Yarbrough testified that the gunshot wound was a "through and through right to left." (11 RT 2038.) Counsel stipulated to the report of the coroner, Dr. Detraglia, that the gunshot wound that killed Mr. Rooney entered on the right side and exited through the left side of the head. (8 RT 1494.)

Marchand Elliott is left-handed. During trial at sidebar, defense counsel pointed out to the court that Mr. Elliott is left-handed. (11 RT 2211.) Moreover, during the penalty phase, an incident between Mr. Elliott and a police officer was admitted. (11 RT 2298-2305.) During this incident, Mr. Elliott told the officer he was getting identification when he reached using his left hand in his back left pocket. (11 RT 2301-2304.) This inconsistency in the evidence is one more indication that there was insufficient evidence to convict Mr. Elliott of the Lucky's Market incident.

2. The Boys Market Incident

The perpetrator in the Boys Market robbery put the gun to the right temple of the victim, Joseph Swal. (7 RT 1318.) Eyewitness Wilson Colon, testified that the perpetrator carried the gun in his right hand. (7 RT 1362.) As discussed above, Marchand Elliott is left-handed. Again, this inconsistency in the evidence is yet another indication that insufficiency of the evidence requires reversal of Mr. Elliott's conviction for the Boys Market robbery.

E. The In-Court Identifications of Mr. Elliott Were Based on Impermissibly Suggestive Out of Court Identifications and Their Admission Into Evidence Violated Mr. Elliott's Due Process Rights.

The admission of the eyewitness identifications in Mr. Elliott's trial deprived him of the due process of law to which he was entitled under the Fifth and Fourteenth Amendments. The United States Supreme Court has recognized that "the vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." (*United States v. Wade* (1967) 388 U.S. 218.) The Ninth Circuit characterized eyewitness identifications as "at best, highly dubious, given the extensive empirical evidence that eyewitness identifications are not reliable." (*United States v. Smith* (9th Cir. 1977) 563 F.2d 1361, 1365 (Hufstedler, J., concurring.))

The reasons for unreliability in eyewitness identification were discussed in *United States v. Russell* (6th Cir. 1976) 532 F.2d 1063, 1066: "There is a great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation, and this risk is increased when the observation was made at a time of stress or excitement . . . . [This] danger is inherent in every identification of this kind, ..." The court further explained, "this problem is important because of all the evidence that may be presented to a jury, a witness' in-court statement that 'he is the one' is probably the most dramatic and persuasive." (*Id.* at p. 1067.)

The standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification is whether "a very substantial likelihood of irreparable misidentification" exists. (*Simmons v. United States* (1968) 390 U.S. 377, 384.) The United States Supreme Court held in *Simmons* that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a "very substantial likelihood of irreparable misidentification." (*Id.*, at 384.)

In *Stovall v. Denno* (1967) 388 U.S. 293, the United States Supreme Court held that the defendant could claim that "the confrontation conducted

. . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." They held this must be determined "on the totality of the circumstances" of the case at hand. (*Id.*, at 302.)

In this case, Detective Yarbrough created a "six pack" of photos for eyewitnesses to identify the perpetrator. (11 RT 2036-37.) Such photo arrays are meant to include several individuals who resemble the suspect, so as to avoid leading the witness to choose an individual who stands out from the rest. (*People v. Holt* (1972) 28 Cal.App.3d 343, 350.) The array in this case was so unduly suggestive that it was described by the eyewitness identification expert in this case as a "1-pack." (10 RT 1985-86.) Only two of the individuals in the photo array shared Mr. Elliott's hairstyle, and none shared his skin tone. (10 RT 1985-86.) This array, which was the one most often used to identify Mr. Elliott, was nothing more than a single man show up and thus, constituted a denial of due process of law under *Stovall v. Denno* (1967) 388 U.S. 293.

This error was compounded by the complete lack of uniformity in the eyewitness identifications of the perpetrator at either Boys Market or Lucky's Market, signaling that the photo array furthered the erroneous identification in this case. The factors to be considered in evaluating the likelihood of misidentification were stated by the United States Supreme Court in *Neil v. Biggers* (1972) 409 U.S. 188. These factors include the

opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. (*Id.* at 199.)

In applying these factors in totality to the testimony of the state witnesses in the trial of Mr. Elliott, it is clear that the conviction based on in-court misidentifications of Mr. Elliott as the perpetrator must be set aside because these in-court misidentifications are based on inaccurate and unreliable lineup identifications.

A critical factor to consider in the misidentification of Mr. Elliott in the Lucky's case is that the live lineup the state witnesses attended occurred in March, 1990, fifteen months after the incident occurred. Further compromising the identification, the witnesses testified they only viewed the perpetrator for a few seconds from a considerable distance during the event. State witness Cheryl Pitzer saw the perpetrator for "just a few seconds" as she was standing "probably about 20, 25 feet" away from him. (6 RT 1028, 1021.) Mr. Fiamengo saw a side view of the perpetrator for "maybe two or three seconds" as he was running past him in the store. (5 RT 957, 976.) Albino Martins saw the left profile of the perpetrator for "a matter of seconds" from a distance of approximately 34 feet away. (6 RT 990, 1002.)

The likelihood of misidentification is also increased since the state witnesses gave inconsistent testimony of the perpetrator's physical characteristics and clothing. The most notable discrepancies were in the description of **hair** (short and curly, 5 RT 878, 969, 6 RT 991, 1025; neatly trimmed afro, 5 RT 981; hair was long, curled with activator, with a wet look, shoulder length 6 RT 1086; hair was longer, down the nape of his neck, 7 RT 1184), **age** (mid 20's or...28, 5 RT 876; suspect was 28-30 yrs old, 6 RT 1032; early 20's, 6 RT 1064; under 30, 7 RT 1172), **eyes** (light colored eyes, perhaps blue or hazel, eyes were blue or hazel, not brown, 5 RT 876 & 939; eye color was dark brown, 5 RT 975), **glasses** (wearing at the time gold wire framed glasses, 5 RT 872, 6 RT 1026, 1055 & 1064; the person did not have glasses, 6 RT 1007), **height** (5'7", 7 RT 1172; 5'10" or 5'11" tall, 5 RT 873; under 6 feet tall, between 5'10"-5'11", 6 RT 1065; about 5'10", 5 RT 969), **clothing** (wearing a colored windbreaker, dark pants, blue or black, and sneakers, 5 RT 872; white or off white jacket, 6 RT 1026; others could not recall clothing) and **facial marks** (skin of this person was not smooth, it had pock marks, 6 RT 1087, later testimony changed to "active acne," 6 RT 1093; No scarring on the face, 6 RT 1032.)

State witness Cheryl Pitzer told police officers she was unsure whether she could identify the perpetrator because she wasn't sure that if she were to see the face again she would recognize it. (6 RT 1035.) Ms. Pitzer was admittedly "frightened" at the time. (6 RT 1032.) Some weeks

after the incident, but before the live lineup, Ms. Pitzer saw photographs of Mr. Elliott on television and a wanted poster that hung in the Lucky's Market store. (6 RT 1026, 1036, 1039.) At the March 15, 1990 lineup, after fifteen months had passed since the incident, Ms. Pitzer chose Mr. Elliott in the lineup. (6 RT 1044.)

At the March 15, 1990 lineup, state witness Lawrence Diehl identified the perpetrator as being someone other than Mr. Elliott. (7 RT 1151-1152.) Mr. Diehl testified that he was looking at the gun and focused on the barrel pointed on him. (7 RT 1168-1169.) Mr. Diehl was closest to the perpetrator, 3 feet away, and believed the perpetrator to be 5'7" tall. (7 RT 1171-1172.)

As stated above, the courts in *Wade* and *Russell* warn of the dangers and impact of eyewitness misidentifications. In Mr. Elliott's trial, applying the standard of totality of the circumstances and the *Biggers* factors, unreliable identifications clearly occurred that led to an improper conviction of Mr. Elliott. As the introduction of the eyewitness identification violated Mr. Elliott's due process rights, his convictions must be reversed.

E. Conclusion

The record in this case is rife with evidence so unreliable that it renders the facts insufficient for a determination of guilt. (*People v. Daugherty* (1953) 40 Cal. 2d 876, 884.) This insufficiency of

evidence in this case renders Mr. Elliott's conviction in violation of the due process clause. Accordingly, his conviction must be reversed.

VII. THE COURT ERRONEOUSLY CUT OFF THE DEFENSE'S CROSS-EXAMINATION OF STATE FINGERPRINT EXPERT, THEREBY VIOLATING MR. ELLIOTT'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM AND HIS FIFTH AMENDMENT DUE PROCESS RIGHTS BY IMPERMISSIBLY SHIFTING THE BURDEN TO PROVE HIS INNOCENCE.

The most critical testimony presented by the prosecution in this case was that of the fingerprint expert. The fingerprints were the sole piece of physical evidence purporting to link Marchand Elliott to the Lucky's incident. Mr. Elliott's defense, then, turned on his counsel's ability to thoroughly cross-examine the prosecution's witness who claimed that the fingerprints were, indeed, a match to Mr. Elliott. However, when counsel sought to question the expert's methodology, the trial court cut off cross-examination under California Rule of Evidence 352 ultimately reasoning that "if you're a real fingerprint expert, you can use any technique you want." (7 RT 1290.)

A. Factual Backround

Deputy Sheriff Ronald George, a latent fingerprint examiner, was called by the prosecution to testify that nine fingerprints had been recovered in an abandoned, stolen van determined by the police to have been used in the Lucky's incident. (7 RT 1245-1265.) No fingerprints were found on any non-removable item in the van. (7 RT 1248, 1249, 1257, 1260, 1264.) Two prints were found on a Rubbermaid container lid, (7 RT 1250-53.), and six fingerprints were found on a Star tabloid newspaper. (7 RT 1257-

59.) The examiner testified that in his opinion, both fingerprints found on the lid matched Mr. Elliott's (7 RT 1254–55), and that three of the six fingerprints from the Star tabloid matched Mr. Elliott's. (7 RT 1259–60.) The fingerprints that are purported to match Mr. Elliott were found on two pages inside the magazine, and another was taken from the outside back cover of the magazine. (7 RT 1300.) Three other Star tabloid prints were never matched to anyone. (7 RT 1264, 1267, 1292–93.)

Several years later, in 1991, after defense investigators initiated an examination of the fingerprints found on the moveable items in the van, the Sheriff's department located a match between one fingerprint found on a copy of a Los Angeles Times newspaper dated December 5, 1988. (7 RT 1265, 1281.) That fingerprint was found to have matched Steven Young. (7 RT 1265.)

On cross-examination, defense counsel began to question Deputy George on (1) whether there is "an accepted number of minimum characteristics that must be shown in a fingerprint before an expert will render an opinion that that print belongs to a definite person." (7 RT 1270); and (2) whether the fingerprint examiners counted the number of characteristics on each print found in the van. (7 RT 1284-85.)

Deputy George testified on both direct and cross that he did not count the exact number of characteristics before making his identifications in this case. (7 RT 1257, 1271, 1284.) On cross, he directly contradicted

himself by stating that there was a minimum of eight characteristics found on one of the prints identified as Mr. Elliott's and a minimum of fifteen characteristics identified on the print belonging to Steve Young. (7 RT 1284-86.)

As defense counsel continued his questioning regarding the minimum number of characteristics the examiner used to identify the fingerprints, the court interrupted, and called a sidebar. (7 RT 1286.) The court stated, "I'm about to cut this off under [Cal. R. Evid.] 352 as [an] unconscionable waste of the court's time. Unless you make an offer of proof that you intend to call an expert of your own to say that that print is not Marchand Elliott's then this examination, I think, is just a complete waste of time." (7 RT 1286.)

Defense counsel responded that he was planning to bring experts to testify that fingerprint examiners count characteristics before identifying prints and that the scientific community agrees that a minimum number of characteristics must be present before making a positive identification. (7 RT 1286–87.) The court interrupted with:

> Court: No, no, no. That's not it. You tell me you've got an expert who is going to come in and look at the rolled prints of Marchand Elliott and look at the latents and *say this is not Marchand Elliott.*
>
> Stein: [The expert is] going to say one of them had 8 characteristics.
>
> Court: No. He's going to say it's—cannot be identified as Marchand Elliott.

Stein: He's saying it's possible, not a definite as to one of them. He says one is a possible.

(7 RT 1287.) (Emphasis added.)

The Court then ordered that, under Cal. R. Evid. 352, cross examination should end absent an offer of proof that he was planning to bring his own expert to say that the prints were not Mr. Elliott's. (7 RT 1287.) The court specifically stated, "Under 352, that's the end. That is the end. You may not explore this any further. I've listened to all that I want to hear on the cross-examination of this witness on this point unless you are prepared to make an offer of proof that you're having someone who can say this is not Marchand Elliott." (*Id.*)

When asked why no discovery had been produced regarding defense fingerprint experts, defense counsel said that he had not intended to call any fingerprint expert until he heard Deputy George's testimony that the scientific community did not have a consensus with respect to the minimum characteristics needed before a definitive identification could be made. (7 RT 1288.) Counsel specifically stated that he was shocked to find that Deputy George stated that he didn't count the characteristics, and that Deputy George believed that no number of minimum characteristics was required in order to make an identification. (7 RT 1288-1289.) Defense counsel noted that upon learning this information, he was setting Deputy George up for impeachment. (7 RT 1290.) The court responded with,

"I've heard expert after expert testify exactly as [Deputy George] is saying, that this is the way that the comparison is made. It's not a matter of counting characteristics." (7 RT 1290.) In short, the court determined that defense counsel was not allowed to question the method by which Mr. George came to his conclusions:

> All right, look: from hearing many, many experts testify, the general way that identifications are made is to follow characteristics and look for common patterns, and then – once sufficient common patterns are made, they say this is a make, this latent matches this known, and that's it. Now, the technique is not necessarily to log and say we've got this characteristic, this characteristic, this characteristic. They don't necessarily count points.

(7 RT 1289.) Defense counsel made a record of the planned impeachment, stating that "it is accepted within the community that there's a definite standard of minimum characteristics required before someone would render an opinion." (7 RT 1289-1290.) The court initially agreed, stating, "Oh, sure, there's a minimum," but then retracted from this position by positing that a minimum only applies if the expert is using a counting technique, but that no minimum was required if no such counting technique was used. The court concluded its reasoning by stating that "if you're a real fingerprint expert, you can use any technique you want." (7 RT 1290.) The court then reiterated its decision that under Rule 352, defense counsel was precluded from questioning Deputy George's methodology on the basis of "wasting time." (7 RT 1291.)

B. **The Court Violated the Sixth Amendment Right of Mr. Elliott to Confront Witnesses Against Him Because the Court Terminated an Appropriate Cross-Examination of the Fingerprint Expert.**

In *Pointer v. Texas* (1965) 380 U.S. 400, 403, the United States Supreme Court held that the Sixth Amendment right of an accused to confront the witnesses against him is a "fundamental right . . . made obligatory on the States by the Fourteenth Amendment." The right of cross-examination is a primary interest secured by the confrontation clause. (*Douglas v. Alabama* (1965) 380 U.S. 415, 418.) Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. "[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed,... to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (*Alvardo v. Superior Court* (2002) 23 Cal. 4th 1221, 1137 (citations omitted).)

While limited by the discretion of a trial court to preclude repetitive and unduly harassing interrogation, the cross-examiner has traditionally been allowed to impeach the witness. (*Id.* at 419.) This is particularly so in the context of expert witnesses. As this Court made plain in *People v. Nye* (1969) 71 Cal.2d 356, 374:

> Once an expert offers his opinion... he exposes himself to the kind of inquiry which ordinarily would have no place in the cross-examination of a factual witness. The expert invites investigation into the extent of his knowledge, *the reasons for his opinion including facts and other matters upon which it is based*, and which he took into consideration; and he may be "subjected to the most rigid cross-examination" concerning his qualifications and *his opinion and its sources*.

(citations omitted, emphasis in original.) (*See also People v. Jones* (1964) 225 Cal.App.2d 598, 611 ("The weight to be given to the opinion of an expert depends on the reasons he assigns to support that opinion."))

In Mr. Elliott's case, the trial court impermissibly prevented defense counsel from conducting a cross-examination for the appropriate purpose of impeaching Deputy George's method of determining that the fingerprints belonged to Mr. Elliott. (7 RT 1290.) The court implied that such in-depth cross examination of an expert's methodology is not appropriate. (7 RT 1286.) This conclusion was clear error. "Because an expert witness may be cross-examined more extensively and searchingly than a lay witness, the court has broad discretion to admit such evidence for impeachment." (*People v. Hendricks* (1988) 44 Cal.3d 635, 642.)

This is particularly true where, as here, the expert was testifying about a matter that has been extensively questioned as a legitimate form of identification "science." (*See generally, Epstein, Robert. Fingerprints Meet Daubert: The Myth of Fingerprint "Science" is Revealed.* (2002) 75

S.Cal.L.Rev. 605.) Since the late 1990's, the manner of determining a fingerprint match has been challenged to the degree that the very admissibility of fingerprint evidence was called into question. (*See, e.g., United States v. Llera Plaza* (E.D. Pa. 2002) 188 F.Supp.2d 549.) While courts have now found fingerprint evidence admissible, such admissibility is conditioned upon the ability of defense counsel to thoroughly cross-examine the fingerprint examiner.

In *Llera Plaza*, for example, the District Court only allowed for the admissibility of the FBI fingerprint expert's testimony after an extensive inquiry into the methodology used to compare a suspect's rolled prints against latent prints taken from a crime scene. (*Id.*) Likewise, in *People v. Abner* (1st Dist. Div. 1 1968) 209 Cal.App.2d 484, 490, the trial court was found not to have erred in admitting the testimony of an expert fingerprint witness because "the record shows that defendant cross-examined the expert at length, [and] made no objection to the fact that the expert said that he could not remember the 12 points of similarity[.]" (*Id.*)

Fingerprint identification is a highly subjective process. Moreover, significant disagreement amongst fingerprint examiners exists as to the number of common ridge characteristics required in order to declare a match. While the FBI requires no minimum number of matching characteristics, in Australia a minimum of twelve exists, and in France and Italy, sixteen are required. (75 S.Cal.L.Rev. 605, 636 (*citing Christophe*

Champod, Numerical Standards and "Probable" Identifications. (1995) 45 J. Forensic Identification 136, 138.)) Despite a lack of common characteristics required for a match, the fingerprint community has assigned no weighted measures for some characteristics over others. *Id.* at 639. And while the "one dissimilarity doctrine" states that a single dissimilarity between rolled and latent fingerprints prevents a finding that one individual produced them, this "rule" is often circumvented by explaining away dissimilarities as distortions in the rolled or latent prints. (*Id.* at 640.) Based on these types of problems with the reliability of fingerprint analysis, courts have gone so far as to allow defendants to "present expert testimony at trial regarding the scientific bankruptcy of the field." (*Id.* at 650.) At a minimum, then, Mr. Elliott should have been able to question the accuracy of Deputy George's methodology in this case.

Instead, the trial court prevented defense counsel's best efforts to question Deputy George's testimony on the above bases. It seemed, in fact, that the court had determined that Deputy George had properly matched the latent prints to Mr. Elliott's fingerprints, because, as a "real fingerprint expert," he was entitled to use "any technique [he] want[ed]." (7 RT 1290.) As stated in *Crawford v. Washington* (2004) 541 U.S. 36, 61, "admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." "The Confrontation Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive

guarantee. It commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Id.*)

The facts of Mr. Elliott's case are strongly akin to the facts of a California Court of Appeals case. (*People v. Acevedo* (2001) 93 Cal. App. 4th 757.) In *Acevedo*, the state's expert testified about the defendant's blood alcohol level based on the partition ratio used to convert urine-alcohol concentrations to blood-alcohol concentrations. Defense counsel attempted to cross-examine the state's expert on the variability of individual partition ratios used to convert these concentrations, but the trial court repeatedly precluded all questioning in that area. Specifically, "[t]he court sustained the prosecution's relevance objection to questions regarding the universal acceptance of the conversion ratio for breath to blood and the fact that about half the states do not recognize urinalysis as a legitimate means of obtaining the blood-alcohol concentration." (*Id.* at 767.) The trial court was found to have prejudicially erred when it precluded cross-examination on the subject because the jury should have been allowed to consider the fact that there is individual variability among partition ratios. (*Id.* at 771.) By preventing cross-examination of the expert, the appellate court held that the trial court violated the defendant's Sixth Amendment right to confront a witness against him.

An identical situation arose in *People v. Lepine* (1989) 215 Cal.App.

3d 91. There, cross-examination regarding partition rations was curtailed by the trial court. The appellate court determined that this error required reversal, finding that:

> What the People seek, however, is not escape from an unfair disadvantage, but the perpetuation of an unfair advantage. While we will not, and cannot, arbitrate scientific disputes, it seems clear from the evidence submitted in this case and from a host of opinions in this and other states, that the partition ratio may vary from time to time and from individual to individual. This being the case it is appropriate a jury be allowed to consider that fact. We trust in the general rules of evidence, the preparation of counsel and the good judgment of trial judges to insure that this question of partition ratio variability is presented to jurors in a proper, complete and understandable form.

(*Id.* at 100.)[34]

These cases are highly instructive to the present case. Mr. Elliott's defense counsel was prevented from cross-examining Deputy George on a key issue of highly relevant evidence – the variability and subsequent accuracy of fingerprint examination techniques. Just as in *Acevedo*, defense counsel attempted to show that the methodology used by Deputy George was specifically discredited by other experts within the field. (7 RT 1286-87.) Such examination would have effectively impeached the witness

[34] The necessity for cross-examination on partition ratios has been negated by amendment to the statute determining the threshold limits for alcohol content. The legislature cured the need for such cross-examination by including threshold amount for both blood and breath alcohol content. (*See, generally, People v. Bransford* (1995) 8 Cal.4th 885.) This statutory change does not affect the analysis here.

and his methods of determining whether or not the fingerprints belonged to Mr. Elliott. (7 RT 1284-86, 1290.)

However, the court prevented defense counsel from continuing along this line of questioning because the court had "heard expert after expert testify exactly as [Deputy George] is saying, that this is the way that the comparison is made." (7 RT 1290.) The court concluded that Deputy George's method was "the way that the comparison is made" and precluded the jury from hearing evidence to the contrary. (7 RT 1290.) By so doing, the court impermissibly deemed itself the fact-finder by effectively determining that the match was appropriately made. (*See Crawford v. Washington* (2004) 541 U.S. 36, 61.) By preventing cross-examination of Deputy George, the court violated Mr. Elliott's Sixth Amendment right of confrontation. As such, this Court must reverse Mr. Elliott's conviction and remand the matter for a new trial.

C. The Court Violated Mr. Elliott's Due Process and Sixth Amendment Rights by Preventing Him from Presenting His Defense.

During cross-examination of the state's fingerprint examiner, the defense was precluded from questioning Mr. George unless he was able to make an offer of proof that he was planning to call an expert that would state that the fingerprint in question did not belong to Mr. Elliott. The defense stated it would be able to bring an expert witness to show that the

fingerprint was not definitively Mr. Elliott's. The court found this to be unacceptable.

> Court: No, no, no. That's not it. You tell me you've got an expert who is going to come in and look at the rolled prints of Marchand Elliott and look at the latents and say this is not Marchand Elliott.
>
> Defense Counsel: [The expert is] going to say one of them had 8 characteristics.
>
> Court: No. He's going to say it's—cannot be identified as Marchand Elliott.
>
> Defense Counsel: He's saying it's possible, not a definite as to one of them. He says one is a possible.
>
> (7 RT 1287.)

The court reiterated its ruling that the defense expert, if called, would have to say that the prints were definitely not Mr. Elliott's. (*Id.*) Defense counsel made numerous objections to the court's ruling and reasoning. (7 RT 1287-1291.) Because the proposed defense expert would have pointed out the insufficiencies in the finding that the prints were Mr. Elliott's without making a definitive identification, defense counsel ultimately did not call the proposed witness. (7 RT 1291.) This limitation violated Mr. Elliott's rights to present a defense and right to a fair trial.

While "[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense," *People v. Hall* (1986) 41 Cal.3d 826, 834, the blanket exclusion of critical evidence that goes directly to the defense offends basic notions of due process. (*See*

Crane v. Kentucky (1986) 476 U.S. 683, 690-691.) The exclusion of critical defense evidence "may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense." (*DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062, (citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, and *Washington v. Texas* (1967) 388 U.S. 14, 18-19.)) "The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts.... [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." (*Washington v. Texas* (1967) 388 U.S. 14, 19.)

The case of *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, is instructive here. Between Mr. Alcala's first and second trials, the California Supreme Court had found hypnotically-induced testimony to be unreliable. The key prosecution witness from the first trial was no longer available, and the state introduced her testimony from the first trial. In *Alcala,* the trial court prevented the defense from bringing an expert who would have testified that the key prosecution witness's testimony was the product of hypnotism, and was therefore unreliable. (*Id.* at 868.) The Ninth Circuit found that the exclusion of the defense expert violated the defendant's constitutional rights, because the expert's testimony had

"remarkable impeachment value" in a case resting largely on circumstantial evidence. (*Id.* at 877-878.)

This case presents an analogous situation. The sole piece of physical evidence against Mr. Elliott in this case was the fingerprint evidence. An expert testifying that the latent and rolled fingerprints had fewer than eight matching characteristics (7 RT 1287) would have provided "remarkable impeachment value" given that "[a]n average human fingerprint contains between seventy-five and 175 ridge characteristics." (75 S.Cal.L.Rev. 605, 608 (citing Fed. Bureau of Investigation, U.S. Dep't of Justice, *The Science of Fingerprints* (rev. ed. 1998)).) Therefore, Mr. Elliott's "right to compulsory process was violated [because] he was barred by the trial court from presenting 'testimony [that] would have been relevant and material, and ... vital to [his] defense.'" (*Alcala* at 880 (citations omitted.)) As such, Mr. Elliott's conviction must be reversed and the case should be remanded for a new trial.

D. The Court Shifted The Burden of Proof to Mr. Elliott by Requiring that He Show Exculpatory Evidence as a Prerequisite for Cross-Examination of a Witness Against Him.

The court in Mr. Elliott's case made the decision that defense counsel, in order to continue with his cross-examination, was required to make an offer of proof of exculpatory evidence. The court, based on its own experience of having heard "many expert after expert" testify in the

manner that Deputy George had testified, (7 RT 1287-1290), terminated cross-examination on Deputy George's methodology "unless you make an offer of proof that you intend to call an expert of your own to say that that print is not Marchand Elliott's then I think this examination is just a complete waste of time." (7 RT 1286.) This statement improperly shifted the burden of proof to the defense.

Here, the trial court required the production of exculpatory evidence by the defense in order to exercise a right that had no such requirement – the right to conduct a thorough cross-examination. It is, simply, never the defendant's burden to produce exculpatory evidence. It is axiomatic that the People bear the burden of proving a defendant's guilt beyond a reasonable doubt and that this burden never shifts to the defendant to prove his innocence. (Evid. Code, § 501; *People v. Mower* (2002) 28 Cal.4th 457, 479.) Due process requires that the prosecution, not the defendant, bear the burden of proving every element of a criminal offense. (*See In re Winship* (1970) 397 U.S. 358, 364; *Brinigar v. United States* (1949) 338 U.S. 160, 174 ("Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which ... has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."))

The court made a most unusual and utterly unconstitutional ruling in this case: that Mr. Elliott be required to proffer that an expert would be able to provide exculpatory evidence in order to cross-examine a witness against him. (7 RT 1287.) A defendant is, simply, never required to prove his innocence, and certainly, such proof is never requisite to his ability to put on his own defense. As such, the court violated Mr. Elliott's rights to due process of law under both state and federal constitutions, and his conviction must be reversed.

VIII. THE TRIAL COURT VIOLATED MR. ELLIOTT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY ERRONEOUSLY EXCLUDING EVIDENCE THAT A THIRD PARTY WAS CULPABLE OF THE CAPITAL CHARGE.

The defense moved to introduce evidence that Steven Young was the shooter in the Lucky's fatal robbery. The defense sought to introduce evidence that Mr. Young's fingerprints were in the getaway van, that eyewitnesses saw Mr. Young at the store at the time of the shooting, that Mr. Young and Mr. Elliott were acquaintances, that Mr. Young bears a striking resemblance to Mr. Elliott, and that Mr. Young had recently pled guilty to several armed robberies in the vicinity. The trial court denied introduction of the resemblance between Mr. Elliott and Mr. Young, the fact that they knew one another, and Mr. Young's convictions for similar crimes, thereby denying Mr. Elliott his right to present his third-party defense.

A. Factual Background

In a written motion submitted to the court, the defense counsel moved to introduce evidence that Steven Young was the shooter in the Lucky's Market fatal robbery. (3 CT 700–762.) The defense supported its request with a declaration that noted "[Steven Young's] fingerprint was found on the alleged getaway vehicle has already been introduced and three witnesses have identified Mr. Young as being in the store at the time of the

robbery. [¶] In addition, Mr. Young fits the description of the killer which has been given by numerous witnesses." (3 CT 703.)

During argument on the motion, the prosecution did not deny defense counsel's assertion that "from the information that's been supplied to us by the People, and from some of the interviews that we have conducted, we have 3 people that have identified the Picture I 4, which appears in line-up I, in the 4th position, which is Steven Young." (8 RT 1521.) The prosecution admitted, upon questioning by the court, that Mr. Young's photo had been in the photo arrays. (8 RT 1520.)

The defense further supported its written motion with a description of four similar armed robberies committed by Mr. Young that occurred between December 22, 1987 and November 26, 1988 in the Los Angeles area. (3 CT 705–62.) The defense argued that evidence of these four crimes — to which Young had pled guilty — were relevant to cast doubt on whether Mr. Elliott was the shooter because Mr. Elliott and Mr. Young knew one another, Mr. Young's fingerprint was found in the getaway van, and the crimes to which Mr. Young pled involved common characteristics to the crime in this case, such as pointing a gun at the armored guard's head, stealing and abandoning a getaway van, and having the robber run through the store to escape, all occurring in the Los Angeles area.[35] (3 CT

[35] Notably, the Lucky's incident occurred only weeks after the last crime to which Mr. Young pled guilty – on December 15, 1988. (RT 1187-88.)

705–762, 8 RT 1525–26.) Defense counsel argued the import of this evidence in this case, as "special circumstances are alleged which differentiate between the actual shooter and an accomplice. If the Jury has reasonable doubt and believes that someone other than the Defendant is the actual killer, the People must prove that the Defendant had the intent to kill before the special circumstances can be found true." (3 CT 703.)

During argument on the motion, the defense also requested that evidence of Mr. Young's similarity in resemblance to Mr. Elliott be introduced, and that the fact of Mr. Young's acquaintance with Mr. Elliott be introduced. (8 RT 1524 – 1526.)

In denying the motion, the trial court explained its erroneous understanding of the admissibility of third party evidence:

> The last statement [in the defense motion] is, "Mr. Young fits a description of the killer which has been given by numerous witnesses." Not one, not a single witness has testified. And I have to go on the state of the record that's before me, not what may come in at some later date. So for that reason, I'm disturbed about this motion at this time.
>
> Secondly, there is – the evidence that is cited, that defense has established a connection between Steven Young and the commission of the crime in this case – and again, there is not one word of testimony that establishes Mr. Young with the commission of the crime in this case.
>
> The only evidence that remotely connects Mr. Young to this – to the scene is the fact that on a piece of newspaper in the stolen van that was discovered near the crime, his fingerprint was found there. And there's no evidence before us as to when that fingerprint was left. That fingerprint could have been placed on that newspaper a week before, two weeks

> before, anything else. So as far as establishing the criteria of *People v. Hall* [(1986) 41 Cal.3d 826], the defense is so far short that the case is completely inapplicable.
>
> ... [I]n *Hall*, it was an unsolved crime. There was nobody to say who it was except the informer.[36] And the defendant in the case said it was the informer who did it, and wanted to put on that kind of defense. And admittedly, the informer was percipient [sic] and was there and was a participant. We're so far short of that.

(8 RT 1519-1520.) The defense attempted to explain that the *Hall* standard did not require more than the proffered evidence of Mr. Young's involvement in the crime, but the court continued to inexplicably reiterate that without evidence that Mr. Young was the killer, the defense was not permitted to put on evidence that Mr. Young was the killer:

> [A]t this point in the proceeding there is not one word of evidence where Mr. Elliott [sic] is linked with anything except a fingerprint on a piece of newspaper that could have been left at any time which isn't – why do you think Mr. Elliott is not charged – I mean why do you think Mr. Young – I'll get the name right yet; Yes, Mr. Young is not charged in this matter? Because anybody, any defense attorney that's worth a darn could say that newspaper proves nothing...

(8 RT 1523.) Defense counsel repeatedly argued that it was allowed to introduce evidence to establish a reasonable doubt by offering third-party evidence under *Hall*. (8 RT 1520–25.) The trial court disagreed, stating that there were too many robberies in California that had the same modus operandi as presented in this case for the evidence about Steven Young to

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[36] It appears that the judge believed that the Lucky's crime was, in contrast to the informer scenario presented in *Hall,* already "solved."

be relevant. (8 RT 1524–25.) In response, defense counsel stated that Mr. Young "pled guilty" to the crimes that the defense was seeking to introduce into evidence. (8 RT 1525.)

The trial court responded, "We have nothing to put Mr. Young in that vehicle [which was the alleged getaway van]. And you know that if Mr. Young were charged on the basis of that fingerprint, there isn't a jury in the State of California that could ever convict him. . . ." (8 RT 1525.)

After further argument, the defense counsel responded, "Judge, just to clarify the court's position, the court is telling me, and it's comparing the *Hall* standard to if Mr. Young was charged with this crime." (8 RT 1527.)

The court ultimately stated that the defense could introduce witnesses who could identify Steven Young as the shooter but that it was excluding all other offered evidence. (8 RT 1527–32.) The court specifically excluded any evidence that Mr. Young knew Mr. Elliott (8 RT 1526, "I understand that Mr. Young and Mr. Elliott knew each other. And I'm sure that Mr. Elliott knows a whole bunch of people. But that does not create – it doesn't rise up to a *Hall* situation"), that Mr. Elliott bore a striking resemblance to Mr. Young, (8 RT 1524) and any evidence that Mr. Young had been involved in several other similar armed robberies. (8 RT 1525, 1532.)

During the defense case, Mr. Elliott's attorneys sought to call a witness, Berton Wyngaarden, who would have testified that a person whose

appearance was more similar to Mr. Young's than Mr. Elliott's was seen "casing" the Lucky's market two days before the crime. (9 RT 1797.) The defense proffered that a Mr. Wyngaarden would have testified that he reported to the police that a person more closely resembling Mr. Young than Mr. Elliott, and an unidentified woman, were making observations of the store that appeared to be planning for a robbery. (9 RT 1798-1800.) Unlike Mr. Elliott, who was in his early twenties at the time of trial and unquestionably light-skinned, Mr. Wyngaarden would have testified that he reported to the police that "he observed a male black, 28 to 30, 170 to 180 pounds, dark-complected, short hair," and that this man, along with the unidentified woman "appear to be measuring, pacing the parking lot between Midstate Bank and Winchell's, appear to be sketching the area on a legal pad. Subjects then paced off the width of the driveway that leads to the front of Lucky's; then paced the distance from the front of the store to the rear of the store. Subjects subsequently noted informant watching them, left the area hurriedly." (9 RT 1799-1800.)

The trial court again precluded the defense efforts to introduce this evidence that someone other than Mr. Elliott was the perpetrator in this case. Determining that the evidence was not useful because, even if the person seen was not Mr. Elliott, "There could have been a dozen people who were planning to rob a particular store. And that doesn't have anything to do with the people who eventually carried it out. I just can't

see – it just seems too remote." (9 RT 1798.) Defense counsel responded, "Your honor, this is two days before this robbery took place the he saw it." (*Id.*) The court went on to say that it would have been admissible if there were some evidence that "this was a plan to do something to an armored guard," (*Id.*), and that it should be excluded because "to say that because they were black people that therefore they were suspicious is, I think, is a racist thing." (9 RT 1799.)

The court could not be persuaded that this evidence was critical to raising a reasonable doubt that the gunman could have been Mr. Young and not Mr. Elliott. The court had come to its own conclusion that the person who was seen casing the store resembled Mr. Elliott, not Mr. Young. (9 RT 1801.) Responding to defense counsel's proffer that "the description that this man gave fits Young, the man that – whose fingerprint was found on the newspaper in the getaway vehicle," (*Id.*), the court retorted, "The description fits Mr. Elliott to a T; closer to Mr. Elliott's description than some of the witnesses who've testified here." (*Id.*) Defense counsel, thwarted at every turn from introducing evidence to support each aspect of their third-party defense, were reduced to simply making a record on appeal.[37] The court made clear, one last time, that it felt that evidence

[37] Mr. Stein advised Mr. Ramirez, "Put it on the record that Mr. Young is dark and Mr. Elliott is light. It's improper that it fits his description." (RT 1801.) Mr. Stein addressed the court, stating "Your honor, the description is that of a dark-complected man. And as the Court knows, no one has

regarding someone casing the store who resembled Mr. Young was not to be introduced: "[A]s far as this wild attempt – and I do regard it as a wild attempt to try to bring Mr. Young into this case somehow. It just won't fly. And I won't allow that witness to testify to this totally unrelated conduct. And I find it to be totally unrelated to what happened on this particular occasion." (9 RT 1802.)

B. Standard of Review

The State of California recognizes that a defendant may challenge criminal charges by introducing evidence that a third person, not the defendant, committed the crime charged. (*People v. Jackson* (2003) 110 Cal.App.4th 280, 286 [hereinafter *Jackson]*.) "A criminal defendant has a right to present evidence of third party culpability if it is capable of raising a reasonable doubt about his own guilt." (*People v. Panah* (2005) 35 Cal.4th 395, 481 [citations omitted] [hereinafter *Panah*]). "[M]ere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime [citations]." (*Panah, supra,* 35 Cal.4th at 481.) "To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only

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described Mr. Elliott as being dark-complected. Everyone has described him as being light —" (RT 1802.)

be capable of raising a reasonable doubt of defendant's guilt." (*People v. Hall* (1986) 41 Cal.3d 826, 833.)

The right to present a defense is a fundamental component of a fair trial. (*Washington v. Texas* (1967) 388 U.S. 14, 17-19.) This right is subject to state evidentiary rules only to the extent that they prohibit introduction of evidence that is nothing more than speculation, has only a "remote" connection to the crime, or does not prove a material issue in the case. (See *Holmes v. South Carolina* (2006) 126 S.Ct. 1727, 1733.) ("*Holmes*").

This Court has de novo review to determine whether the trial court erred in denying the admission of such evidence. (*Jackson, supra,* 110 Cal.App.4th at 286.)

C. The Trial Court Erroneously Excluded Evidence that Would Have Cast Reasonable Doubt on Mr. Elliott's Culpability for the Fatal Robbery.

The trial court erred by excluding the defense's request to offer evidence of Mr. Young's resemblance to Mr. Elliott, Mr. Young's connection to Mr. Elliott, and the recent guilty pleas Mr. Young entered to crimes identical to the one charged in this case. The trial court refused to allow the defense to present its whole theory that showed that Steven Young was involved in the crime based on (1) his prior convictions for similar crimes that occurred in the relevant time period in surrounding areas; (2) proof that he knew Mr. Elliott; and (3) proof that his fingerprint

was located in the getaway van; and (4) evidence that three witnesses identified Mr. Young as being in the store during the robbery.

First, the trial court erred by excluding the evidence because it was not convinced that Steven Young was responsible for the crime. Since 1986, the California Supreme Court has rejected a trial court's decision to reject evidence based on its own "hasty conclusion" with respect to the credibility of the evidence in showing guilt or innocence. "Such a determination is properly the province of the jury" and cannot be a basis to exclude third-party evidence. (*People v. Hall* (1986) 41 Cal.3d 826, 834.)

Specifically, in *Hall*, this Court rejected the then-prevailing line of cases which stood for the proposition that "a 'substantial probability' of third-party guilt [must be shown] before such evidence may be admitted." (41 Cal.3d at 829.) Reiterating "the admissibility of any relevant evidence that raises a reasonable doubt as to a defendant's guilt, including evidence tending to show that a party other than the defendant committed the offense charged," the *Hall* Court found that the trial court erred in ruling to exclude evidence tending to show a third-party's culpability.[38]

In the present case, the trial court used the wrong standard to determine the admissibility of the proffered evidence. The question for the Court, after *Hall*, is whether the evidence showing that Mr. Young was

[38] The *Hall* Court found the ruling was harmless, however, because the defense managed to circumvent the court's erroneous ruling and introduce the third-party evidence. *Id.* at 835.

responsible for the crime was "relevant evidence that raises a reasonable doubt as to a defendant's guilt," and not, as the trial court stated, whether there exists "a jury in the State of California that could ever convict him on the basis of a fingerprint on a piece of newspaper..." (8 RT 1525.) By continually asking the defense for this level of proof, the trial court went beyond a return to the pre-*Hall* standard which required a preliminary showing of a "substantial probability" of Mr. Young's guilt; rather, the court demanded that the defense show that a jury would find Mr. Young guilty *beyond a reasonable doubt* before allowing it to offer the requested third-party evidence. Rather, the evidence of Mr. Young's involvement in the crime was only required, under *Hall*, to serve as "relevant evidence that raises a reasonable doubt as to a defendant's guilt." (41 Cal.3d at 829.)

In addition to applying the incorrect standard, the court erroneously reasoned that the defense was not entitled to bring in the proffered third-party evidence because the State's case had not shown any evidence of Mr. Young's guilt. As aptly stated by defense counsel, "The court is requiring us to put the cart before the horse. That's what this is about, whether we're allowed to introduce evidence that a third party committed this crime." (8 RT 1524.) Indeed, the defense was in no way entitled to rely on the evidence presented in the prosecution's case as the basis for their motion to introduce evidence that some person other than Mr. Elliott committed the crimes in this case.

Here, the trial court impermissibly shifted the burden from the prosecution to the defense, by requiring the defense to somehow prove that a jury would have found Mr. Young guilty beyond a reasonable doubt before allowing the defense to present its third-party defense. Indeed, from the record, it appeared that the trial court had already determined that Mr. Elliott, and not Mr. Young, was the gunman in this case, and was not prepared to allow the defense to enter any evidence to the contrary. Despite unrefuted evidence that Mr. Young's fingerprint was on the newspaper in the van, the court stated "we have nothing to put Mr. Young in that vehicle," (8 RT 1525), and discredited the potential for Mr. Young to be the perpetrator, asserting "in your experience and in my experience, time and time again we have had the same suspect described by various witnesses as being everything from 6'1" to 5'6." And nevertheless, it was unequivocally established that the defendant was the defendant."[39] (8 RT 1531.)

Ultimately, the trial court found that *Hall* was inapplicable by distinguishing a minor factual matter that had no bearing on the finding. The court reasoned that the present case did not warrant application of *Hall* because in *Hall*, an informant had identified the defendant as the perpetrator, and the defense had sought to show that the perpetrator was responsible for the crime. The trial court reasoned,

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[39] Again, the judge appears to have pre-determined that the eyewitnesses who have identified Mr. Elliott are correct.

> I'm simply saying that *Hall* can be distinguished because *Hall* was such a completely different fact situation where there were two people. One was telling on the other. And the other person, when he found that he'd been informed on, said, "I didn't do it. He did." And admittedly both of them were there, and it was – and so it was a who-did-it between these two. And there was every reason for the juror to be suspicious of the informant. We don't have that situation at all.

(8 RT 1527). Here, the trial court's reasoning was utterly flawed. Nothing in *Hall*'s holding requires that there be two parties making cross-accusations, or that the defense be placing the blame for the crime on the informant. Rather, the holding quite simply requires that third-party evidence be held to no stricter standard than any other exculpatory evidence – "it need only be capable of raising a reasonable doubt of defendant's guilt." (41 Cal.3d at 833.)

Ironically, the trial court appeared fixated on the fact that Mr. Young's fingerprints could have been placed on the newspaper at some earlier point in time and then transferred into the vehicle, and reasoned that no jury could have convicted Mr. Young for the crimes charged. However, the same can be said of Mr. Elliott's fingerprints. Indeed, the evidence used to connect Mr. Young to the getaway van – a fingerprint on a movable object – is identical to the *sole* physical evidence used to convict Mr. Elliott of the crime – his fingerprints on two movable objects found inside the van.

This is particularly relevant because, had defense counsel been allowed to show that Mr. Young and Mr. Elliott knew one another, they would have been able to explain to the jury why Mr. Elliott's fingerprints could have innocently arrived on moveable objects found in the van. Mr. Young was known to have previously used stolen getaway vans after gunpoint robberies of armored car guards picking up deposits. (8 RT 1521.) Innocent contact between Mr. Elliott and Mr. Young could have easily resulted in, for example, his taking the magazine from Mr. Elliott at some point prior to the robbery and leaving it in the getaway van, or Mr. Elliott being in the van and leaving his fingerprints at some point before the robbery. It is noteworthy that the van was stolen six full days before the robbery. (7 RT 1228-1230.) However, without being able to introduce evidence of Mr. Young's priors and his connection to Mr. Elliott, the jury was not able to contextualize the fact that Mr. Young's fingerprint was found within the van.

Another matter that could have been contextualized by the introduction of the excluded third-party evidence was the defense theory of misidentification of Mr. Elliott by the key prosecution witness, Janet Delaguila. Ms. Delaguila testified that she had seen a person in Lucky's two days before the robbery whom she knew from her prior position at a dry cleaners in Lucky's. (6 RT 1048.) Nor did the prosecution present any

other witnesses associated with the dry cleaner to testify that they recognized Mr. Elliott.

Delaguila testified that this person was accompanied by a woman at the time, and ultimately identified him as Mr. Elliott. (6 RT 1049, 1073.) However, despite her insistence that Mr. Elliott had been to the dry cleaners approximately three times a week, no record existed that Mr. Elliott ever patronized that dry cleaner. (6 RT 1072, 7 RT 1416, 9 RT 1812.) A witness who could have testified that a person who did not look like Mr. Elliott had been casing the store two days before the robbery – a dark skinned man accompanied by a woman – would have been powerful evidence which raised a reasonable doubt as to the identity of the perpetrator. (9 RT 1799-1800.) This is particularly so given that Ms. Delaguila claimed to have seen Mr. Elliott in the store with a woman the same day that this dark-complected man was seen casing Lucky's, and would have raised a reasonable doubt that Ms. Delaguila was confusing Mr. Young with Mr. Elliott.

The trial court further erred by not evaluating whether the offered evidence of Steven Young's culpability if presented to the jury was based on "mere motive" or circumstantial or direct evidence. The defense was not offering remote evidence of a randomly-chosen person being involved in the crime. The defense presented a coherent theory showing that the description of the gunman matched the physical characteristics of Mr.

Young, three witnesses identified him as the gunman, Mr. Young's fingerprints were found in the alleged getaway van, a witness saw a person more closely resembling Young than Mr. Elliott "casing" the store two days earlier, and police surveillance showed that Steven Young and Mr. Elliott were acquainted with one another. The trial court erred in diluting this defense theory by picking and choosing what may or may not be presented. As a whole, the legal theory is based on circumstantial evidence and should have been rejected or accepted in whole. The trial court thus erred in rendering the theory unusable by picking and choosing what pieces of the puzzle could be presented. (*Hall, supra,* 41 Cal.3d at 833 (holding that direct or circumstantial evidence linking the third person to the actual perpetration of the crime is admissible).

Finally, these errors — standing alone and cumulatively — violate Mr. Elliott's right to a fair trial, reasonable access to the courts, effective assistance of counsel, reliable guilt and penalty determinations, and due process and equal protection of the laws as required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The improper exclusion of evidence that could have created reasonable doubt as to Mr. Elliott's guilt is constitutional error requiring reversal.

D. Conclusion

The trial court violated California law by determining that Steven Young could not have been guilty of the charged crimes. Under California

and federal law, the question of guilt is for the jury to decide and the trial court erroneously decided that the evidence that could have raised reasonable doubt was categorically irrelevant. Moreover, the trial court violated Mr. Elliott's rights to a fair trial, reasonable access to the courts, effective assistance of counsel, reliable guilt and penalty determinations, and due process and equal protection of the laws as required by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Because both the state and federal constitutional violations are structural error, Mr. Elliott is entitled to a new trial.

IX. THE TRIAL COURT ERRED BY ADMITTING AN IRRELEVANT, HIGHLY PREJUDICIAL PHOTOGRAPH OF MR. ELLIOTT THAT WAS UNRELATED TO THE CRIMES FOR WHICH HE WAS ACCUSED, THEREBY VIOLATING HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

Over defense counsel's objection, the trial court admitted into evidence a four photograph display depicting Mr. Elliott from August 1987 until some point in time in 1989. (7 RT 1197-1201.) Defense counsel objected to one particular photograph that was taken in August of 1987, in which Mr. Elliott's hair was in plastic rollers. (7 RT 1198, 1200.) This photograph was irrelevant because the photo bore no resemblance to any description by any witness of the perpetrator of either crime and was taken over a year prior to the charged crimes. Because this photograph was first, irrelevant and, second, more prejudicial than probative under California Evidence Code § 352 and Federal Rule of Evidence § 403, its admission denied Mr. Elliott due process of law under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, as well as sections 7, 15, 17, and 24 of article I of the California Constitution.

A. Factual Background

Defense counsel objected to a black and white photo of Mr. Elliott that had been placed in a photo spread which depicted Mr. Elliott in hair rollers. Counsel specifically stated "there is no foundation for that picture, especially with the rollers the way they are. No one has identified it as ever

having been like that." (7 RT 1198.) The prosecutor claimed that the photo buttressed the testimony of Ms. Delaguila, who claimed that Mr. Elliott's hair had been longer in the past. (*Id.*) Defense counsel countered that another photo in the array showed Mr. Elliott with longer hair, and served the same purpose. (*Id.*)

The court disagreed, and reasoned that because it was a "very poor likeness, very poor photo," coupled with a date for the photo somehow eradicated any prejudice the photo could cause. (*Id.*) Defense counsel reiterated the objection to the fact of Mr. Elliott's hair in rollers, and reminded the court it considered the hairstyle of Myron Glasper,[40] the sole black venire person, to be cause for a challenge. (7 RT 1199.) The court denied having made an opinion based on Mr. Glasper's appearance, stating, "I said that the People objected to that, and you vigorously took the other side and said that there was no basis at all for people being excluded because they chose to wear their hair in a particular style." (*Id.*)

However, the court misstated its reasoning at *voir dire*. At *voir dire*, the court accepted the prosecutorial challenge to Mr. Glasper, having found that "his style of hair, and so on, as far as the mainstream is concerned, is bizarre." (4 RT 804.) In its *Batson* challenge, defense counsel maintained that there was nothing "bizarre" about Mr. Glasper's appearance, stating that "his haircut is not an unusual haircut in the black population," and that

[40] Mr. Glasper's hair was in a ponytail. (RT 805.)

"pony tails are in style, not just with white people," to which the court replied, "No, no, no. I would take note of the fact that his appearance was bizarre enough that the court personnel, long before there was any challenge posed, commented about it." (4 RT 805.) Counsel reiterated that "In Norwalk, in this courthouse, it may be an odd appearance," to argue that Mr. Glasper would not have stood out in Central Los Angeles. (*Id.*) The court nonetheless maintained that Mr. Glasper's hairstyle was a legitimate reason for the prosecution to have him removed from the venire. (4 RT 806.)

Despite having taken the position that a mere ponytail was sufficiently "bizarre" to justify excusing a black juror, the court refused to entertain the suggestion that a picture of Mr. Elliott with his *hair in rollers* could possibly be prejudicial. (7 RT 1199.) The court repeatedly stated that "I think that the prejudicial effect is absolutely minimal," "And he apparently posed for a picture with his hair in that particular style. So what's the prejudice," and "So what if his hair is in rollers? How does this prejudice your position or your client?" (7 RT 1198-1199.)

B. Legal Standards

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. Rule Evid. § 401. "[E]vidence is irrelevant if it has no

tendency in reason to prove or disprove a disputed fact bearing on a material issue..." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204 fn 14.) "Evidence is substantially more prejudicial than probative if, broadly stated, it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.'" (*People v. Jablonski* (2006) 37 Cal.4th 774, *(citing People v. Alvarez* (1996) 14 Cal. 4th 155, 204 fn. 14.)) Where the value of evidence for its proper purpose is slight and the likelihood that it will be used for an improper purpose by a fact finder is great, the trial court may, in its discretion, exclude the evidence even though it would otherwise be admissible. Evid. Code § 352; Fed. Rules Evid. 403. An abuse of discretion standard of review applies to any ruling by a trial court on the admissibility of evidence. This includes evidentiary rulings which "turn on the relative probative value and prejudice of the evidence in question." (*People v. Jablonski* (2006) 37 Cal.4th 774, 805 (citations omitted).)

C. The Photograph of Mr. Elliott in Curlers Was Both Irrelevant and Highly Prejudicial.

As a preliminary matter, the issue is sufficiently preserved for appellate review. Although defense counsel did not specifically raise the constitutional grounds for the objection of the photos, the objection that the exhibit "was more prejudicial than probative preserves the constitutional issue whether, for the same reason, the admission of [the photograph]

violated due process." (*People v. Perry* (2006) 38 Cal.4th 302, *citing People v. Partida* (2005) 37 Cal.4th 428, 437-439.)

In Mr. Elliott's case, no evidence was ever admitted stating that the perpetrator wore rollers or curlers. The photograph depicted a man with curlers and the perpetrator was described as having short curly hair about ¾ to 1 inch long. (5 RT 878, 970, 981.) Thus, the photograph served no purpose in the identification of the perpetrator or to any other fact finding in this case.

One of the witnesses to the Lucky's incident, Janet Delaguila, stated that she had seen the perpetrator in her former place of employment, a dry cleaner, prior to her employment at Lucky's. (6 RT 1047-1048.) However, there was no testimony that the person Ms. Delaguila saw at the dry cleaner ever wore his hair in curlers.

The photograph of Mr. Elliott in rollers should have been excluded because it was irrelevant. Mr. Elliott also argues, *inter alia*, that the photograph was more prejudicial than probative. The depiction of Mr. Elliott in the curlers painted Mr. Elliott as a strange, eccentric person, and was likely to alienate the jury from Mr. Elliott and to dehumanize him.

In Mr. Elliott's case, during jury selection, the trial court had determined that black people with "bizarre" hair should not sit on the jury. (4 RT 804.) During *voir dire*, the trial court excluded the only potential black male juror, Myron Glasper, because of his "unusual appearance." (4

RT 806.) The trial court found that Mr. Glasper's "style of hair as far as mainstream is concerned is bizarre" because he wore his hair in what was described as an afro, with a bun in the back. (4 RT 803, 804.) However, despite having found a mere ponytail so bizarre as to justify excusing a potential juror from the venire, the trial court could not see the prejudice involved in the jury's viewing Mr. Elliott's hair in rollers.

Finally, the prosecutor used this photo to make a non-sensical and confusing argument to the jury in closing. In summation, the prosecutor argued that the witnesses whose descriptions varied so greatly from one another at either crime scene in this case could be explained by the fact that Mr. Elliott was a veritable master of disguises, able to vary his appearance at will. (11 RT 2096.) The prosecutor misled the jury by citing the varied appearances of Mr. Elliott throughout his young life to justify the incongruous identifications from witnesses who had viewed the perpetrator *within seconds of each other.* Thus, Mr. Elliott was truly prejudiced by the introduction of this evidence.

Because the prejudicial effect of the admission of this photograph substantially outweighs the probative value of this evidence, the court clearly erred. Thus, the conviction of Mr. Elliott must be reversed.

X. THE COURT ERRED BY ADMITTING EVIDENCE OF AN UNCHARGED ROBBERY AND SHOOTING AT THE PENALTY PHASE, DEPRIVING APPELLANT OF THE RIGHT TO A RELIABLE SENTENCING DETERMINATION, VIOLATING OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Factual Background

On December 29, 1987, the assistant manager of Hughes Market on National Boulevard in Los Angeles, Augustus Guardino, was shot in the head at close range and robbed. (17 Supp. CT 4455-56.)

Mr. Elliott was originally charged with attempted murder, mayhem, and second degree robbery in connection with this incident. (17 Supp. CT 4415-4416.) After being filed with the Boys Market and Lucky's Market offenses, the counts were severed and remained pending in the downtown court during the Norwalk trial. (1 RT 45-46.) This matter never went to trial and Mr. Elliott never was convicted for any charge arising out of the Hughes incident. (11 RT 2231.) Subsequently, the prosecution dismissed the charges. (18 Supp. CT 4722-23.)

The prosecution, however, introduced the facts in aggravation at the penalty phase of Mr. Elliott's trial, despite the desperate lack of evidence that he had anything to do with this incident. (11 RT 2236-2295.) There is no physical evidence linking Mr. Elliott to the Hughes Market offenses. (*Id.*)

Mr. Guardino, the only witness who was able to identify Mr. Elliott as having participated in the Hughes Market incident, testified at the sentencing proceeding. (11 RT 2248-95.) According to him, he came upon his assailant while carrying the store's cash. (11 RT 2250.) His procedure was to look down each aisle of the market as he walked from one end to the other. As he turned to look down the last aisle there was a man pointing a gun. He threw his head to the side as the man pulled the trigger. (11 RT 2251.) A bullet entered the right side of his head and exited through the left temple destroying his left eye. (11 RT 2254-55.)

Mr. Guardino saw the shooter for a total of two seconds, all while a gun was at his head. According to Mr. Guardino, his view of the assailant's face was partially obstructed by the gun. (11 RT 2270-2271.) The gunman grabbed the money and ran out of the market. (11 RT 2242-43.)

The day he was shot, Mr. Guardino told the police the person who shot him was between five-eight and five-ten, late 20's to early 30's, between 160 and 170 pounds, had a light complexion, and a mustache with a mole over the right side of it. He was wearing a dark cap, dark jacket and dark pants. (11 RT 2266.)

Police Officer Michael Gannon, testified that three days after the incident, he interviewed Mr. Guardino at U.C.L.A. hospital. (12 RT 2373.) The description Mr. Guardino gave at that time was of a black male, 5'9 to 6 feet, 30 to 40 years of age, medium weight, wearing a dark jacket, dark

pants. (12 RT 2374.) In an additional interview approximately a week after the first interview with Gannon, Mr. Guardino described the suspect as a man who was shorter then 5'11", with a thin mustache with a dark mole-like coloration above the right side of his mustache. (12 RT 2376.)

Witness Daniel Lopaze was in the market and three or four feet away from Mr. Guardino when Guardino was shot. (12 RT 2386-2387.) He testified the shooter as a black male, about 5'9", 145-150 pounds, with very short hair and not wearing a cap. (12 RT 2387-88.)

In November 1988, nearly a year after being shot, Mr. Guardino saw a composite of a suspect in the newspaper. (11 RT 2255.) He testified it was "possibly" in the Valley Edition of the Los Angeles Times at his parent's house where he saw this composite. (11 RT 2295.) Mr. Guardino thought he kept a "copy at home" of this composite in his "files on everything that's happened since." (11 RT 2274-2275.)

Mr. Guardino informed Police Detective Waack that he saw a picture of the suspect in the Daily News newspaper and on television as well. (12 RT 2418.) He recognized the suspect as the person who shot him and notified the police investigator. (11 RT 2256.)

In addition to this newspaper composite and television viewing, and still prior to his initial identification of Mr. Elliott, Mr. Guardino was provided with a second composite. This composite was of the suspect in his own case given to him by his brother in law, also an employee of

Hughes Market, who had gotten it from the "Hughes Market people." (11 RT 2275.)

Finally, in November 1989, nearly two years after the shooting, Mr. Guardino made his first identification of Mr. Elliott. He selected Marchand Elliott out of a photographic line up of six individuals. (11 RT 2258.) In March 1990, he identified Mr. Elliott in a live line up. (11 RT 2259-60.) On May 15, 1990, he testified at the preliminary hearing and identified Mr. Elliott, the defendant, as his assailant. (11 RT 2261.)

Again, in January 1992, Mr. Guardino was shown photographs of six suspects. (11 RT 2261-62.) Mr. Elliott was among the individuals. (11 RT 2262.) Mr. Guardino, however, identified a different person as the gunman who shot him. (11 RT 2262.) Mr. Guardino believed that this person was the gunman because they both had the same 'eyes . . ., mustache, the tilt of the head, [and] just the look." (11 RT 2263.) When informed that this was a different person, Mr. Guardino defended his selection claiming the second person reminded him of how Mr. Elliott appeared at the 1990 line up. (11 RT 2263.)

Apart from Mr. Guardino, no other witness identified Mr. Elliott as the gunman in the Hughes Market Robbery. (11 RT 2236-2298.) In addition, there was no physical evidence linking Mr. Elliott to the Hughes Market offenses.

B. The Trial Court Admitted Evidence Of This Uncharged Shooting In Error As The Eyewitness Testimony Is Highly Unreliable And The Nature Of The Evidence Is Overwhelmingly Prejudicial.

The United States Supreme Court has held that convictions based on eye-witness identification following a questionable pretrial identification procedure will be set aside on due process grounds if "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (*Simmons v. United States* (1968) 390 U.S. 377, 384.) The *Simmons* Court noted that, "each case must be considered on its own facts." (*Id.*)

"To determine whether a challenged identification procedure was unduly suggestive so as to substantially affect the reliability of the identification, a district court reviews the totality of circumstances." *Trevino v. Hardison* (D. Idaho 2006), 2006 U.S. Dist. LEXIS 27294, 11-12 [citing (*Neil v. Biggers* (1972) 409 U.S. 188, 199; *Stovall v. Denno* (1967) 388 U.S. 293, 30].) The court must "weigh the corrupting effect of the suggestive identification against the five factors set forth in *Neil v Biggers*: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the prior description of the criminal; (4) the level of certainty demonstrated at the identification; and (5) the length of time between the crime and the identification." (*Trevino* at 12 (citing *Manson v. Brathwaite* (1977) 432

U.S. 98, 108, 114.) The prosecutor bears the burden of proof with regard to other violent criminal activity asserted during penalty phase. (*People v. Jackson* (1996) 13 Cal.4th 1164; CALJIC No. 8.88.)

In *Simmons v. United States, supra*, the Supreme Court warned against pretrial identification procedures in "which the photograph of a single individual recurs or is in some way emphasized." (*Id.* at 383.) In *Foster v. California* (1969) 394 U.S. 440, where there was a photographic line up followed by a one person show up, then another lineup with the appellant being the only common person in all three, the Court found a due process violation. It determined under these circumstances, "the pretrial confrontations were so arranged as to make the resulting identifications virtually inevitable." (*Id.* at 444.)

Mr. Guardino's initial identification was unreliable because it was predicated upon a composite and television viewing of Mr. Elliott in connection with a separate offense. In addition, it occurred two years after he saw his assailant for two seconds, during which time he had a gun to his head partially obscuring his view. Moreover, his description of the shooter does not match that of Mr. Elliott who, for example, has no mole on his face.

And, finally, the fact that the witness's initial photo six pack selection of Mr. Elliott, tainted by exposure to pictures of him as the accused in another incident, was repeatedly confirmed. First, it was

confirmed in a live lineup, where Mr. Elliott was the only person who had also appeared in the photo six pack. Then, it was reconfirmed at the preliminary hearing where Mr. Elliott was the only person who had appeared in all three. These procedures do not meet the five factor test set out in *Neil v. Biggers, supra,* and resulting identification was "virtually inevitable" as is described in *Foster*, *supra* at 444.

C. Conclusion

Evidence of the Hughes Market shooting and robbery is extremely prejudicial and hardly reliable. The prosecution did not meet its burden with regard to these offenses. All penalty phase errors potentially implicate the Eighth and Fourteenth Amendments by creating a risk that the jury's death verdict is not a reliable determination that death is the appropriate punishment. (*See, e.g., Caldwell v. Mississippi* (1985) 472 U.S. 320 (prosecutor's penalty argument that jury's penalty determination not final but subject to appellate review contrary to Eighth Amendment's requirement of reliability; *Johnson v. Mississippi* (1988) 486 U.S. 578, 587 (a death sentence based upon "materially inaccurate" information may violate the Eighth and Fourteenth Amendments).) As such, Mr. Elliott's death sentence must be reversed.

XI. MISDEMEANOR POSSESSION OF A LOADED FIREARM IN A PUBLIC PLACE DID NOT AMOUNT TO CRIMINAL ACTIVITY INVOLVING FORCE OR VIOLENCE OR THE THREAT OF FORCE OR VIOLENCE AND WAS THEREFORE NOT ADMISSIBLE PURSUANT TO PENAL CODE SECTION 190.3.

A. Factual Background

According to his testimony at the penalty phase of Mr. Elliott's trial, on June 25, 1988, Deputy John Kuhn responded to a radio dispatch, sending him to investigate a report of suspicious activity in West Los Angeles. (11 RT 2299-2300.) After Officer Kuhn observed that a particular car was unoccupied, he saw four young black men walking towards him. (11 RT 2301.)

Officer Kuhn ordered the four men to place their hands on the hood of the car. (11 RT 2301.) Three of the men complied, and the fourth, Mr. Elliott, refused. (11 RT 2301.) Mr. Elliott informed the officer that he had "some [identification] to prove that he was a good person" and made "several" attempts to reach for his left back pocket. (11 RT 2301-02.) Using his left hand, Mr. Elliott reached for his left back pocket. (11 RT 2304.) The officer ordered Mr. Elliott to keep his hands on the car. (11 RT 2301-02.)

When additional officers arrived, Officer Kuhn searched Mr. Elliott and found a loaded revolver in his back left pocket. (11 RT 2302-03.) Mr. Elliott's wallet, which contained his identification, was located in his back

right pocket. (11 RT 2303-04.) Mr. Elliott was convicted of a misdemeanor for possession of a loaded firearm in a public place in violation of Penal Code Section 12031(a) as a result of this incident. (11 RT 2210; 3 CT 891.)

The state gave notice of its intent to introduce evidence of this conviction as aggravation at the penalty phase pursuant to Penal Code section 190.05(b). (3 CT 894.) The defense objected to the admission of a conviction for a non-violent misdemeanor for this purpose. (11 RT 2297; 3 CT 888-899.) The court overruled the objection and admitted evidence of the circumstances of the conviction, Officer Kuhn's testimony, to show "the potential for violence" exhibited by Mr. Elliott's conduct. (11 RT 2297.) The state was prohibited from introducing the actual fact of the conviction. (11 RT 2211.) However, the court noted, "if that officer [Officer Kuhn] hadn't told him [Marchand Elliott] to keep his hands in front of him, there is every reason to believe that would be a dead officer." (11 RT 2210.)

Once again, just prior to the testimony, the defense renewed its objection to admission of weapons possession under Penal Code section 190.3. Again, the court overruled the objection finding, "...any time that someone is armed with a loaded weapon, that it falls into the category because of the potential for violence." (11 RT 2297.)

At the penalty phase closing argument, the prosecution argued that the jury should consider Officer Kuhn's testimony when deciding whether or not Mr. Elliott should die. (13 RT 2701.)

B. The Facts Surrounding The Misdemeanor Weapon Possession Did Not Amount To Criminal Activity Involving Force Or Violence Or The Threat Of Force Or Violence And Therefore Was Inadmissible

Penal Code Section 190.3 contains a description of the aggravating and mitigating factors that a jury may take into consideration when determining whether to impose a sentence of death or life without possibility of parole. The prosecution may not introduce aggravating evidence that is not relevant to the statutory factors listed in Penal Code section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 774.) With respect to factor (b), at issue here, section 190.3 states in relevant part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: . . . (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence. . . .
>
> However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

This Court has held that evidence of prior violent criminality is relevant to the decision to impose capital punishment. (*People v. Jennings* (1988) 46 Cal.3d 963, 982.) The purpose of section 190.3, subdivision (b)

is to show the defendant's propensity for violence. (*People v. Avena* (1996) 13 Cal.4th 394, 426; *People v. Wright* (1990) 52 Cal.3d 367, 432.) This assists the jury in determining whether the defendant is the type of person who deserves to die. (*People v. Ray* (1996) 13 Cal.4th 313, 349-350.)

The evidence of other criminal activity introduced pursuant to section 190.3, subdivision (b), requires proof of conduct constituting the commission of an actual crime that is defined in a specific penal statute. (*People v. Thompson* (1988) 45 Cal.3d 86, 127; *People v. Phillips* (1985) 41 Cal.3d 29, 72.) It may be admitted in aggravation only if it can support a finding by a rational trier of fact as to its existence beyond a reasonable doubt. (*People v. Clair* (1992) 2 Cal.4th 629, 672-673.) It is the responsibility of the trial court to determine that the evidence meets this high standard of proof before admitting it. (*People v. Boyd*, *supra*, 38 Cal.3d at p. 778.)

As noted above, the court admitted evidence not only that Mr. Elliott possessed a loaded weapon, but also the implication that he intended to use it against Officer Kuhn. Mr. Elliott was never convicted or even charged with any offense related to an assault or threat of assault upon the officer. The court's ruling was incorrect for at least two reasons. First, the evidence was simply insufficient to prove Mr. Elliott had any intention of using the weapon because he was moving his hand toward what the officer believed

to be his pocket. Second, a violation of Penal Code section 12031 (a) does not involve force or violence or the threat or force or violence.

Based on the court's rationale in denying the motion to suppress, it essentially concluded that Mr. Elliott's possession of a weapon was sufficient to prove beyond a reasonable doubt that he had assaulted an officer as well. As the court noted, "if that officer [Officer Kuhn] hadn't told him [Marchand Elliott] to keep his hands in front of him, there is every reason to believe that would be a dead officer." (11 RT 2210.) The conviction sheds no light on the officer's speculation that Mr. Elliott was moving toward his gun while claiming to reach for his identification.

The court's speculation should not have been a factor in determining whether or not to admit Officer Khun's testimony. (*People v. Waidla* (2000) 22 Cal.4th 690, 735 ["'[S]peculation is not evidence…'"].)

As to the court's assertion that, "any time that someone is armed with a loaded weapon" it is admissible for purposes of aggravation pursuant to Penal Code Section 190(b), this Court observed in *People v. Jackson*, criminal "firearm possession is *not*, in every circumstance an act committed with actual or implied force or violence." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1235 (italics added.)) Indeed, this Court has consistently held that "mere possession" of a single gun in a non-custodial setting does *not* involve force or violence or a threat of force or violence under factor

(b). (*People v. Belmontes* (1988) 45 Cal.3d 744, 809; *People v. Dyer* (1988) 45 Cal.3d 26, 76.)

To be sure, "*other* factual circumstances surrounding the weapon possession" may be such as to demonstrate an implied threat of force or violence. (*People v. Jackson*, *supra*, at 1235 (italics added.)) In *Jackson*, for instance, this Court distinguished garden-variety non-violent weapon possession from the possession in that case based on the additional facts that "defendant was an escaped prisoner fleeing from a murder charge at the time he was discovered with a gun . . ." (*Ibid.*) Hence, this Court concluded, "a defendant who arms himself after having escaped from custody can be presumed to be in possession of the gun to assist his continued flight rather than for legitimate self-defense or some other lawful purpose. Possession under these circumstances amounts to 'substantial evidence of an implied threat of violence' admissible under section 190.3." (*Ibid.*; *see also, People v. Garceau* (1993) 6 Cal.4th 140, 203 [defendant's possession of "*arsenal*" of weapons, including machine gun, silencer, and handguns, qualified as factor (b) evidence]; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588-589 [possession of deadly weapon *while in custody* involves implied threat of force or violence].) Here, however, there were no additional factors to suggest that Mr. Elliott's behavior involved violence under factor (b).

All penalty phase errors potentially implicate the Eighth and Fourteenth Amendments by creating a risk that the jury's death verdict is not a reliable determination that death is the appropriate punishment. (*See, e.g., Caldwell v. Mississippi* (1985) 472 U.S. 320 (prosecutor's penalty argument that jury's penalty determination not final but subject to appellate review contrary to Eighth Amendment's requirement of reliability); *Johnson v. Mississippi* (1988) 486 U.S. 578, 587 (a death sentence based upon "materially inaccurate" information may violate the Eighth and Fourteenth Amendments).) The arbitrary deprivation of a purely state law right at penalty phase may violate the Due Process Clause of the Fourteenth Amendment. (*See Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295 (state trial court's misapplication of its capital sentencing statute implicates the Eighth Amendment's prohibition against cruel and unusual punishment and the liberty interest protected by the Fourteenth Amendment).)

Here, the trial court's erroneous admission of this non-violent misdemeanor for purposes of aggravation of penalty prevented Appellant from a reliable determination of penalty in violation of the Eighth and Fourteenth Amendments.

XII. THE PROSECUTOR VIOLATED MR. ELLIOTT'S RIGHT TO DUE PROCESS BY ASKING THE JURY TO DRAW INFERENCES OF LACK OF REMORSE FROM MR. ELLIOTT'S FAILURE TO TESTIFY.

During the prosecutor's closing argument at the penalty phase, the prosecutor brought to the jury's attention that Mr. Elliott "sat there the whole time *as he sits there now, and he doesn't care. He isn't remorseful in the slightest.*" (13 RT 2705) (emphasis added). Defense counsel immediately objected, and the court responded with, "I think that's very much on the border. I would avoid that if I were you." (13 RT 2705.)

The Fifth Amendment prohibits a prosecutor from informing the jury that a defendant's silence is evidence of his lack of remorse for committing a crime. (*See Griffin v. California* (1965) 380 U.S. 609, 615 (1965).) Reversal is warranted when "such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis for the conviction, and where there is evidence that could have supported acquittal." (*Anderson v. Nelson* (1968) 390 U.S. 523, 524.) Reversal can only be avoided "where the prosecutorial comment was a single isolated statement, where it did not stress any reference to guilt, and where it was followed by curative instructions." (*See United States v. Armstrong* (9th Cir. 1981) 654 F.2d 1328, 1336, *cert. denied,* (1982) 454 U.S. 1157 (1982).)

Here, while the prosecutorial comment was singular, it made a direct reference to guilt. Specifically, the prosecutor set up the reference to Mr. Elliott's silence with the following statement:

> The defendant did some truly, truly heinous things...But the bottom line is a lot of victims came up and testified. And these were people, some of them, there was no question but that the defendant had shot them, had done things to them.

(13 RT 2705.) By going on to immediately state that "[a]nd he sat there the whole time as he sits there now, and he doesn't care. He isn't remorseful in the slightest," the prosecutor represented that Mr. Elliott had a duty to make some sort of apology to the victims of these crimes. The caselaw is utterly clear that while "the prosecution may comment upon a defendant's lack of remorse, in doing so it may not refer to the defendant's failure to testify." (*People v. Crittenden* (1994) 9 Cal.4th 579B.) "Similarly, we have recognized that a prosecutor may not urge that a defendant's failure to take the stand at the penalty phase, in order to confess his guilt after having been found guilty, demonstrates a lack of remorse." (*Id., c*iting *People v. Pensinger* (1991) 52 Cal.3d 1210, 1270-1271; *People v. Keenan* (1988) 46 Cal.3d 478, 509; *People v. Coleman* (1969) 71 Cal.2d 1159, 1168-1169.) The prosecutor's comments ran afoul this clear mandate, and amounted to reversible error.

This comment was particularly prejudicial because this is not a case with overwhelming evidence of guilt — of any of the three robberies he

was accused of committing. No physical evidence tied Mr. Elliott to the crime scene of any crime, eye-witness testimony provided vastly different descriptions of the gunman, the key prosecution witness's allegation that Mr. Elliott had been a customer at a dry cleaners is refuted by the lack of record or other employees who recognized Mr. Elliott, and each gunman was identified as being right-handed and Mr. Elliott is left-handed. The sole piece of fingerprint evidence against him was determined to be Mr. Elliott's with questionable methodology, and was only found on moveable objects in the van that could have been placed there by anyone at any time.

Finally, the "trial court's failure to offer a curative instruction compounded the *Griffin* error." (*Beardslee v. Woodford* (9th Cir. 2004) 358 F.3d 560, 588.) The objection in this case was not even properly sustained in a manner that would have encouraged the jury to have disregarded the prosecutor's reference to Mr. Elliott's silence. Notably, the word "sustained" was never said. The court simply suggested to the prosecutor, "I would avoid that if I were you." (13 RT 2705.) This was a woefully inadequate response given the constitutional dimensions of the prosecutor's conduct.

The prosecution's comments drawing attention to Mr. Elliott's constitutional right to silence and his conduct in the courtroom are simply impermissible means to inflame passions. Because the prosecutor's comments "manifestly intended to call attention to the defendant's failure

to testify or . . . of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify," reversal is warranted. (*United States v. Tarazon* (9th Cir. 1993) 989 F.2d 1045, 1051–52.)

SEVERANCE

XIII. TRIAL COURT VIOLATED CALIFORNIA AND FEDERAL LAW BY USING THE WRONG STANDARD IN DENYING MR. ELLIOTT'S MOTION TO SEVER TWO CHARGES.

A. Factual Background

On February 10, 1992, defense counsel filed a motion to sever the two charged counts relating to the attempted murder and assault with a deadly weapon at Boys Market from two counts relating to the Lucky's Market's murder and robbery. (2 CT 479–502.) Because the court had recently dismissed the robbery count related to the Boys Market Assault, defense attorneys argued that severance was proper (2 CT 481), and argued that the joinder of these counts was prejudicial to Mr. Elliott. (2 CT 486–87.)

The evidence used to establish the identity of the gunman responsible for the Boys Market incident consisted of two eye-witness identifications. The first was made by the victim who saw the gunman run to the back of the store, and the other by an individual who had originally stated that he had never seen the perpetrator's face. (8 RT 1436-41.) The evidence used to establish the identity of the gunman responsible for the Lucky's Market robbery and murder was presented by five individuals who, despite giving confusing and contradictory descriptions of the

gunman,[41] ultimately gave in court identifications of Mr. Elliott. (7 RT 1151, 5 RT 983, 854, 6 RT 995.)

In light of the fact that there was weak evidence regarding the identity of the gunman responsible for both the Boys Market crimes and the gunman responsible for Lucky's Market crimes, the defense argued that the evidence relating to each of the counts would impermissibly influence the jury's decision in determining whether the State had presented sufficient evidence of the gunman's identity for each count. (2 CT 479–502.)

On February 18, 1992, the trial court heard argument from both sides on this issue. (2 RT 202–223). The trial court denied the severance motion finding that there is insufficient evidence of prejudice from the joinder, reasoning that if fingerprint evidence from the crime scenes were linked to other suspects and not to Mr. Elliott, this would be advantageous to the defense. (2 RT 221–23.)

In particular, the trial court dismissed the defense's claims that the Boys Market case was weak because there was only one eye-witness offered to identify Mr. Elliott as the gunman. The trial court found this point unpersuasive because "[i]n most sex crimes there is no corroboration, and the case is based entirely on a single witness; but that doesn't make them weak cases." (2 RT 221.) The trial court continued to support his

[41] As discussed in Argument VI, the conviction in this case should be reversed because the testimony in this case was not sufficiently credible to sustain a finding of guilt.

denial by stating that if "there is a *Trombetta* or *Hitch*-type motion . . . [it] could result in that other [the Boys Market] case being dismissed." (2 RT 222.) The trial court accordingly denied the severance motion.

B. Legal Standards

While Penal Code § 954 "permits joinder of all assaultive crimes against the person, all of them being considered 'of the same class,'" (*Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 135, cert den. 451 U.S. 988; see also *Williams v. Superior Court* (1984) 36 Cal.3d 441, 447), §954 also provides that a trial court, acting "in the interests of justice and for good cause show, may in its discretion order that different offenses ... be tried separately." A failure to grant severance may therefore amount to an abuse of discretion. (*People v. Stitely* (2005) 35 Cal.4th 514, 531; *People v. Sapp* (2003) 31 Cal.4th 240, 248.) Even where no abuse of discretion is found, the denial of severance may require reversal on appeal when joinder is so grossly unfair as to deny the defendant due process of law. (*People v. Valdez* (2004) 32 Cal 4th 73, 120; *United States v. Lane* (1986) 474 U.S. 438, 446 n.8 (misjoinder rises to the level of a constitutional violation when it results in prejudice so great as to deny Fifth Amendment right to a fair trial.)) The Ninth Circuit has determined that this standard is met when the "joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be

inadmissible." (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1085, hereinafter "*Bean*".)

In determining whether joinder is proper, trial courts are generally directed to consider "(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case." (*People v. Cook* (2006) 39 Cal.4th 566, 581(citing *People v. Mendoza* (2000) 24 Cal.4th 130, 161).

When, as here, crimes of the "same class" are charged together, "evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together...." (§954.1) However, the four factors to be considered are not a four part test, but rather guidelines for consideration of whether the failure to sever would result in such prejudice to the defendant as to deprive him of due process. Proper consideration of these factors in this case would have resulted in severance. Thus, for the reasons set forth in Section C herein, the trial court abused its discretion in denying the severance motion. Moreover, Mr. Elliott was severely prejudiced by the failure to sever the counts in this case, resulting in denial of his due process rights.

C. The Trial Court Erred in Denying Severance by Failing to Apply the *Cook* Factors.

The trial court applied the wrong standard in ruling upon the defense severance motion. In denying the motion, the court reasoned that "if there is a serious issue where there is a *Trombetta* or *Hitch*-type motion, that would have to be entertained here; and that could be – could result in that other case being dismissed." (2 RT 222.)

The remedy for prejudicial joinder is severance, not dismissal for insufficiency of evidence. If the remedy for improperly joined charges were dismissal, then there would never be a need for severance. Moreover, the purpose of severance is to avoid prejudice to a defendant from prosecutorial bootstrapping of weak – but potentially sufficient – evidence together to overcome what might otherwise amount to reasonable doubt had the cases been tried separately.

The judge's reasoning was further flawed because the remedy of dismissal also fails to correct the problem of timing. The defense sought pre-trial severance to prevent the facts of one charge influencing the guilt determination regarding the second charge. The remedy of dismissal for insufficient evidence would only have been available after the jury's exposure to the facts about both charged crimes – at the close of the state's evidence.

The proper standard for determining the necessity for severance is

based on whether undue prejudice would be caused to the defendant, considering the four factors addressed in *People v. Cook, supra.* Had the court properly considered those four factors, the two charges in this case would have been severed.

1. The Evidence was Not Cross-Admissible

None of the evidence in either of the cases could have been admitted to prove that Mr. Elliott was guilty of the charge in the other case. The Boys Market assault and attempted murder case (hereinafter "Boys Market assault case") had only one eyewitness to identify Mr. Elliott as the gunman. The Lucky's fatal robbery (hereinafter "Lucky's capital case"), which occurred weeks later, also concerned the sole question of the gunman's identity.

The charges in this case, according to the court itself, were run-of-the-mill grocery store robberies that lacked signature qualities. (1 RT 69, 2 RT 205). In pretrial motions, the defense had sought discovery on the Steven Young gang and the investigation of several robberies that had similarities to the charged crimes in this case. The court found that there was no "signature" element to the string of robberies that had occurred in the Los Angeles area in the late 1980's. When defense counsel attempted to explain the similarities in the crimes, the court retorted, "now you narrowed it down to about 10,000 cases in this county." (1 RT 69.)

Despite finding that the cases had nothing sufficiently in common

for purposes of discovery regarding a potential third-party defense, the court turned that ruling on its head in order to deny severance. The court should have maintained a uniform view of the evidence for these two rulings. Having previously found that there was no similarity between the crimes, severance should have been granted.

Thus, under the court's own previous finding, unlike cases in which the joined crimes have similarities of *time* (*People v. Stanley* (2006) 39 Cal.4th 913, 933 [joinder proper involving two crimes that occurred within 13 hours of one another] (hereinafter "Stanley"), *location* (*Stanley*, *supra*, 39 Cal.4th at 933 [crimes occurred in "same general area of downtown Oakland"]), *weapon* (*Id.*, different victims attacked by same knife), *injury* (*Id.*, surgeon who treated different victims with unique stab wounds concluded that they were attacked by same person), or *modus operandi.* (*Id.*, both victims attacked in similar manner near their vehicles and the robber tore each back pocket attempting to steal wallets), the crimes at issue lacked such indicia of similarity. According to the trial court, the crimes were run-of-the-mill grocery store robberies, occurring within weeks of one another, in separate cities, and without any signature markings. None of the evidence in the Boys Market assault case could have been introduced at Lucky's capital case (and vice versa) if the matters had been severed.

2. *The Charges Unusually Inflamed the Jury*

As set forth below, the prosecutor seized on the dissimilarities in

the two cases to argue for a broader scheme of dangerousness and violence. However, any evidence introduced in separate trials could not have been imputed to Mr. Elliott. This misuse of the evidence violates due process by using "total evidence [from both crimes to] . . .alter the outcome of some or all of the charges." (*Cook, supra,* 39 Cal.4th at 581.) This impermissible approach was most flagrant when the prosecutor manipulated the absence of proof that the same weapon was used in each crime to argue Mr. Elliott's ability to procure numerous and multiple guns. (13 RT 2691–96). The conflation of inference with fact is precisely the harm that improper severance causes. Rather than having no physical evidence and no weapon linking Mr. Elliott to the Boys Market assault, the prosecutor used the capital crime to speculate that Mr. Elliott must have been a dangerous, sophisticated criminal to obtain multiple weapons at his will. The whole purpose of preventing unlawful joinder is to have otherwise weak evidence become tainted from inferences and suggestions that unfairly bolsters such evidence to support two charges that could not independently establish the guilt of a defendant. This is precisely what happened to Mr. Elliott.

3. A Weak Case was Joined with Another Weak Case

The trial court not only failed to consider the damage joining a weak case to another case can do, but specifically, illogically, reasoned that joinder of a weak case with another case would assist the defense:

Why couldn't you use the reverse of that argument and say

> that it would be to the advantage of the defense to have them joined, because if the people join such a weak case, why, then, the fact they were willing to proceed on such a weak case shows how bad the case in chief is; garbage in, garbage out. They were – willing to file one piece of garbage and filed a second piece of garbage, as well. Certainly, that would be an argument available to you.

(2 RT 220.) Defense counsel responded, "Sure, it would. But I don't believe that's a prong that has to be met for joinder. Again, that's a factor that mitigates against joinders... because, you know, the probabilities are the other way." (*Id.*)

Rather than allowing Mr. Elliott to defend himself against the weak eyewitness identification in two crimes for which he was charged, the prosecutor twisted otherwise weak identification evidence in both cases to prove that Mr. Elliott committed both crimes and was deserving of death. Over the defense's objection, the prosecutor expressly argued to the jury that all of the conflicting evidence from the eyewitnesses regarding the description of the gunman, as, for example, both tall and short, and having long hair and short hair, show that Mr. Elliott was the gunman in both crimes. (11 RT 2102-09.) To mask the weakness in the cases caused by drastically different descriptions of the gunman, the prosecutor argued that the varying descriptions were proof of Mr. Elliott's capacity to disguise himself. Here, the prosecutor craftily presented her argument in such a manner that the various eye-witness identifications were used to bolster the identification of Mr. Elliott in both crimes – the very type of prejudice

improper joinder can cause.

4. A Capital Offense was Joined with a Non-Capital Offense

Here, a non-capital case was joined with a capital case. This fact should have alerted the trial court to scrutinize the decision to join these matters to avoid any prejudice to Mr. Elliott. The trial court declined to grant severance, justifying his decision by stating that if the Boys Market assault case were weak, defense counsel could dismiss it at a future date. (2 RT 222.) Proof of exoneration, however, is not the proper means to protect Mr. Elliott from an unfair trial. The proper inquiry is whether a weak case is improperly bolstered by its inclusion in an unrelated case, which in this instance, was a capital case.

* * *

In short, the trial court applied the wrong standard for determining the necessity of severance in this case. The prosecution seized on this erroneous ruling to contend that any doubt about the gunman's identity in either case was proof that the gunman was a single person who can evade identification through changing his appearance. Although it is a high standard to meet, this case has the facts to show that the joinder of these two cases is "exceedingly asthenic." (*Bean, supra,* 163 F.3d at 1086). The record shows that "the only rationale the State could muster in support of joinder was that it was more convenient for the prosecution to try the

disparate cases together." (*Id.*) However, this reason is inadequate to guarantee a fair trial. "Against serious concerns about the fundamental fairness of a capital trial, the shallow defense of prosecutorial expedience has a hollow ring." (*Id.*)

Thus, the trial court abused its discretion in denying severance despite the facts that (1) the evidence for each case was not cross-admissible; (2) the prosecutor's use of conflicting evidence to argue that Mr. Elliott was a sophisticated, cunning criminal and thereby inflame the jury; (3) as evinced by the gaps in evidence (no gun found at either crime scene, no weapon traced to Mr. Elliott, no physical evidence at the Boys Market crime, no common time, no common marker) weak cases were joined to overcome a paucity of solid evidence in either case; and (4) the bootstrapping of a capital charge with an attempted murder and assault charge. (*Cook, supra,* 39 Cal.4th at 581). Mr. Elliott was denied his right to a fair trial, as the failure to sever these counts allowed inferences and suggestions to inflame the jury. Rather than trying the capital case only on the evidence available, the prosecution was permitted to make their case against Mr. Elliott through speculation and inference – factors which are simply not permissible in capital cases. This violation of both state and federal constitutional rights to due process warrants vacating the conviction and a new trial for Mr. Elliott. (*Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073; *Panzavecchia v. Wainright* (5th Cir. Unit B 1981) 658 F.2d 337;

Breeland v. Blackburn (5th Cir. 1986) 786 F.2d 1239; *Proctor v. Butler* (11th Cir. 1987) 831 F.2d 1251, 1256-57; *People v. Valdez* (2004) 32 Cal 4th 73, 120; *United States v. Lane* (1986) 474 U.S. 438, 446 n.8.)

MISTRIAL MOTIONS

XIV. THE TRIAL COURT ERRED IN FAILING TO GRANT A MISTRIAL WHEN THE PROSECUTOR DISPLAYED A LIST OF ALLEGED CRIMES AND CRIME LOCATIONS TO THE JURY, DEPRIVING APPELLANT OF HIS RIGHTS TO DUE PROCESS, CONFRONTATION, A FAIR TRIAL, AND A FAIR, RELIABLE SENTENCING DETERMINATION.

On the second day of the guilt phase of Mr. Elliott's trial, the prosecutor placed a box on her table which was marked with a list of a series of alleged crimes, organized by jurisdiction. This list was written in large lettering, and included the law enforcement agencies responsible for investigating each crime. Many of these alleged crimes were not admissible at the guilt phase. The list was prominently displayed, with the box placed next to the jury and visible by them. Immediately upon noticing this highly prejudicial box and list, trial counsel moved for a mistrial, which was denied. The prosecutor's conduct and the trial court's ruling denied appellant his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to due process, a fair trial based on the evidence, confrontation, and a fair and reliable sentencing determination.

A. Factual Background

On the second day of trial, in plain view and next to the jurors, the prosecutor placed a box labeled: "Witnesses; Lucky's, L.A.S.O.; Boys, Inglewood; Hughes, L.A.P.D.; San Bernardino, Los Angeles, Bellflower, and Long Beach." (6 RT 1015.) By this stage of the trial, the prosecution

had completed opening remarks and offered some testimony – the jury was well aware of the Lucky's incident and had learned that the L.A. County Sheriff's office had investigated that crime. (5 RT 839-840.) They were also apprised of the fact that the Boys Market robbery had occurred in Inglewood. (5 RT 835, 838.) The remaining locations on the box were, therefore, obviously a list of jurisdictions in which other crimes had allegedly occurred. This was borne out in the penalty phase, when evidence was introduced concerning other crimes, including the Hughes robbery investigated by the Los Angeles Police Department. (11 RT 2225-29 [prosecutor's opening]; 2228 [carjacking].) In their motion for a mistrial, defense counsel argued that the jurors were able to see the box, especially as they entered and exited, and if they had read the label, Mr. Elliott would suffer prejudice. (6 RT 1015.)

The prosecutor responded by claiming the jurors would not be able to understand the meaning of the words on the box, and that, while she was seated, not all of the jurors could see the box. (6 RT 1016.) The defense brought to the attention of the court that the box was located closest to the juror, who, as the wife of a Los Angles Police Department Homicide Investigator, would most likely be able to discern the significance of the

letters of "L.A.P.D.," and other such acronyms, and make the association with other crimes. (6 RT 1015.)[42]

The court admonished the prosecutor for labeling the box in a "very thoughtless" manner. (6 RT 1016.) The court further stated, "...you know what's in the box. You don't have to put great big labels across the outside. I think it was very foolish...." The court instructed her to remove the box at once, but found that mistrial was not warranted. (6 RT 1016-17.) The court offered to provide a curative instruction, but warned, "I think you might just exacerbate the situation by trying to instruct them on something that probably the majority of the jurors haven't even noticed or paid attention to." (6 RT 1017.) The defense immediately pointed out that the court was speculating "because I think it can be seen as they come in and out." (6 RT 1017.) The defense then declined such an instruction. (6 RT 1017.) The court denied the motion for a mistrial. (6 RT 1016-17.) The court made no findings as to what the jury was or was not able to see, the likely meaning of what was displayed, or the resulting prejudice, other than to chastise the prosecutor and to say that a curative instruction would only worsen the problem.

[42] Indeed, it is likely that most jurors would be able to understand such acronyms in the context of the list.

B. The Display of the Box in the Presence of the Jury Created An Unacceptable Risk of Impermissible Factors Coming Into Play, Was Inherently Prejudicial, and Eroded the Presumption of Innocence in Violation of Due Process.

The Fourteenth Amendment incorporates the essence of the Sixth Amendment right to be tried "by a panel of impartial, 'indifferent' jurors [whose] verdict must be based upon the evidence developed at trial." (*Irwin v. Dowd* (1961) 366 U.S. 717, 722.) "'Due process requires that the accused receive a fair trial by an impartial jury free from outside influences.' Courts must safeguard against "the intrusion of factors into the trial process that tend to subvert its purpose." (*Estes v. Texas* (1965) 381 U.S. 532, 560 [Warren, C.J. concurring] citing *Sheppard v. Maxwell* (1966) 384 U.S. 333, 362.) The Supreme Court has held that when the consequence of a courtroom practice or occurrence is that an 'unacceptable risk is presented of impermissible factors coming into play,' there is 'inherent prejudice' to a defendant's constitutional right to a fair trial and reversal is required. (*Estelle v. Williams* (1976) 425 U.S. 501 [compelling a defendant to appear before the jury in prison garb found impermissible]; *Holbrook v. Flynn* (1986) 475 U.S. 560 [In challenging courtroom procedure, question is not whether the jurors articulated a consciousness of some prejudicial effect, but rather whether there was an unacceptable risk of prejudice.) The *Williams/Flynn* principle is designed to help protect a defendant's right to a fair trial, as guaranteed by the Fifth, Sixth and

Fourteenth Amendments. (*Williams*, 425 U.S. at 503; *Flynn*, 475 U.S. at 567.) Courtroom factors may deny a defendant a fair trial by undermining the presumption of innocence and by suggesting guilt through "'circumstances not adduced as proof at trial.'" (*Flynn*, 475 U.S. at 567 [*quoting Taylor v. Kentucky* (1978) 436 U.S. 478, 485]; *see also Williams*, 425 U.S. at 503-04 [noting fundamental, constitutional nature of presumption of innocence].) Such displays deprive a defendant of his right to confrontation, the presumption of innocence, and the right to a trial by jury with proof established beyond a reasonable doubt.

The difficulty with such non-evidentiary displays is that the speculation they engender is unchallenged, and it lends credibility to the State's case without permitting the defense the ability to refute it through confrontation or presentation of evidence. (*Estelle v. Williams* (1976) 425 U.S. 501, 833). Here, the prosecution placed before the jury a box apparently filled with evidence that was not admissible at the guilt phase of this trial, and whose admissibility in the penalty phase had yet to be determined. This was coupled with a list of locations that encouraged the jury to speculate that there were many more crimes in differing locations. This presentation of inadmissible crimes and locations was a very clever way for the prosecutor to lead the jury to believe there was an entire spree of such acts throughout the area, of which they were only hearing of a few.

At this stage of trial, the jury was aware that "Lucky's" carried the accusation of murder and robbery. This was the first label on the box. Thus, the list could easily have led the jury to logically speculate that the remainder of the list included other similar incidents. The exhibition of inadmissible evidence undermined the presumption of innocence, and potentially led the jury to speculate about a lengthy list of potentially violent crimes in various location, apparently under investigation by a large number of law enforcement agencies.

C. The Prosecutor Engaged in Prejudicial Misconduct which Violated Appellant's Rights to Due Process and a Fair Trial.

Prosecutorial misconduct such as occurred here violates a defendant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to confrontation, fair trial, due process and a reliable and accurate sentencing proceeding.

> Conduct by a prosecutor that does not violate a court ruling is misconduct only if it amounts to 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury' or 'is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' A finding of misconduct does not require a determination that the prosecutor acted in bad faith or with wrongful intent. To preserve a claim of prosecutorial misconduct for appeal, a defendant must object and seek an admonition if an objection and admonition would have cured the harm.

(*People v. Kennedy* (2005) 36 Cal.4th 595,617-18.) (Citations omitted.)

Under the federal constitution, the appropriate standard of review for a claim of prosecutorial misconduct is whether the prosecutor engaged in "'egregious misconduct ... amount[ing] to a denial of constitutional due process.'" (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 647-48.) Prosecutorial misconduct denies a defendant due process only when it is "'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" (*Greer v. Miller* (1987) 483 U.S. 756, 765, *quoting United States v. Bagley* (1985) 473 U.S. 667, 676.) Because a prosecutor wears a "cloak of official authority," instances wherein the State engages in extra-evidentiary displays are less likely to be curable and more likely to cause prejudice. (*People v. Hill* (1992) 3 Cal.4th 959, 1000, overruled in part on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Initially, no request for a curative instruction is required to preserve this claim. Here, the trial court itself noted that such an instruction would actually harm the defense. This reflects the seriousness of the prosecutor's actions – there was no possible way to alleviate the prejudice to the defense. When the misconduct is so outrageous or inherently prejudicial that an admonition could not have cured it, none is required. (*People v. Dennis* (1998) 17 Cal.4th 468, 521.)

This is not an instance of prosecutorial misconduct in argument, or a state's witness who "inadvertently" blurts out incriminating information.

Such standard claims are much more curable with a general admonition that argument is not evidence, that the jury is to disregard the reference, or a specific instruction that the prosecutor's comments were improper and to be disregarded. (*People v. Dennis*, *supra*, 17 Cal.4th at 521; [trial court had cautioned the jury that counsel's arguments were not evidence and should not be considered as such]; *see also People v. San Nicolas* (2004) 34 Cal.4th 614, 615 [any prejudice from a prosecutor's derogatory references could have been cured by an admonition].)

Here, the prosecutor's conduct was both deceptive and reprehensible. Essentially, she displayed a list of suggested other criminal activity to the jury in, as the court pointed out, "great big labels." (6 RT 1016.) There was no reason to label the box of files in such a manner, and no reason to place it on the table in plain view of the jury. The defense maintained that the jury saw the box labels as they entered, a statement contradicted by neither the prosecutor nor the trial court.[43] Most telling, the prosecutor did not claim that the placement of the box was inadvertent. This fact is noteworthy given the wildly disparate descriptions of the perpetrator, creating the need to buttress the prosecutor's case with innuendo and conjecture.

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[43] The display of the list to the jury requires reversal because the appearance of impropriety in this case cannot go unchecked. However, Mr. Elliott's habeas corpus petition will address further evidence which will show that the jurors were, indeed, influenced by the boxes.

D. Mistrial Was the Sole Appropriate Remedy in Mr. Elliott's Case.

It is error to deny a motion for a mistrial when a party's chances of receiving a fair trial have been irreparably damaged. (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) The denial of such a motion is reviewed for an abuse of discretion. (*Id.*)

As a preliminary matter, the issue is preserved for review. Defense counsel moved for a mistrial. (6 RT 1015.) Counsel was not required to request a curative instruction, because, as the trial court itself noted, such instruction was likely to "exacerbate the situation." (6 RT 1017.) In such circumstances, as discussed above, there is no further requirement to preserve the issue. (*People v. Hill, supra,* 17 Cal.4th at 820 [request for curative required if it would have cured the harm].) Given the extremely prejudicial nature of the matters displayed to the jury, and their highly speculative nature, the trial court's denial of the mistrial motion was incorrect.

A motion for mistrial based on a claim that a defendant's federal due process rights were violated at trial should be granted when the court "'is apprised of prejudice that it judges incurable by admonition or instruction.'" (*People v. Lucero* (2000) 23 Cal.4th 692, 713-714.) "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling....'" (*Id.* at p. 714.) In assessing whether a practice or procedure

impermissibly affects the defendant's right to a fair trial, "[c]ourts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." (*Williams*, 425 U.S. at 504.) This means that courts deciding whether a courtroom practice is inherently prejudicial must take into account the nature of the proceedings and issues before the jury. (*See, e.g.*, *Flynn*, 475 U.S. at 569 [noting that security officers in courtroom might suggest that defendant is dangerous or untrustworthy under certain circumstances]; *Deck v. Missouri* (2005) 544 U.S. 622, 632-33 [considering nature of issues before jury in deciding whether routine shackling at penalty phase of capital trial is constitutionally acceptable].)

Here, the trial court abused its discretion. It made no findings that the matters regarding the degree to which the box and its labels were observable by the jury, the length of times and number of times the jury may have seen the box, and what prejudice this was likely to cause. Further, and perhaps more important, the court never assessed how the conduct affected the trial, given the nature of the state's proof and the potential defenses. Given the location of the box and the "great big" size of the lettering, the likelihood that the list of crimes and jurisdictions did not influence the jury is remote. Because the court never articulated or employed the proper standard for review, and never even attempted to

make any inquiry, or make any relevant factual findings, it abused its discretion.

E. Appellant Was Prejudiced.

The error was not harmless beyond a reasonable doubt. This Court has long recognized the danger inherent in exposing juries to other criminal activity. The rationale for excluding other crimes evidence arises from the danger that the jury will convict merely because of the defendant's criminal propensity to commit crimes, regardless of whether guilt is proven beyond a reasonable doubt. (*People v. Alcala* (1984) 36 Cal.3d 604, 631.) Because other crimes evidence "may be highly inflammatory, its admissibility should be scrutinized with great care." (*People v. Gray* (2005) 37 Cal.4th 168, 202; *People v. Carpenter* (1997) 15 Cal.4th 312 ["inherently prejudicial"].)

There are a host of procedural mechanisms designed to protect defendants from the introduction of such evidence. Foremost among them is the right to a hearing prior to the introduction of the evidence. Such hearings give the trial court and counsel the opportunity to determine whether there is sufficient evidence rather than mere speculation, whether that evidence is reliable and admissible, whether it actually rises to the level of evidence that proves an issue in the case (Cal. R. Evid. 1101), and whether it is simply too prejudicial to warrant introduction (Cal. R. Evid. 352). (*See People v. Banks* (1970) 2 Cal.3d 127, 137, fn. 6, ["the *extreme*

prejudicial effect of evidence of offenses other than that charged requires that the trial court, prior to admitting such evidence, undertake a closely reasoned analysis of probative value in order to determine whether such value is sufficient to outweigh inherent prejudice."] [emphasis added].)

The conduct here precluded any such evaluation and determination prior to the jury's learning of the likelihood of other criminal activity. This conduct is a separate due process violation as well, both substantively under *Jackson v. Denno* (1964) 378 U.S. 368, and as a state-created liberty interest under *Hicks v. Oklahoma* (1980) 447 U.S. 343.

Likewise, the list of crimes and jurisdictions deprived appellant of his rights in the penalty phase under Penal Code section 190.3(b), which requires the jury consider only crimes of violence, and only those that are proven beyond a reasonable doubt. As discussed under Argument XI, this is a substantive due process and Eighth Amendment violation under *Ring v. Arizona* (2002) 536 U.S. 584 and *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101 ["Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt."] [opinion of Scalia, J.]), and a violation of a state-created due process right under *Hicks v. Oklahoma, supra.*

It is a rare case where a defendant is not prejudiced by jurors who are exposed to extra-evidentiary other crimes. (*United States v. Keating* (9th Cir. 1998) 147 F.3d 895, 900; *United States. v. Footman* (D.Mass. Nov 12, 1998) 33 F.Supp.2d 60, 62-63 [citing studies as to "attribution effect" of such evidence on juror decision-making]; *see also Jeffries v. Wood* (9th Cir.1997) 114 F.3d 1484, 1490; *Lawson v. Borg* (9th Cir.1995) 60 F.3d 608 [petition granted where jury improperly told that defendant was violent]; *Jeffries v. Blodgett* (9th Cir.1993) 5 F.3d 1180, 1191 [petition granted where jury learned that defendant had committed prior armed robbery]; *Dickson v. Sullivan* (9th Cir. 1988) 849 F.2d 403 [petition granted where jury told that defendant had committed a similar crime].) In these cases, prejudice is presumed.

Mr. Elliott's case is no different. The fact that the jury was provided with what appeared to be a list of specific crimes charged against appellant was itself severely prejudicial. This prejudice was compounded and rendered incurable by the connection of these crimes to multiple jurisdictions and law enforcement agencies, lending an air of credibility to these inadmissible allegations. This is exactly the form of jury exposure that courts have traditionally found to be highly inflammatory, as the above cases suggest.

At trial, the prosecution attempted to minimize the damage that had been done by stating that not all the jurors could have seen the list. (6 RT

1016.) That only some of the jurors may have seen the list bears no consequence. (*Lawson v. Borg* (9th Cir.1995) 60 F.3d 608, 613 ["[t]he number of jurors affected by the misconduct does not weigh heavily in the prejudice calculus, for even a single juror's improperly influenced vote deprives the defendant of an unprejudiced, unanimous verdict."]; *see Dickson v. Sullivan* (9th Cir.1988) 849 F.2d 403, 408 ["If only one juror was unduly biased or improperly influenced, Dickson was deprived of his Sixth Amendment right to an impartial panel."); *Dyer v. Calderon* (9th Cir.1998)151 F.3d 970, 973 ["The Sixth Amendment guarantees criminal defendants a verdict by impartial, indifferent jurors. The bias or prejudice of even a single juror would violate Dyer's right to a fair trial."]; *United States v. Gonzalez* (9th Cir.2000) 214 F.3d 1109; *Tinsley v. Borg* (9th Cir.1990) 895 F.2d 520, 523-24 ["Even if only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury."][internal quotations omitted]; *Harrington v. California* (1969) 395 U.S. 250, 254 [recognizing that "we must reverse if we can imagine a single juror whose mind might have been made up because of Cooper's and Bosby's [inadmissible] confessions and who otherwise would have remained in doubt and unconvinced"]).

F. Conclusion

The prejudice here was exacerbated by the nature of the State's case (varied descriptions of the perpetrator; unidentifiable fingerprints and

questionable fingerprint methodology), and the defense of mistaken identity. Because the defense also asserted that mistaken identity may also suggest appellant was an accomplice, there was separate prejudice to the special circumstance finding. Finally, given the lingering doubt aspects of the penalty presentation, and the requirements under Penal Code section 190.3(b) that any other crimes be crimes of violence that the jury must find beyond a reasonable doubt, there was independent penalty phase prejudice. For these reasons, Mr. Elliott's conviction and sentence should be reversed, and the case remanded for a new trial.

XV. MR. ELLIOTT'S PSYCHOLOGICAL BREAKDOWN DURING TRIAL AND SENTENCING, EVINCED BY REPEATED SELF-DESTRUCTIVE BEHAVIOR AS THE PROCEEDINGS PROGRESSED, REQUIRED A PSYCHOLOGICAL EVALUATION TO DETERMINE WHETHER MR. ELLIOTT WAS ABLE TO CONTINUE TO ASSIST IN HIS DEFENSE; MOREOVER, MR. ELLIOTT WAS DENIED HIS RIGHTS TO DUE PROCESS, A FAIR TRIAL AND A RELIABLE SENTENCING DETERMINATION WHEN HE WAS CONVICTED AND SENTENCED TO DEATH BY A BIASED JURY, INFLAMED BY MR. ELLIOTT'S PERSONAL ASSAULT UPON THEM AND THE COURT.

As Mr. Elliott's trial and penalty phase progressed, his ability to remain, as the court had described him, "very well behaved," broke down. First, Mr. Elliott had an inexplicable outburst, during which he threw two apples at the jury, and one at the court. (10 RT 1906.) Later on, Mr. Elliott insisted on wearing a pair of glasses he had never before worn which were similar to the pair described as having been worn by the perpetrator in the Lucky's incident. (12 RT 2338.) Finally, Mr. Elliott refused to wear civilian clothing after the end of the guilt phase. (11 RT 2207.) Mr. Elliott's arguably suicidal behavior required the court to assess his psychological ability to assist in his own defense. Moreover, Mr. Elliott's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Federal Constitution and the corresponding provisions of the California Constitution were violated when the court refused to declare a mistrial or even poll the jury to determine whether they were able to continue to evenhandedly sit in judgment of Mr. Elliott given that they had been

personally assaulted by him. These errors, individually and cumulatively, require reversal.

A. Factual Background

On Monday, March 16, 1992, during the presentation of defense witnesses at the guilt phase of his trial, Mr. Elliott stood up, threw three apples and returned to his seat. (10 RT 1906.) Two of the apples hit jurors, and the other missed the judge. (10 RT 1906.) The reporter noted a pause in the proceedings during which the jurors were apparently excused, as the next note is: "The following proceedings were held out of the presence of the jury." (10 RT 1906.) The court recounted the event for the record adding, "And one of the jurors is extremely upset. She appears, according to the staff that have conferred with her—she appears to be hyperventilating and is close to hysteria. She may or may not be able to continue this morning's session." (10 RT 1907.)

The court announced spontaneously that it would not "declare a mistrial or upset these proceedings." (10 RT 1907.) It informed Mr. Elliott that he would appear in restraints for the remainder of the proceedings for the safety of the jurors and warned if there was another outburst, Mr. Elliott would be excluded from the proceedings. (10 RT 1907.)

Defense counsel argued that the jurors could no longer be fair. (10 RT 1909.) He requested that the court conduct individual *voir dire* to determine the ability of each juror to remain impartial in light of Mr.

Elliott's misconduct. (10 RT 1909.) The court responded by saying, "I will give them an appropriate instruction. But I'm not going to conduct an inquiry at this time that could result in aborting these proceedings... I'm not going to make an individual inquiry of the jurors." The court announced its intention to inquire that if anyone were "so upset that they would prefer to recess until this afternoon, I'll give them that opportunity. But that's the only inquiry I'm going to make." (10 RT 1909-10.)

As Mr. Elliott was being escorted out of the courtroom, he responded by saying, "This is shit." (10 RT 1910.) The court noted that Mr. Elliott was close to being excluded from the proceedings. (10 RT 1910.)

In the presence of the jury the court explained that Mr. Elliott would be kept in waist chains and handcuffs, "unable to throw anything or come close to any of the jurors." The court informed the jurors, which he noted was a matter of "common sense," that they must decide the defendant's guilt or innocence on the evidence and not on Mr. Elliott's behavior, as that would not be the "proper criteria." (10 RT 1911-12.) The court continued,

> Now, I realize that something as bizarre as this is very upsetting. And a couple of you, I understand were struck. And this is a frightening experience, and certainly something you have every right to assume will never happen in a courtroom. So the reason I called you out now in the absence of the defendant was to inquire of each and every one of you if you are able to continue with the trial this morning, or if you would prefer to recess to

> compose yourself a little bit, and settle down and have the trial this afternoon.

No one responded. (10 RT 1913.)

After a break requested by defense counsel to speak with his client, the proceedings continued for the remainder of the afternoon. (10 RT 1915.) Mr. Elliott remained shackled for the remainder of his trial. The defense made a motion to dismiss the jury in order to have a new jury determine Mr. Elliott's sentence. This motion was denied. (11 RT 2207-08.) During the penalty phase, the court permitted the prosecutor to argue one of the reasons Mr. Elliott should be sentenced to death was his assault on the court and the jurors with apples. (13 RT 2706.)

The trial court committed reversible error in the following respects: 1) It failed to *voir dire* the jury to determine whether or not each member could fairly and impartially decide the case against Mr. Elliott based solely upon the evidence; 2) It failed to order an examination regarding Mr. Elliott's mental competence to proceed; 3) It failed to declare a mistrial following the direct assault on the jurors by the defendant; and 4) It compounded these errors by permitting the prosecution to explicitly argue a death sentence could be based upon this assault.

B. The Trial Court Denied Mr. Elliott His Rights to Meaningfully Participate in His Defense, to Due Process, a Fair Trial and a Reliable Sentencing Determination When the Court Failed to Order a Mental Status Examination Following Mr. Elliott's Assaultive Actions Toward Jurors.

A criminal defendant who is mentally incompetent to assist in his defense cannot be tried under our system of laws. (*Pate v. Robinson* (1966) 383 U.S. 375.) Whenever evidence is presented to the trial court which raises the specter of mental incompetence, the trial court is under an obligation to *sua sponte* order a mental status examination of the defendant. (*Tillery v. Eyman* (9th Cir.1974) 492 F.2d 1056.) The trial court's failure to order such an examination in this case following Mr. Elliott's assault upon jurors and attempted assault upon the judge was error warranting reversal.

This case is not controlled by *People v. Ramos* (2004) 34 Cal. 4th 494, because in *Ramos* the court relied upon the defendant's demeanor in the presence of the court to overcome defense counsel's proffer that the defendant was behaving erratically. To the contrary, Mr. Elliott behaved erratically, and arguably in a suicidal manner, in the presence of the court. This is the clearest type of case where the court should have ordered a mental status examination for the defendant. Mr. Elliott was denied his rights to due process, a fair trial, and a reliable sentencing determination in contravention to the protections afforded under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and related

provisions of California law. Because of this error, Mr. Elliott's convictions and sentence of death should be reversed.

C. The Trial Court Denied Mr. Elliott's Rights To Due Process And a Fair Trial By An Impartial Jury When it Refused to Conduct Individual *Voir Dire* to Determine Whether Or Not Each Juror Was Capable of Rendering a Verdict Based Solely Upon the Evidence After They Were Personally Assaulted By the Defendant And Witnessed Him Attempt to Assault The Court.

A defendant in a criminal trial has the right to have his guilt or innocence determined by jurors who can fairly and impartially assess the evidence against the defendant. The verdict must be based solely upon the evidence presented at trial. (*See, e.g., Nebraska Press Ass'n v. Stuart* (1976) 427 U.S. 539, 551.) If the court has reason to believe that jurors may not be able to fulfill their obligation to decide the issues before them fairly and impartially, the court is obligated to inquire into the jurors' ability to fulfill their sworn duty. (*See, e.g., Smith v. Phillips* (1982) 102 S.Ct. 940, 945 ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."); *Remmer v. United States* (1954) 347 U.S. 227.)

"[E]ven when it is the defendant's own misconduct that jeopardizes the fairness of the trial, the trial court must use reasonable means tailored to the particular circumstances of the case to help ensure a fair trial." (*Williams v. Woodford,* (9th Cir. 2004) 384 F.3d 567, 627.) Individually

sequestered *voir dire* is the most appropriate method to determine whether jurors are capable of being unbiased and fair. (*See Nebraska Press Ass'n.*, 427 U.S. at 602 (Brennan, J., concurring in judgment.)) If the questioning of a juror reveals any incapacity to fulfill the juror's constitutional obligations, it is incumbent upon the trial court to remove that juror and empanel a replacement juror who can meet these obligations. (*See Id.* at 551 ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. . . . 'A fair trial in a fair tribunal is a basic requirement of due process.'") (Citations omitted.))

It is reasonable to assume that the deliberations in this case were affected by the direct personal physical assault by the defendant during the trial. Here, the record notes that one juror was "close to hysteria" and "extremely upset." (10 RT 1907.) Nonetheless, the trial court refused to conduct individual *voir dire* to determine whether these jurors could continue to serve as impartial, 'indifferent' jurors. Rather, the trial court compounded the problem by validating any fear or anger the jury may have been harboring against the defendant by stating that "something as bizarre as this is very upsetting. And a couple of you, I understand were struck. And this is a frightening experience, and certainly something you have every right to assume will never happen in a courtroom." (10 RT 1913.) While the trial court stated that it was "common sense" that the jury was not to consider the incident in the guilt deliberations, it did nothing to

confirm that the jurors would be able to set aside the personal assault against them.

Even under far less prejudicial circumstances, the Ninth Circuit has determined that an evidentiary hearing was required to determine whether threats to one juror had led to impermissible jury bias. In *United States v. Angulo* (1993) 4 F.3d 843, a juror informed the other jurors that she had received a threatening phone call, and asked if they had also received such calls. She brought this to the trial court's attention in chambers, who excused her on this basis. The court failed to question the remaining jurors about potential bias. (*Id.* at 846.) These circumstances mandated remand for an evidentiary hearing, as "the potential for bias is so strong that the judge was obliged at a minimum to hold a hearing. In cases where a bribe or a threat to a juror was communicated to the other jurors, the trial judge must fully examine the effect of the threat on the remaining jurors." While "a hearing is required only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case," *People v. Cleveland* (2001) 25 Cal.4th 466, the judge in this case surely had this very information from the demeanor of the jurors after having been struck by the apples.

Indeed, many courts have deemed individual *voir dire* to be the proper approach to determining whether a defendant's conduct towards a

juror has caused an untenable level of bias amongst jurors. In *Babbs v. State*, (TX App. 1987) 739 S.W.2d 646, a mere threatening gesture by the defendant toward a single prospective juror led the court to individually question each juror who had witnessed the event to determine whether they "would be able to hear and decide the case based only on the evidence from the witness stand, in spite of what had occurred." (*Id.* at 647.)

A defendant's Sixth Amendment rights are violated "even if only one juror was unduly biased or improperly influenced." (*See United States v. Keating* (9th Cir. 1998) 147 F.3d 895, 903 (citations omitted).) At a minimum, then, the trial court should have inquired whether the jurors who were struck, and particularly, the juror who appeared to be "hysterical" and "hyperventilating," was able to continue as an impartial juror. Rather, in the present case, the trial court *actively avoided* learning whether individual jurors would be able to fairly sit in judgment of Mr. Elliot. (10 RT 1910.)

In the recently decided *People v. Lewis* (2006) 39 Cal.4th 970, the co-defendants simultaneously attacked their attorneys during trial. While the court in that case was reticent to do anything that would lead to a mistrial, it nonetheless took many measures to insure that the defendants received a fair trial. It was determined that,

> [o]verall, the remedial steps taken by the court adequately addressed defendants' concerns. The court accommodated defendants' request to ask jurors whether they could be fair or had heard press accounts. Examinations were conducted of individual jurors who thought the incident might have

> affected them. At defendants' request, the court excused the one juror injured when the courtroom was hastily evacuated.

(*Id.* at 1031.) Likewise, in *People v. Jenkins* (2002) 95 Cal.Rptr.2d 377, a prospective juror claimed to have received threats by telephone. Jurors who may have spoken with this juror were individually polled to see if any contamination had occurred. (*Id.* at 441.) This was deemed a proper procedure in the face of threats against a single, previously excused juror. (*See also United States v. Sarkisian* (9th Cir. 1999), 197 F.3d.966, 980-982 (individual in camera meetings with each juror sufficient to determine whether jurors able to continue as impartial members of the jury.))

In the present case, in which two jurors were personally assaulted by the defendant, and every single juror was witness to the assault, the trial court did nothing to ascertain whether the jurors could continue to sit in judgment of the defendant without holding the assault against him. Thus, the trial court denied Mr. Elliott his rights to due process and a fair trial by an impartial jury when the court refused to *voir dire* the jurors to determine whether they could continue to be fair and impartial. (10 RT 1909.) As such, the reliability of the verdict against Mr. Elliott was undermined, and his convictions and sentence of death must be reversed.

D. The Trial Court Should Have Declared a Mistrial Following the Apple-Throwing Incident, and its Failure to Do So Denied Mr. Elliott His Rights To Due Process, and a Fair Trial by an Impartial Jury.

A criminal defendant has the right to be tried by a fair and impartial jury, which will dispassionately weight the evidence against the defendant. (*See* U.S. Const. Amends. V, VI, VIII and XIV; Cal. Const. art. 1, *People v. Boulerice* (1992) 7 Cal. Rptr. 2d 279, 285.) In the event that a jury cannot fulfill its oath to fairly and impartially decide the case before it based solely upon competent evidence, and not passion or prejudice against the defendant, the trial court is obliged to declare a mistrial. (*See Bruton v. United States* (1968) 88 S.Ct. 1620, 1625 n. 6 ("An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence.") (citations omitted).) "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.)

The trial court failed in its obligation to ensure that Mr. Elliott received due process and a fair trial by an impartial jury when the court failed to declare a mistrial following this highly inflammatory incident in which Mr. Elliott assaulted some members of the jury empanelled to decide his guilt or innocence, and ultimately his fate. (10 RT 1909.) The defense made a motion for mistrial, which was denied by the trial court. (10 RT

1907.) Instead, the trial court insisted that it would only instruct the jury concerning the incident. The trial court's instruction to the jury that it must not take into consideration the conduct of the defendant . . . [in] deciding the question of his guilt or innocence, (10 RT 1911-12), was inadequate and cannot substitute for the appropriate remedy of a mistrial under these circumstances.

It is hard to imagine a situation more fraught with passion and potential prejudice than having the victims of an assault sit in judgment upon the person who has just assaulted them. The Texas Court of Appeals has recognized the need for some ameliorative process if a mistrial is to be avoided, even where the defendant invites error by threatening a juror. (*Babbs v. State* (TX App. 1987) 739 S.W.2d 646 (mistrial not necessary because hearing held to determine issue of bias).) In this case, no ameliorative action was taken, and the court should have granted a mistrial.

While it is generally the case that a defendant cannot receive a mistrial on the basis of prejudice arising from the defendant's own behavior, this case is distinguishable from the cases that so hold. First, as discussed below, it is unclear whether Mr. Elliott's behavior was indeed voluntary or rather the product of a disruption in his mental status that required further inquiry by the court. Second, even if the act were voluntary, the fact that *jurors* were actually struck by the defendant's apples distinguishes this case from those in which defendants struck their

lawyers or made spontaneous confessions. For example, in *People v. Hendricks* (1988) 44 Cal.3d 635, the defendant admitted guilt to six murders in a spontaneous outburst. This court determined that the defendant's own voluntary act precluded a mistrial on the basis of any prejudice that resulted from that act. (*Id.* at 643.) However, in *Hendricks*, the jury was not personally assaulted by the defendant, making it far more likely that they would be able to make a decision based solely on the facts presented to them at trial.

Certainly, there must be some circumstances in which a defendant's behavior can result in a mistrial. Although the principle that a defendant's misconduct should not result in any "benefit" to the defendant, this axiom cannot be inviolate. For example, if a defendant were to do significant physical harm to a number of jurors, this would clearly require a mistrial. In such an example, the jury would have been rendered incapable of continuing to sit in judgment of the defendant. The present case presents an analogous situation: once two of the jurors and possibly the judge had been struck by the apples thrown by Mr. Elliott, they were simply no longer capable of deliberating over his guilt or innocence, let alone the appropriate penalty once he was convicted.

Under the specific circumstances in this case, then, Mr. Elliott was denied his rights to due process, a fair trial and a reliable sentencing determination in contravention to the protections afforded under the Sixth,

Eighth and Fourteenth Amendments to the United States Constitution and related provisions of California law. Because of this error, Mr. Elliott's convictions and sentence of death should be reversed.

E. Mr. Elliott Was Denied His Rights to Due Process and a Fair and Reliable Determination of His Sentence When the Trial Court Permitted His Sentence to Capriciously Rest Upon Passion and Prejudice in Violation of the Cruel and Unusual Punishments Clauses of the Federal and State Constitutions.

A death sentence may not rest upon arbitrary or capricious factors. (*See, e.g., Furman v. Georgia* (1972) 408 U.S. 238; *Gregg v. Georgia* (1976) 428 U.S. 153.) A capital sentencing result which is based upon passion and prejudice offends the prohibition against cruel and unusual punishments. (*See* U.S. Const. Amend. VIII; *see also Gregg* 428 U.S. at 198 (noting that an important feature of the Georgia statute was that it protected against death sentences that were "imposed under the influence of passion or prejudice.").) The trial court's failure to ensure that Mr. Elliott's fate was decided by a fair and impartial jury violated this prohibition.

The errors discussed in subsection A-C, *supra*, resulted in an impermissibly high risk that Mr. Elliott's sentence rested upon passion and prejudice instead of competent evidence. The trial court, in fact, increased this risk by permitting jurors to consider Mr. Elliott's assaultive behavior against the jury in deciding whether he should live or die. Specifically, the trial court permitted the jury to consider this evidence at sentencing, requiring only that it must not take into consideration the conduct of the

defendant . . . [in] deciding the question of his guilt or innocence. (10 RT 1911-12.) Furthermore, the trial court permitted the prosecution to explicitly argue to the jury that Mr. Elliott's death sentence could be based upon his assaultive behavior toward them. (13 RT 2706.)

During the closing argument, the prosecution reminded the jury about the apple-throwing incident and stated:

> This just goes to show you what kind of a person we're dealing with. And his honor told you, we had that incident in the courtroom where the defendant came out and decided to pelt him with an apple, decided to pelt an apple at the jury, that you were not to consider that in the guilt phase.
>
> That is absolutely right. . . .[N]ow we're at the penalty phase where you have to determine whether or not the defendant should receive the death penalty.
>
> Can you consider his behavior in the courtroom? You better believe you can. And you have to ask yourself about a person who would do something like that, ladies and gentlemen.
>
> And you've got to ask yourself, does this fit in with everything we know about the defendant? You better believe it does. Because he is a person who cares about nothing but himself and his immediate gratification. And nothing we do or say is going to change that.
>
> Nothing his family does or says is going to change that. That is what the evidence is as we've seen here in court.

(13 RT 2705-06.)

The prosecutor's argument specifically telling the jury to consider Mr. Elliott's assaultive behavior toward them was improper and, by itself,

warrants reversal of the death sentence in this case. The trial court was a direct participant in this error. In instructing the jury that they could not consider the assault in the guilt/innocence determination, the court implicitly informed the jury that they could consider this behavior in determining punishment. This inadequate admonition directly contributed to the prosecutor's improper closing argument, as is made clear from her reference to the court's instruction. (13 RT 2706.) If the court had not realized the improper connotation which would flow from the "guilt-only" nature of the admonition, the prosecutor's argument made that point abundantly clear. The trial court was under an independent obligation to correct this erroneous argument when it was made. The trial court also shirked its responsibility to ameliorate to the extent possible the negative consequences of this argument and the court's own improper admonition.

The case of *Williams v. Woodford* (9th Cir. 2004) 384 F.3d 567 is quite instructive to the present case. In *Williams,* jurors complained that between the guilt and penalty phases of the capital trial, the defendant mouthed to them, "I'm going to get each and every one of you motherfuckers." (*Id.* at 626.) This matter did not come to the court's attention until after the penalty phase was complete and the jury had completed its deliberations. After discussing the matter with both parties, the trial court summoned the foreman, and specifically inquired of him whether the jury had considered the matter in determining the penalty. The

foreman insisted that they had not discussed the matter. The Ninth Circuit determined that "even when it is defendant's own misconduct that jeopardizes the fairness of the trial, the trial court must use reasonable means tailored to the particular circumstances of the case to help ensure a fair trial." (*Id.*) The Court then determined that the individual questioning of the foreman, who assured that the jury had not considered the threat in determining the penalty, was sufficient to ensure that the jury had based their verdicts on the evidence alone.

Here, the jury was specifically encouraged to consider non-evidence in determining the fate of Mr. Elliott. Moreover, it was highly inflammatory behavior directed at the very people who were to serve as impartial judges of the facts relating to the case before them. Not only was nothing done to ensure that the jury would not consider the assault against them, but rather, the prosecutor explicitly encouraged the jury to hold the fact that they had been assaulted by Mr. Elliott against him. All this occurred with the approval of the trial court, who had specifically limited the admonishment to the guilt phase of the proceedings.

These errors deprived Mr. Elliott of his rights to due process, a fair trial and a reliable sentencing determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and related provisions of California law. These errors, individually and collectively warrant reversal of Mr. Elliott's convictions and sentence of

death.

INSTRUCTIONAL ERRORS

XVI. THE TRIAL COURT VIOLATED MR. ELLIOTT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A TRIAL BY JURY AND TO DUE PROCESS BY FAILING TO PROPERLY LIMIT THE FLIGHT INSTRUCTION.

During the State's direct examination of an investigating officer, the prosecutor sought to show that Mr. Elliott's family was unaware of his whereabouts after the commission of the crime, at a time when the police were investigating the crimes in this case. The trial court ended this line of questioning, stating that the delay in locating Mr. Elliott could have been caused by any number of reasons, and that it bore no relationship to the crimes in this case. Yet, despite having precluded this highly prejudicial evidence, the trial court's flight instruction encouraged the jury to consider the very information that the court had found too speculative to serve as evidence of flight. Moreover, the instruction was given despite clear caselaw that precludes giving a flight instruction where the case turns entirely on identification and the sole evidence of flight is by the perpetrator of the crime. The flight instruction in this case impermissibly lessened the prosecution's burden, violating Mr. Elliott's rights to trial by jury and to due process under the federal (Sixth and Fourteenth Amendments) and state (Art. I §§14 and 15) constitutions. A new trial is therefore warranted.

A. Factual Background

The prosecutor attempted to bring out evidence that the police had difficulty locating Mr. Elliott after he became a suspect in the crimes alleged in this case. (7 RT 1408-1409.) Defense counsel immediately objected on the basis of relevance, and the prosecution rebutted that the evidence was relevant to flight. (7 RT 1409.) Defense counsel again objected and asked to be heard at the bench. The court responded:

> The Court: No. The objection is sustained as to what efforts were made at that time. You can proceed if there's anything that's relevant about anything that happened as far as Mr. Elliott was concerned after he was taken into custody. But as far as the efforts that were made at this time, the objection is sustained.
>
> Prosecutor: May we approach the side bar?
>
> The Court: All right. You may make an offer of proof.
>
> (The following proceedings were held at the bench:)
>
> The Court: The testimony that you have got in the trial is that ... the perpetrator shoots the guy, grabs the money and the gun, runs through the store, goes out to a waiting van and drives away. That's all you need. So to put on the fact that after the crime that the officers are baffled just isn't going to – *you just get too much danger of getting in prejudicial material.* ...
>
> Prosecutor: ...If I understand correctly, the evidence that we have that they surveilled his house and spoke with his family and the defendant was basically on the lam is something the court doesn't feel is appropriate?
>
> The Court: No, I absolutely don't. He can be on the lam for all kinds of reasons.

> Prosecutor: That answers my second question, which was when he was finally arrested, there was a flight there[44]...So I am assuming don't bring that out, either?
>
> The Court: Yeah.

(7 RT. 1409-1410.)

Despite having properly curtailed the prosecution's efforts to introduce irrelevant and prejudicial information about the police efforts to locate Mr. Elliott, the court nonetheless instructed the jury to consider whether Mr. Elliott had fled after being accused of the crimes in this case. The instruction delivered in this case, CALJIC 2.52, read as follows:

> The flight of a person immediately after the commission of a crime, *or after he is accused of a crime* is not sufficient in itself to establish his guilt; but is a fact which, if proved, may be considered by you in light of all other proved in [sic] facts in deciding the question of guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(11 RT 2157-58) (emphasis added.) Moreover, the court failed to instruct the jury that they were first required to determine whether the defendant was the person who fled the scene of the crime before determining whether such flight showed consciousness of guilt.

B. The Trial Court Should Have Limited the Instruction to Flight From the Crime Scene.

At trial, witnesses testified that the perpetrator in the crimes in this case fled upon completion of the crimes. Therefore, a flight instruction

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[44] Mr. Elliott was arrested when fleeing from an attempted car theft. (RT 2346.) Therefore, the judge properly ruled that the flight at the time of the arrest bears no relevance to the crimes charged in this case.

would have been proper for the limited purpose of the jury's consideration of flight from the crime scene as tending to show consciousness of guilt. *(People v. Scott* (1988) 246 Cal.Rptr. 406.) However, the trial court also instructed the jury to consider evidence of flight after having been accused of a crime, despite having prevented the prosecution from eliciting testimony to buttress the theory that Mr. Elliott was hiding from law enforcement authorities.

There are two factual bases for finding consciousness of guilt from flight: a) flight immediately after commission of the crime, and b) flight after being accused of crime. When the evidence only supports one of these bases, reference to the other should be deleted from the instruction.

In *People v. Carrera* (1989) 49 Cal.3d 291, evidence had been presented to show that the defendant, after having been arrested for the crime charged, escaped from a county jail and fled. (*Id.* at 314.) No evidence had been admitted to show that the defendant had fled immediately after commission of the crime. Nonetheless, the trial court gave the full CALJIC 2.52 instruction, including the language about flight immediately after commission of a crime. (*Id.*) The Court in *Carrera* found that the language about immediate flight should have been redacted. (*Id.*)

The necessity of redacting the irrelevant theory of flight is far more pressing in Mr. Elliott's case. In *Carrera*, the defendant had fled after having been accused of a crime. Carrera did not deny that he was the

person who had fled from the county jail. By contrast, identity was the sole issue in the present case. Therefore, any suggestion that Mr. Elliott had been attempting to evade police officers would be a powerful suggestion to the jury that Mr. Elliott was the perpetrator of the crimes in this case.

Moreover, the prosecution in *Carrera* limited its argument to the flight from jail as showing consciousness of guilt for the crimes charged.[45] No such limitation existed in the present case. Rather, despite being specifically admonished to not elicit testimony about how long it took the police to find Mr. Elliott, the Prosecutor, in closing argument, implied that Mr. Elliott had been hiding from police authorities by repeatedly stating that the police had a lineup "when they finally could." (11 RT 2097, 2098.)

Therefore, under the circumstances in this case, the failure to redact the segment of the instruction addressing flight after being accused of a crime was severely prejudicial and violated Mr. Elliott's Sixth and Fourteenth Amendment rights. As such, his conviction must be reversed.

C. The Court Erred in Failing to Instruct the Jury to First Determine Whether Mr. Elliott Was the Person Who Fled the Crime Scene Before Giving Any Weight to the Flight Evidence.

Even if the trial court had properly limited the flight instruction to flight from the scene of the crime, the instruction was erroneous in yet

[45] The *Carrera* court found that the failure to redact the prejudicial language was not reversible error because the prosecution's argument made clear that the only flight in this case was defendant's flight from jail. (*Id.*)

another regard. As previously stated, identity was the sole issue in this case. For many years, California Courts have held that flight instructions are per se erroneous when identity is at issue in a case. Reasoning that it is irrelevant to a finding of guilt whether an unknown perpetrator, who may or may not be the defendant, fled the scene of a crime, courts precluded the giving of a flight instruction where identity was a contested issue.

In *People v. Mason* (1991) 52 Cal.3d 909, this Court disapproved that line of cases, and, quoting *People v. London* (1988) 206 Cal.App.3d 896, held that when identity is an issue, "such a case [only] requires the jury to proceed logically by deciding first whether the [person who fled] was the defendant and then, if the answer is affirmative, how much weight to accord to flight in resolving the other issues bearing on guilt. The jury needs the instruction for the second step." Thus, where identity is at issue, a jury must also be instructed to find three preliminary facts: 1) that the perpetrator of the crime in question fled scene of crime, 2) that the person was the defendant, and 3) that the person who fled did so to avoid observation or arrest. A jury should then be instructed to disregard all flight evidence unless the preliminary facts have been proven. No such instructions followed CALJIC 2.52 in this case.

It must first be determined that the perpetrator fled. In the present case, Mr. Elliott does not contest that the perpetrator of the crimes in this case fled the scene of the crime. Nor does he contest the third inquiry –

that the perpetrator fled the crime scene in order to avoid arrest or observation.

However, the identity of the perpetrator remains the central issue in this case. Here, the jury was not required, prior to considering the import of flight evidence, to make the determination that it was, indeed, the defendant who fled as required by *People v. Mason* (1991) 52 Cal.3d 909. (See also *People v. London* (1988) 206 Cal.App.3d 896.) This responsibility is particularly important where identity is the sole issue in the case. "[T]hat a certain person was observed fleeing from, say, the scene of a robbery and thereby manifested a consciousness of guilt is of no consequence unless the person fleeing was the defendant." (*Id.* at 902.) Because the jury was not informed of its responsibility to first determine whether Mr. Elliott was, indeed, the perpetrator, the instruction was critically flawed, and requires reversal of Mr. Elliott's conviction and remand for a new trial.

D. The Court Erred in Giving a Flight Instruction Where the Sole Evidence of Flight was that of the Perpetrator, and the Sole Issue in the Case was the Identity of that Perpetrator.

It cannot be argued that since the jury found Mr. Elliott guilty of the charged crimes, that it necessarily found him to be the person who fled the crime scenes. Rather, it is impossible to know whether the jury used the fact of flight from the crime scene to determine Mr. Elliott's guilt without

first determining the identity of the perpetrator. This conundrum – the necessity of determining the ultimate issue in order to determine a fact that can be used to determine the ultimate issue – is the very reason that flight instructions are prejudicial and supremely confusing to juries where the sole issue in a case is identity. Indeed, this is why the Court in *London* stated, "To be sure, if identity is the *only* issue in a case, evidence of flight is irrelevant and the instruction is improper." (206 Cal.App.3d 896, 902, citing *People v. Parrish* (1986) 185 Cal.App.3d 942, 948.)

While the *Mason* court subsequently determined that the preliminary inquiry into the identity of the perpetrator is generally sufficient to cure this problem, the *Mason* court did not specifically address the difference between cases in which identity is the *sole* issue versus cases in which identity is one of several contested matters. *Mason* simply relied on *London's* reasoning to hold that "if there is evidence identifying the person who fled as the defendant, and if such evidence 'is relied upon as tending to show guilt,' then it is proper to instruct on flight," without specifically repudiating *London's* admonishment that flight instructions are never relevant when the sole issue in the case is identity.

One month after this Court issued the *Mason* opinion, *People v. Pensinger* (1991) 52 Ca1.3d 1210, was decided. *Pensinger* reiterated the disapproval of *Anjell* and its progeny, but clarified the requirement that there be some independent grounds for finding that it was the *defendant*

who fled to justify a flight instruction. Citing *People v. Rhodes* (1989) 209 Cal.App.3d 1471, 1476, this Court found that "Obviously a flight instruction is correctly given 'where there is substantial evidence of flight by the defendant *apart from his identification as the perpetrator*, from which the jury could reasonably infer a consciousness of guilt.'" (52 Cal.3d 1210, 1245 (italics in original.)) As the *Rhodes* Court explained, "where there is independent evidence of flight as to which defendant's identity as the fleer is not in dispute, CALJIC No. 2.52 is proper." (209 Cal.App.3d 1471, 1476.)

In the present case, no such independent evidence of Mr. Elliott's flight exists. The judge specifically precluded the prosecution from introducing speculative evidence that police officers' inability to locate Mr. Elliott was evidence of flight. The only evidence of flight in this case, then, was that of the perpetrator. Under *Pensinger*, eyewitness identification of Mr. Elliott as the perpetrator is insufficient justification for giving the instruction.

Therefore, in cases such as this one, where the sole question for the jury is one of identity, the jury cannot be asked to consider evidence of a perpetrator's flight from the crime scene. This is particularly so where, as here, the witnesses gave such varied descriptions of the perpetrator, and the jury may have not been convinced that Mr. Elliott had been properly identified.

E. Conclusion

Thus, the flight instruction in this case prejudiced Mr. Elliott in three critical regards. First, by failing to redact the superfluous language about flight after being accused of a crime, the jury was free to speculate about whether Mr. Elliott had so fled. The probability of such baseless speculation was increased by the prosecution's flagrant attempts to circumvent the trial court's ruling that any delay in apprehending Mr. Elliott did not go to flight. Second, if a jury were to consider flight of the perpetrator, then they were required to first determine that the perpetrator was indeed Mr. Elliott. Finally, such an instruction would have been insufficient in this case because the case law is clear that no flight instruction can be justified when the *sole* evidence of flight is that of the perpetrator of the crime, whose very identity the jury has been charged with determining. Thus, the court's instruction on flight and its relationship to consciousness of guilt lessened the prosecution's burden and allowed the jury to draw impermissible inferences of guilt in violation of Mr. Elliott's state (Art. I §§14 and 15) and federal (Sixth and Fourteenth Amendments) constitutional rights to trial by jury and due process. As such, his conviction must be reversed and his case remanded for a new trial.

XVII. THE TRIAL COURT AND THE PROSECUTOR GAVE ERRONEOUS AND IRRELEVANT INFORMATION TO PROSPECTIVE JURORS REGARDING THE PARITY OF THE FINANCIAL COST TO THE TAXPAYER WHEN THE STATE IMPOSES THE DEATH SENTENCE OR INCARCERATES A PRISONER FOR LIFE.

Prospective juror Graffius's questionnaire stated that she had "heard" that the death penalty was "cheaper for the State" than sentencing a defendant to life without parole. (3 RT 497.) When asked to elaborate, Ms. Graffius stated in front of the prospective jurors, including jurors McCracken and Marin who ultimately served on the penalty phase jury, that "[b]oth sides had said it cost[s] more money for both." (3 RT 497, 13 RT 2759-61.) The following exchange occurred:

> Prosecutor: "[O]n the one hand if a person has life without [parole], and the State is supporting them for the rest of their lives, on the other hand if they have a death penalty, *the Court is paying for their appeals and we're paying for them to be alive and we're paying for their lawyers, and the appellate process, and what not, would you say it about evens out?*
>
> Ms. Graffius: It seems to me. But I don't know that much. But that's what my opinion is.
>
> Prosecutor: (addressing another prospective juror): [S]ay his honor tells you what the factors are to consider when determining what is the appropriate punishment, life or death, and a financial consideration isn't one, *though I think that Mrs. Graffius put it very clearly when she says probably it will all even out in the long run anyway.* Do you feel you could put any financial consideration out of your mind. . . .?

(3 RT 498) (emphasis added.)

Following this colloquy, defense counsel questioned prospective juror Berens in the presence of the panel of prospective jurors about her questionnaire answer asserting that capital punishment saved tax payers money. (3 RT 536–37.) This panel of jurors included Mr. Rubin and Mr. Salazar, who ultimately served on the penalty phase jury. (13 RT 2759-61.) During the defense counsel's questions, the trial court interrupted and stated in open court, "[a]nd financially, to put this to rest, without going into a great deal of detail, *there isn't an awful lot of difference between the cost to the State in a death penalty case and a life without possibility of parole case.*" (3 RT 538) (emphasis added).

A. The Prosecutor and the Court Violated Mr. Elliott's Right To A Fair Trial By Inaccurately Stating that the Cost Of Incarcerating An Individual For Life Is Equal to the Cost of Imposing Capital Punishment.

Under the Sixth Amendment to the Constitution, a "[t]rial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472–73). However, here, the prosecutor introduced the financial cost of punishment to the venire, and false information regarding the parity of punishments. By postulating inaccurate evidence about this matter, the prosecutor presented herself as an unsworn

expert witness, preventing any cross-examination of her erroneous testimony about a subject juries are not permitted to consider.

Prosecutorial misconduct occurs when a prosecutor refers to facts that are not in evidence. Facts not in evidence, "tend[ ] to make the prosecutor his own witness -- offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.'" *People v. Hill* (1998) 17 Cal.4th 800, 828 (citations omitted). Thus such statements of "facts" are a highly prejudicial form of misconduct and serve as a frequent basis for reversal. (*Id.*, citing 5 Witkin & Epstein, Cal.Criminal Law (2d ed. 1988) Trial, § 2901, p. 3550.)

Moreover, by informing prospective jurors that the cost of imposing capital punishment "even[s] out" with the cost of incarcerating a prisoner who has been sentenced to a life sentence without the possibility of parole, the prosecutor provided gross misinformation about the death penalty. As acknowledged by Justice Breyer, the costs of each capital case are approximately one million dollars more than each non-capital case. (*See Blakely v. Washington* (2004) 542 U.S. 296, 336 (Breyer, J., dissenting) (*citing* Kozinski & Gallagher, *Death: The Ultimate Run-On Sentence,* 46 Case W. Res. L. Rev. 1, 13-15, and n 64 (1995))). Some researchers have

placed this figure closer to two million dollars. (*See also Antwine v. Delo* (8th Cir. 1995) 54 F.3d 13, 16 n.2 (citing Philip J. Cook and Donna B. Slawson, *The Costs of Processing Murder Cases in North Carolina* (Duke University 1993) (reporting that the cost of sentencing someone to death exceeds the cost of life imprisonment by $163,000. When the cost of cases that are adjudicated capitally but that do not result in execution are considered, the extra cost per death penalty imposed is $250,000; the extra cost of execution is $2 million)). Since this misinformation was delivered in *voir dire*, there was even less opportunity for the defense to rebut it. The harm was further compounded when the trial court buttressed the inaccurate information provided by the prosecution.

B. The Trial Court and the Prosecution Violated Mr. Elliott's Due Process Rights By Impermissibly Encouraging Prospective Jurors to Consider the Financial Cost of Capital Punishment.

The trial court erred by agreeing with the prosecution and repeating the misinformation to the prospective jurors that there was not "an awful lot of difference between the cost to the State in a death penalty case and a life without possibility of parole." (3 RT 538.) As discussed above, significant literature on the relative costs of capital versus non-capital prosecutions, including the cost of execution, does not bear this out.

More important, however, is that the trial court failed to make clear that the jury was not to consider ***any*** evidence of the financial impact of

capital punishment on the state's treasury because such consideration was improper. Had the trial court truly wanted to "put [the matter] to rest," it should have unequivocally informed the prospective jurors that the cost of punishment was an irrelevant factor in deciding Mr. Elliott's case. (3 RT 538.) However, by continuing to raise the issue by repeating that the costs of both penalties are identical, the trial court condoned consideration of the cost of administering justice as a factor in the jury's deliberations. By leaving the issue on the table instead of categorically directing the prospective jurors to disregard this factor in its entirety, the trial court allowed the prospective jurors to weigh financial cost in the final judgment.

It has been made repeatedly clear that the "relative costs of imprisonment and execution are not relevant to a jury's penalty determination." (*People v. Burgener* (2003) 29 Cal.4th 833, 881.) "Questions of deterrence or cost in carrying out a capital sentence are for the Legislature, not for the jury considering a particular case." (*People v. Thompson* (1988) 45 Cal.3d 86, 132; see also *Spaziano v. Florida* (1984) 468 U.S. 447, 461 [the "deterrent function [of the death penalty] is primarily a consideration for the legislature"]; *Tucker v. Zant* (11th Cir. 1984) 724 F.2d 882, 890 ["Protection of the public fisc is not a proper justification for capital punishment."])

One of the most fundamental protections in the Eighth Amendment to the Constitution is the heightened need for "the responsible and reliable

exercise of sentencing discretion" in capital cases. (*Caldwell,* 472 U.S. at 329.) The prosecutor also violated this guarantee by encouraging the venire to consider the cost that the punishment will have on the taxpayers. Even if the information had been accurate (a separate due process violation argued above), the prosecutor is prohibited from introducing irrelevant considerations to the jury. Since 1976, the Supreme Court has held that "cost is not accepted as a legitimate justification for the death penalty." (*Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1412 (citing *Gregg v. Georgia* (1976) 428 U.S. 153, 187)). The trial court and the prosecution thus violated Mr. Elliott's right to fair trial by allowing prospective jurors to consider facts superfluous to his guilt or innocence. This error is sufficient to vacate the sentence.

Just as the assurance of appellate review that was denounced in *Caldwell, supra,* the promise that the taxpayers will not be burdened by the cost of the sentence "is no valid basis for a jury to return a sentence if otherwise it might not. It is simply a factor that in itself is wholly irrelevant to the determination of the appropriate sentence." (*Id.* at 336.) Accordingly, the prosecutor and the trial court violated Mr. Elliott's due process rights by discussing the relative costs of the punishment and his sentence should be vacated.

C. The Prosecutor Violated The Eighth Amendment's Prohibition Against The Consideration Of Irrelevant Evidence By Impermissibly Informing Prospective Jurors That Taxpayers Fund Capital Defendants' Lawyers And Appeals.

In addition to the prior error, the prosecutor told prospective jurors, in the presence of Jurors McCracken and Marin, that: "the court is paying for [capital defendants'] appeals and we're paying for them to be alive and we're paying for their lawyers, and the appellate process, and what not." (3 RT 498.)

Similar to the error mentioned above, the prosecutor violated Mr. Elliott's Eighth Amendment rights to be sentenced free from a jury's consideration of the financial impact of capital punishment. By aligning herself with the prospective jurors as a fellow taxpayer, the prosecutor inflamed passions by building resentment about the cost that "we" are undertaking by keeping capital defendants alive, by paying for their appeals, and by paying for their lawyers.

Here, the prosecution denied Mr. Elliott his Sixth Amendment right to an impartial jury by aligning herself with the jurors – as fellow taxpayers suffering the financial burden of prosecuting Mr. Elliott's alleged crimes. As was made evident by the juror questionnaires, many jurors were already concerned with the cost of capital trials, and many had expressed frustration at the amount of time and money the government spends on the legal aspects of the criminal justice system. (See, e.g. 5 CT 1294, 1348, 4 CT

1182, 10 CT 2755.) Two jurors who expressed this concern ultimately served on the jury. (10 CT 2639, 2674.) The prosecution seized on this frustration, and directed it toward Mr. Elliott by stressing the financial burden of either potential penalty placed on taxpayers.

Like the prosecutor's false assurance of appellate review that was denounced in *Caldwell, supra,* the prosecutor crossed the line by inflaming passions of the people who went on to comprise the jury. The prosecutor instructed the prospective jurors about the financial cost that they will become responsible for when sentencing Mr. Elliott to death or to a life sentence. Akin to the error in *Caldwell,* the prosecutor violated Mr. Elliott's due process rights by tainting the entire jury. Mr. Elliott's sentence should be vacated.

D. The Trial Court Committed Error By Refusing To Instruct The Jury That It May Not Consider Monetary Costs When Deciding Whether Or Not To Impose The Death Penalty.

The monetary implications of penalty were raised in the presence of the jurors at numerous points throughout *voir dire*. Several potential jurors, in the presence of the panel, stated that they would consider the cost of capital punishment versus the cost of housing a life prisoner in deciding the penalty in this case. The vast majority of prospective jurors who discussed this issue indicated that the death penalty is preferable for

financial reasons, and many of these comments were made in the presence of jurors who ultimately served on Mr. Elliott's jury.

During the penalty phase, the prosecution also made repeated implications that the cost of housing someone for life was extreme, going so far as to state that prisoners serving life without parole could marry, father children during conjugal visits, and then take no financial responsibility for the child due to their incarceration.

While the record in this case is lacking a jury charge settlement conference, these numerous, impermissible references to the relative costs of life without parole and death clearly led the defense to request a penalty phase instruction which admonished the jurors to not consider such cost in their deliberations. The court denied this request, and in light of the record in this case, violated Mr. Elliott's Due Process and Eighth Amendment rights.

1. Factual Background

The defense filed a motion requesting individual and sequestered voir dire so as not to engage in discussions of sensitive topics, such as the costs of imposing a death sentence and housing a life prisoner, in the presence of the panel. (1 CT 249-252.) The motion was opposed by the district attorney. (2 CT 305-06.) The court denied the motion and the *voir dire* was conducted in open court.

In the juror questionnaire, every potential juror was asked to consider generic issues concerning the death penalty and life imprisonment. (See, e.g., 9 CT 2300-2327.) Their answers to these questions indicated that the cost of housing a life prisoner was a major concern to numerous potential jurors.[46] The expression of these concerns prompted questions and discussions of the subject during *voir dire* by both the prosecutor and defense counsel.

The record indicates that the prospective jurors were brought into the courtroom in panels of approximately 70 and questioned and excused for hardships. (2 RT 223; 231.) The remainder of each panel was then asked to return at a later date at which time they were called into the courtroom, 14 prospective jurors at a time, where they sat in the jury box for individual questioning. (3 RT 372.)

The following discussions were held in the presence of Juror Durant.[47] Defense counsel asked prospective juror Boardman if she would "think about economics, how much it costs to keep a person alive for the rest of their lives?" (3 RT 404.) This led to a discussion of a hypothetical with another prospective juror, Atkins, during which he stated, "I don't

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[46] Four of the potential jurors who actually served on the penalty phase jury indicated in their questionnaires that prison overcrowding or cost was a concern to them. (13 CT 3619; 6 CT 1761; 9 CT 2318; 5 CT 1316; 10 CT 2639.)

[47] Appellant will note which jurors who were ultimately seated on the penalty phase jury were present during each discussion of cost.

know why we should support him for the rest of his life." And that he would vote for death as a result. (3 RT 405.) The prosecutor then pressed the issue of costs to house a prisoner as a factor in deciding the penalty in this case with Prospective juror Atkins who indicated he would consider it "personally" but not "as a juror" if the court told him he was not consider it. (3 RT 431-432.)

During questioning of Juror Durant himself, defense counsel asked him about "economics" in death penalty cases. Juror Durant responded simply he would consider the evidence put before him in court. (3 RT 415-16.) The trial court never clarified whether or not the jurors would be permitted to consider costs of housing a life prisoner in determining penalty in the presence of Juror Durant and counsel made no further inquiries regarding the subject.

The following discussions took place in the presence of Jurors McCracken and Marin during *voir dire*: Prospective juror Graham indicated costs were a consideration on the questionnaire, leading to a detailed discussion of the topic.

> [Defense counsel]: Would that cause you to say, we vote for the death penalty, and this guy is going to be living in a jail cell, and its going to cost me "X" amount of dollars as a taxpayer—Is that going to cause you to vote for the death penalty?
>
> Prospective Juror Graham: Not that one particular thing.

[Defense counsel]: It's something that's going to be in your mind; Is that right?

Prospective Juror Graham: Yes.

(3 RT 479.)

Defense counsel pressed the issue by incorrectly informing the prospective juror that the judge had informed the panel that they may not consider costs when considering penalty. (3 RT 479.) Prospective Juror Graham then responded, "Of course — *with his [the judge's] instructions, if he says I should not consider it, then I wouldn't consider it.*" (3 RT 479.) (Emphasis added.) However, no such instruction was ever given.

Prospective Juror Graffius indicated on the questionnaire that she thought there may have been conflicting information but she "heard" that the death penalty was "cheaper for the State" than sentencing a defendant to life without parole. (3 RT 497.) This lead to a discussion of the costs of penalty that ended in the prosecutor inaccurately stating that costs probably all "even out" in the long run.

The following exchange occurred:

Prosecutor: "[O]n the one hand if a person has life without [parole], and the State is supporting them for the rest of their lives, on the other hand if they have a death penalty, *the Court is paying for their appeals and we're paying for them to be alive and we're paying for their lawyers, and the appellate process, and what not, would you say it about evens out?*

Ms. Graffius: It seems to me. But I don't know that much. But that's what my opinion is.

(3 RT 498.) (Emphasis added.)[48]

The prosecutor then returned to prospective juror Graham for an additional detailed discussion regarding costs, during which Graham stated that she did not believe she could put financial considerations out of her mind even if the judge had told her not to consider them. She believed that the State should not support someone for the rest of his life if that person was guilty of premeditated murder. (3 RT 498.)

The trial court again failed to clarify whether or not the jury would be permitted to consider the costs in determining penalty in the presence of Jurors McCracken and Marin and counsel made no further inquiries regarding the subject.

In the presence of Jurors Rubin and (foreman) Salazar, the questioning of prospective juror Berens led to a detailed discussion of costs, as a result of her questionnaire in which she offered "with the death penalty tax dollars are saved." (3 RT 536.) She eventually indicated that she did not "think" these considerations would have a "major" impact on her decision. (3 RT 537.)

During defense counsel's questioning of prospective juror Berens, the trial court interrupted and stated in open court, "[a]nd financially, to put this to rest, without going into a great deal of detail, there isn't an awful lot

[48] See the detailed discussion of the inaccuracy of this statement and the resulting violation of due process contained in arguments A-C, above.

of difference between the cost to the State in a death penalty case and a life without possibility of parole case." (3 RT 538)[49] The trial court, after reiterating and emphasizing the inaccurate observation made by the prosecutor during the questioning of the previous panel, cautioned the members of the panel before it, that "It's not one of the factors that you're allowed to consider in determining the question of life or death. So, really, you should put it out of your minds." (3 RT 538.) This cautioning was made in the presence of fourteen prospective jurors, only two of whom ultimately served on the penalty jury, Jurors Rubin and Salazar. (3 RT 516-517.) Counsel made no further inquiries in the presence of Jurors Rubin and Salazar.

In the presence of Jurors Morrissy and Noyer during *voir dire*, defense counsel asked that panel if "anyone would consider costs an overriding consideration" in their determination of penalty. (3 RT 596.) The trial court made no mention or clarification of whether or not the jury would be permitted to consider the costs in determining penalty in the presence of Jurors Morrissy and Noyer, and counsel made no further inquiries regarding the subject.

[49] Again, a detailed discussion of the inaccuracy of this statement and the resulting violation of due process contained in argument A-C, above.

In the presence of Juror Saiza and possibly four others, during the questioning of prospective juror Pearson, there was an extensive discussion regarding costs of penalty in open court.[50]

> Prospective Juror Pearson: "the main thing on that was that it costs the taxpayers to keep them for 60 years.
>
> [Defense counsel]: Okay, is that an overriding concern to you?
>
> Prospective Juror Pearson: Yeah. I've heard the rest of them. I heard what the judge said.
>
> [Defense counsel]: What I'm saying is, is the cost to the taxpayers an overriding concern to you?
>
> Prospective Juror Pearson: No. It's some concern, but not overriding.
>
> [Defense counsel]: Is it something that you would even consider in deciding—
>
> Prospective Juror Pearson: *Oh, yes.*
>
> [Defense counsel]: -- the penalty?
>
> Prospective Juror Pearson: Yeah, depending on the evidence.

(4 RT 701.) (Emphasis added.)

Prospective juror Pearson, when pressed by defense counsel, said she would not consider economics as a juror. However, **after** she made that assurance, she continued:

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[50] There is confusion in the record here as the clerk did not read the names of the jurors who were present. (4 RT 700.) It is possible that Jurors Cormack, Gollaz, Lara, and Alvarez from the previous group were still present and it is certain that Juror Saiza was present as she was questioned by counsel. (4 RT 633; 4 RT 763.)

> Prospective Juror Pearson: "Well, my thoughts are that we have—our jails are so full that where are we going to put all these people that are going to get life in prison without parole? We're building new prisons all the time. This was my concern. Where are we going to put all these people?
>
> [Defense counsel]: And your solution to that is to put them to death?
>
> Prospective Juror Pearson: If it's a serious enough crime, yes, if they've taken life or more than one life.

(4 RT 702.)

Juror Saiza, and possibly other jurors, were exposed to this extensive conversation regarding the costs and problems associated with housing numerous life prisoners. (4 RT 702.) At one point, defense counsel asked the entire present panel if any of them would consider costs in determining penalty, to which they responded as a group in the negative. (4 RT 752.) The trial court made no mention or clarification of whether or not the jurors would be permitted to consider costs in determining penalty in the presence of Juror Saiza and the others, and counsel made no further inquiries regarding the subject.

During the penalty phase, the defense called James W.L. Park, a prison/correctional consultant, to testify to the conditions of those who serve life without parole. The direct examination paid special regard to security and safety to the public, drew out that many prisoners rehabilitate themselves, learn trades, and contribute to the prison community. (12 RT 2495-2507.) The prosecution used cross-examination to repeatedly make

reference to the cost of housing a prisoner for life. Specifically, the prosecutor referenced prison overcrowding (12 RT 2508), the numerous facilities that are available to prisoners such as televisions, libraries, and recreational facilities (12 RT 2508-2511), and went so far as to ask the question, "if a person has a child while he was in prison, the father is in jail, who pays for the child while the father is in custody?" (12 RT 2524.) Despite an objection being sustained as to this question, and the defense's efforts to show that Mr. Elliott was unmarried and therefore ineligible for conjugal visits (*Id.*), the prosecution continued to press the issue by asking, "Are you allowed to get married after you are sentenced to prison?" (*Id.*) Further objections were overruled. (*Id.*)

At the conclusion of the trial, the defense requested the following penalty phase instruction:

> In deciding whether death or life imprisonment without the possibility of parole is the appropriate sentence you may not consider for any reason whatsoever the deterrent or nondeterrent effect of the death penalty or the monetary cost to the state of execution or maintaining a life prisoner.

(3 CT 863.) The trial court refused to give the instruction and noted that *People v. Thompson* (1988) 45 Cal.3d 86, the case upon which the instruction was based, had been "overruled" and this Court had "specifically disapproved" of the instruction in *People v. Benson* (1990) 52

Cal.3d 754 at 806. (3 CT 863.) The trial court was inaccurate regarding both of these cases and it was error to refuse the instruction.

2. *Trial Court's Refusal To Instruct The Jury Regarding The Consideration Of Costs To The State Of Execution Versus Maintaining a Life Prisoner Was Error And a Violation Of Appellant's Due Process Rights And Eighth Amendment Right To a Fair And Reliable Sentence.*

The trial court's handwritten note on the defense's requested instruction inaccurately describes *People v. Benson* (1990) 52 Cal.3d 754, 806 as specifically disapproving the proposed instruction and "overruling" *People v. Thompson* (1988) 45 Cal.3d 86, the case upon which the instruction request was based. (3 CT 863.) In *Benson* the Court found the instruction inapplicable based upon the fact that, "[t]he issue of deterrence or cost was not raised at trial either expressly or by implication." (*People v. Benson,* at 807.) The Court then went on in a footnote to describe how *Thompson*'s language "might perhaps be read" to require a trial court to give the instruction regarding costs whenever the defense so requests, but cautioned that in *Thompson* the Court's "focus ...[was] solely the case under review. In any event, the words constitute dictum." (*People v. Benson, supra.* at 807, fn 13.) This approval in dicta of giving this instruction when requested cannot constitute an "overruling" as the trial court found. Moreover, appellant's case is distinguishable from both *Benson* and *Thompson* in that the issue of costs was in fact raised during the trial. Moreover, cost was obviously a concern expressed by numerous

prospective and actual jurors as is made clear in their questionnaires and discussions on the record, a concern that was exploited by the prosecution during the penalty phase.

In *People v. Hines* (1997) 15 Cal.4th 997, 1065 this Court found that because the prosecutor did not raise the issues of costs and deterrence at trial, the trial court's refusal to give this instruction was not error. Similarly, in *People v. Bacigalupo* (1991) 1 Cal.4th 103, 146, the Court found the trial court's refusal to give the instruction was not prejudicial "because emphasis was not placed on these considerations [costs and deterrence] at trial."

Here, on the other hand, the emphasis and prejudice are clear. There are numerous detailed discussions of the subject in the presence of virtually every juror. It was clearly a subject that was emphasized during *voir dire* and not resolved by the trial court. The sole mention by the court of the impropriety of financial considerations was, at best, a weak admonishment in the presence of only two actual jurors, and served to highlight the issue with misinformation. (3 RT 538.) The remainder of the jurors were left directionless after hearing numerous fellow prospective jurors, under oath, declaring the death penalty is "cheaper for the state" (3 RT 497); the State should not support someone guilty of premeditated murder for the rest of his life (3 RT 498); "with the death penalty tax dollars are saved" (3 RT 536); and, finally, that "jails are so full" the solution is to put the convicted

to death. (4 RT 702.) This limited list of juror comments was exacerbated by the court and counsel's repeated speculation on which penalty costs more and why. (3 RT 498, 538.) During the penalty phase, the prosecutor's cross-examination reiterated these impermissible concerns, refreshing this concern in the juror's minds directly before the decision as to life without parole or death was to be made.

It is important to note that these discussions during *voir dire* by the prospective jurors were almost entirely in favor of imposition of death. Moreover, for any thoughtful juror performing a civic duty, it is a natural consideration to think of the potential financial implications to the State of one's act. These realities mandated the proposed instruction related to cost. One potential juror actually said, "Of course—with his [the judge's] instructions, if he says I shouldn't consider it, then I wouldn't consider it." (3 RT 479.) Despite this obvious need for the instruction, it was never given.

The fact that the jurors were free to consider costs of imposition of penalty and prison overcrowding in their deliberations led to an arbitrary, capricious and unreliable sentencing determination. Mr. Elliott's penalty was imposed based upon misleading and highly impermissible information in violation of his right to due process. (*Caldwell v. Mississippi* (1985) 472 U.S. 320.) Comments by both the trial court and the prosecutor regarding the costs of housing a life prisoner versus imposition of the death penalty

"so infect[ed] the trial with unfairness as to make the resulting [sentence] a denial of due process." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) The misleading prosecutorial comments which negatively impacted "the need for reliable sentencing in capital cases," *Sawyer v. Smith* (1990) 497 U.S. 227, 235, offended Mr. Elliott's Eighth Amendment rights, and as such, his sentence must be reversed.

XVIII. THE PROSECUTOR'S ARGUMENT ON VICTIM IMPACT OUTSIDE THE RECORD, ENCOURAGED BY THE COURT'S RULING AND INSTRUCTION THAT THE JURY COULD CONSIDER SUCH ARGUMENT WITHOUT VICTIM IMPACT EVIDENCE, VIOLATED MR. ELLIOTT'S RIGHT TO GUIDED DISCRETION IN CAPITAL SENTENCING, AND TO DUE PROCESS OF LAW UNDER BOTH STATE AND FEDERAL CONSTITUTIONS.

In order to "cure" the prosecution's failure to give proper notice of its intent to introduce victim impact through the victim's wife, the trial court encouraged the prosecutor to argue the impact of Mr. Rooney's death on Ms. Rooney and her family *without introducing any evidence of such impact*. To comport with its erroneous determination that argument could be made on facts outside the record, the trial court, *sua sponte*, provided the jury a tailor-made victim impact instruction which encouraged the jury to consider victim impact, redacting any language that it should consider *evidence* of such impact. The prosecutor seized on the court's favorable ruling and instruction by encouraging the jury to consider the impact of Mr. Rooney's death on Ms. Rooney and her family as an aggravating factor, despite having failed to call a single witness to testify to victim impact. Because the jury may have returned a verdict for death based on instruction and argument on an aggravating factor for which there was no record evidence, Mr. Elliott's death sentence must be vacated.

A. Factual Background

The prosecution failed to give the defense proper notice of the victim impact testimony that the state planned to introduce through the wife of Patrick Rooney. In a misguided effort to reach middle ground, the trial court encouraged the prosecution to argue victim impact as an aggravating factor *without introducing any evidence of victim impact.* (12 RT 2339-2341.)

As the court explained its flawed reasoning:

> Now, counsel raises the objection that you have not provided them with your intent to call this witness. [...] It seems to me that under all of the decisions, *Payne* on, *Edwards*, and all of the other decisions in California, that the people are entitled to argue victim impact as a factor *regardless of whether they call any witness or not.*
>
> So [...] what are you going to gain by putting this poor woman on and having her break into tears and put her through the emotional travail of trying to describe the depth of her loss, when you can certainly comment on it as much as you please in your argument *without having any supporting testimony*?

(12 RT 2339-2340) (emphasis added.) Immediately recognizing the problem with the court's reasoning, the prosecutor stated, "I can't start testifying for them, that this is the impact of [sic] the family. He was the sole support of this family, himself, his wife and ... his two sons." (12 RT 2340.) The court disagreed that such argument was improper. As the court reasoned, an unannounced witness testifying to unforeseeable matters was

improper, but prosecutorial argument on the same matters without actually calling the witness inexplicably cured the problem:

> The Court: But the fact that he happened to have two children or that he was the sole support of the family as opposed to having a working wife is not something that a defendant can forsee. And I think that over the defense objection that they're not provided with it, that I will permit you to argue it. But ... the defense objection is well taken as to calling the witness.
>
> Prosecutor: Okay.
>
> The Court: Okay. So I'll modify that [victim impact] instruction.
>
> Prosecutor: Okay.
>
> The Court: So simply, it will speak to the same but it won't say, "Evidence has been admitted."
>
> Prosecutor: Okay.

(12 RT 2340-2341.)

The trial court, then, on its own motion, included the following penalty phase instruction:

> A factor you may consider in this phase of the trial is the specific harm caused by the defendant, including the impact on the family of Patrick Rooney.
>
> You may assess the harm caused by the defendant as a result of the murder of Patrick Rooney as a factor to be considered in determining the appropriate punishment.

(4 CT 926.) The instruction was labeled as Special Circumstances, CALJIC 8.83.2 – however, 8.83.2 does not include any part of this instruction given by the court. In closing, the prosecution argued that the

jury should consider as an aggravating factor the impact of Mr. Rooney's death on his wife and family. (13 RT 2699-2700.)

As discussed under Argument I, the record in this case is lacking a jury charge conference. Therefore, it is not possible to know for certain what further discussions may have occurred during efforts to settle the penalty phase instructions. However, it is known that one of the parties did request a jury instruction on victim impact which included the following language:

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

(3 CT 864.)

B. The Argument and Instruction to Consider Victim Impact, When No Victim Impact Had Been Introduced, Impermissibly Encouraged the Jury to Decide Mr. Elliott's Fate Based on Nothing but Conjecture and Prosecutorial "Testimony."

"It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1129, citing *People v. Eggers* (1947) 30 Cal.2d 676, 687.) This state law error is subject to analysis under *People v.*

Watson (1956) 46 Cal.2d 818, 836. "Under *Watson,* reversal is required if it is reasonably probable the result would have been more favorable to the defendant had the error not occurred." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130.)

In *People v. Melton* (1988) 44 Cal.3d 713, the defendant argued that in charging the jury with weighing aggravating and mitigating factors, those specific factors for which no evidence was admitted should have been redacted. In *Melton*, this Court held that the charging of the complete version of 8.84.1 was not in error because it specifically "advises the jury to weigh a particular factor only 'if applicable.'" (*Id.* at 775.)

By contrast, the trial court in this case crafted the instruction specifically intending the jury to speculate on matters that had *not* been admitted at the penalty phase. The court redacted the language from the instruction that the jury was to consider "evidence of" the impact on Mr. Rooney's family. (12 RT 2340, 4 CT 926.) Confirming its erroneous belief that the prosecution was welcome to argue facts not in evidence, the court advised the prosecution, "you can certainly comment on it as much as you please in your argument without having any supporting testimony." (12 RT 2339.)

The instruction on victim impact which was requested and denied would have solved this problem. (3 CT 864.) Not only did the instruction make clear that jurors were only to consider *evidence* of victim impact, but

also guided them to avoid "the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument." (*Id.*) It can only be assumed that this instruction was requested by the defense, as it admonishes the jury that argument on "emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy." (*Id.*) The court erred in giving its tailor-made instruction in lieu of the defense requested version on a number of grounds.

The given instruction gave no guidance as to how a jury should weigh victim impact, given that no victim impact was introduced at the penalty phase. While the jury was instructed to consider "the impact on the family of Patrick Rooney," (4 CT 926), not one iota of evidence was introduced about who the members of Patrick Rooney's family were or how they may have been impacted. The only evidence introduced was by stipulation that the woman sitting in the courtroom was Mr. Rooney's wife. (12 RT 2353.) No further evidence of Mr. Rooney's relationship to his family members, his financial support of his family, or even whether or not he had any other family members, was placed before the jury. Thus, the jury could have only speculated about the "impact on the family of Patrick Rooney" based on Ms. Rooney's appearance as she sat in the courtroom.

And the jury was encouraged to so speculate. Despite her better instinct that such argument would be improper, the prosecutor followed the trial court's instruction and argued to the jury that they should consider the

impact Mr. Rooney's death had on his wife and family. (13 RT 2699-2700.) The prosecution made multiple references to the impact Mr. Rooney's death would have on his family – a family whose existence was not of record. (*Id.*) It is, simply, misconduct for a prosecutor to refer to facts outside the record. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026; *People v. Wharton* (1991) 53 Cal.3d 522, 566 (prosecutor may not argue facts outside the record.))

The case of *People v. Hughes* (2002) 116 Cal.Rtpr.2d 401 is instructive here. Hughes was tried prior to the admissibility of victim impact evidence. During closing argument, the prosecutor argued facts not in evidence in explaining why the prosecution was not able to bring victim impact. This Court found that the summation did not warrant reversal because "the prosecutor did not dwell upon irrelevant facts or lead the jury to be overcome by emotion; nor, for that matter, did the prosecutor refer to any facts concerning the victim or her family outside the record or unknown to defendant." (*Id.* at 503.) In the present case, and with the blessings of the trial court, the prosecution made specific reference to "facts concerning the victim or [his] family outside the record," and the jury was encouraged to consider these references with a tailor-made instruction redacting any directive to consider record evidence alone. Moreover, the argument about the impact on Mr. Rooney's family was made within the same breath of arguing that Mr. Elliott had "blow[n] his brains out." (13 RT

2699.) The prosecution used violent images of Mr. Rooney's death in the context of the loss to Mr. Rooney's family to "lead the jury to be overcome by emotion." (116 Cal.Rtpr.2d 401, 503.) Such argument, based on information outside the record, was impermissible, and warrants reversal.

The instruction given was reversible error on yet another ground. Here, the trial court drew specific attention to the victim impact with a separate instruction, and did not advise the jury that victim impact was simply a matter to consider under factor (a) under CALJIC 8.85, no more and no less.[51] In *People v. Harris* (2005) 37 Cal.4th 310, the prosecution requested and received a special instruction regarding victim impact which read: "[if] supported by the evidence, it is proper to consider the impact of the murder on the victim's family (including their pain and suffering) when determining the appropriate penalty. You are further instructed that such evidence is to be included within the meaning of factor (a), the circumstances of the offenses, in the preceding instruction (CALJIC No. 8.85) and is not a separate factor in aggravation." This Court found that this language "properly informed the jury of the law regarding victim-impact evidence." Citing *People v. Edwards* (1991) 54 Cal.3d 787, *Harris* reasoned that the instruction appropriately placed victim impact within the context of CALJIC 8.85 factor (a) and did not "improperly suggest what

[51] Factor (a) reads, "The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true."

weight the jurors should give to any mitigating or aggravating factor." (37 Cal.4th 310, 358.) By contrast, the instruction given on victim impact in this case did not specify that victim impact was only to be considered within the framework of factor (a). Rather, it simply encouraged the jury to consider "the impact on the family of Patrick Rooney" as a "factor to be considered in determining the appropriate punishment." This overbroad instruction allowed the jury to give improper weight to the prosecutor's proffer of victim impact – impact about which no evidence had been admitted at trial. Thus, the instruction violated Mr. Elliott's Eighth Amendment to guided discretion in capital sentencing, and requires reversal. Furthermore, the trial court's use of self-created instruction on victim impact which is not used in other capital cases is a "failure of the state to abide by its own statutory commands" and "implicate[s] a liberty interested protected by the Fourteenth Amendment against arbitrary deprivation by a state." (*Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.)

C. Conclusion

By arguing facts not in evidence to inflame the jury, the prosecutor committed misconduct. The damage done by this improper argument was compounded by the instructional error and the court's encouragement of the misconduct in this case. These improprieties, standing alone and in combination, violated Mr. Elliott's Eighth Amendment right to guided

discretion in capital sentencing, and to due process of law under the Fifth, Sixth, and Fourteenth Amendments of the Federal Constitution and the analogous provisions of the California Constitution. As such, his sentence must be reversed.

XIX. CALJIC NO. 2.90 FAILED TO PROPERLY DEFINE REASONABLE DOUBT AND THE BURDEN OF PROOF, IN VIOLATION OF MR. ELLIOTT'S CONSTITUIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. CALJIC No. 2.90 Does Not Adequately Define Reasonable Doubt.

The trial court instructed Mr. Elliott's jury, pursuant to CALJIC No. 2.90, in part as follows:

> Reasonable doubt. . . is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(3 CT 812.)

The last clause of the pattern instruction formerly stated that there has to be "an abiding conviction, to a moral certainty, of the truth of the charge." In *Victor v. Nebraska* (1994) 511 U.S. 1, 13–16, the Supreme Court criticized the "moral certainty" language and expressed concern that, as its meaning evolves, it could in the future suggest less than the "near certitude" required. (*Id.* at 15.) In dicta in *People v. Freeman* (1994) 8 Cal.4th 450, 504, this Court suggested that the phrase could be safely deleted, a suggestion accepted in the version given to Mr. Elliott's jury. The result, however, is an instruction that merely tells the jurors that they need to expect to remain convinced of the truth of the charge for a prolonged period ("abiding conviction"), without telling them *how*

convinced they must be. In *People v. Brown* (2004) 33 Cal. 4th 382, this Court summarily rejected a contention that the revised instruction was insufficient, relying on dicta in *Victor v. Nebraska*. (*Id.* at p. 392.) It is unclear from the discussion in *Brown* that the contentions made here were presented there, and Mr. Elliott asks the Court to reconsider.

One problem is that instructing the jury that they must feel an abiding conviction of the truth of the charge is indistinguishable from the clear and convincing evidence standard. A conviction is simply a "strong persuasion or belief," and *abiding* means "continuing, enduring." (*Webster's Third New International Dictionary* (1976 ed.), pp. 499, 3.) But clear and convincing evidence is that which is so strong and enduring "as to leave no substantial doubt" and "to command the unhesitating consent of every reasonable mind." (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320; *See also People v. Brigham* (1979) 25 Cal.3d 283, 291["a strong and convincing belief . . . is something short of having been 'reasonably persuaded to a near certainty'"].) Indeed, other jurisdictions define clear and convincing evidence in their standard pattern instructions in terms such as that which creates a "firm belief or conviction," which are difficult to distinguish from an abiding conviction. (*See, e.g., U.S. Fifth Circuit District Judges Assoc., Pattern Jury Instructions* (1994) Inst. 2.14, p. 18; *Federal Criminal Jury Instructions* (2d ed. 1991) No. 70.02; *Virginia Model Jury Instructions—Civil* (Rep. ed. 1993) No. 3.110.) At

least one state, and the United States Supreme Court, have used the term *abiding conviction* in defining clear and convincing evidence. (*N.M. Stats. Ann.—Uniform Jury Instructions*, No. 13–1009; *Colorado v. New Mexico* (1984) 467 U.S. 310, 316.)

Language first defining the clear and convincing standard, then explaining that *beyond a reasonable doubt* expresses a higher standard, would have made the instruction adequate. Use of a phrase such as *reasonably persuaded to a near certainty* would also have cured the deficiency. (*See People v. Brigham, supra*, 25 Cal.3d 238, 291.) Telling the jurors that they needed to be convinced, without telling them how convinced, was not enough, even if the unspecified level of conviction must abide.

The problem is accentuated by the structure of the entire instruction. Both the former and current versions began with a firm statement of the burden of proof: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt." (CALJIC No. 2.90 (5th ed. 1988), CALJIC No. 2.90 (6th ed. 1996).) It would be sufficient to end the instruction there.

Both versions, however, continued, with something of a hedge, although in the revised version the italicized language is deleted: "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, *and depending on moral evidence,* is open to some possible or imaginary doubt." (*Ibid.*, italics added.) Then the former version circled back to emphasize the weight of the burden. "It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty,* of the truth of the charge." (CALJIC No. 2.90 (5th ed. 1988), italics added.) The new version circles back as well but, by omitting the italicized language, it stops short of completing the circle. As explained already, telling the jurors that they have to expect to remain convinced that the charge is true, without telling them *how* convinced, is inadequate.

As *Victor v. Nebraska*, *supra*, 511 U.S. 1, explained in detail, the terms *moral evidence* and *moral certainty* were reaching the point where they may be difficult for the modern mind to correctly understand. That is, language which once meant that a juror must be as certain as one can be short of direct observation might no longer communicate the "near certitude" required. (*Id.* at 15.) The solution, especially in an instruction which in its middle section may seem to back off from a strong statement of the burden of proof, is not to give up on saying anything about certainty. It

is to update the language. Since Mr. Elliott's jury received an instruction that conveyed the concept in neither the traditional language nor an update, the language was insufficient.

An inadequate instruction on reasonable doubt is federal constitutional error and is per se reversible. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) All the guilt verdicts and special-circumstances findings must be reversed.

B. CALJIC 2.90 Failed To Inform the Jury That the Presumption Of Innocence Continues Throughout the Entire Trial, Including Deliberations

It is well recognized that the presumption of innocence continues throughout the entire trial and applies to every stage, including deliberations. (See *Clarke v. Commonwealth* (Va. 1932) 166 S.E. 541,545-46; see also *State v. Goff* (W.Va. 1980) 272 S.E.2d 457, 463 [the burden never shifts to the defendant].) Hence, it is improper to give the jury the impression that the presumption of innocence continues until the jury, in its discretion, decides that it should end. (See *United States v. Payne* (9th Cir. 1990) 944 F.2d 1458, 1462-63; see also *People v. Johnson* (Ill. App. Ct. 1972) 4 Ill. App.3d 539; *People v. Attard* (N.Y. App. Div. 1973) 346 N.Y.S.2d 851; *State v. Tharp* (Wash. App. 1980) 27 Wn. App. 198; *Washington Pattern Jury Instructions - Criminal*, WPIC 1.01 [Advance Oral Instruction-Introductory] comment (West, 2nd ed. 1994) [words "during your deliberations" were inserted into this instruction "to avoid any

suggestion that the presumption could be overcome before all the evidence is in"].) "It has been held that an instruction as to the presumption of innocence which correctly told the jury that it attends the accused throughout the trial, but which the trial court qualified by adding, 'until such time, if at all, as it is overcome by credible evidence' is erroneous, because the jury may have inferred from this that, at some stage of the trial before its conclusion, sufficient evidence had been adduced to overcome the presumption, thus shifting the burden upon the accused. [Citations.]" (*Wisconsin Jury Instructions- Criminal, WIS-JI-Criminal* 140 [Burden Of Proof And Presumption Of Innocence] comment p. 4 (University of Wisconsin Law School, 2000).)

Hence, CALJIC 2.90 as given in the present case was deficient because it did not assure that the jury would not shift the burden to the defense at some point prior to completing its deliberations.[52]

C. CALJIC 2.90 Improperly Described the Prosecution's Burden as Continuing "Until" The Contrary Is Proved.

The judge used CALJIC 2.90 (5th Ed. 1988) to instruct the jury, in pertinent part, as follows:

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[52] While defense counsel did not object or offer an alternative instruction, Mr. Elliott argues that the undermining of the prosecution's burden through CALJIC 2.90 was structural error and does not require preservation. However, if this Court determines that such objection was required, then Mr. Elliott will incorporate the failure to do so under the ineffective assistance of counsel claim which will be brought in the habeas petition.

> A defendant in a criminal action is presumed to be innocent until the contrary is proved...
>
> (3 CT 812.)

Use of the term "until" in this instruction undermined the prosecution's burden of proof. "Due process commands that no man shall lose his liberty unless the Government has borne the burden of... convincing the factfinder of his guilt." (Internal citation and quotation marks omitted.) (*In re Winship* (1970) 397 U.S. 358, 364.) This principle is a bedrock element of the federal constitutional rights to a fair trial by jury and due process. (Sixth and Fourteenth Amendments.) Any instructional language which dilutes or reduces the prosecution's burden is constitutionally suspect. (See e.g., *Cage v. Louisiana* (1990) 498 U.S. 39.)

CALJIC 2.90 undermined the presumption of innocence by improperly replacing the word "unless" with the word "until." Use of the word "until"- is less clear and definitive than "unless." That is, "until" implies that the proof will be forthcoming, while "unless" implies that sufficient proof might not ever be presented.

In apparent recognition of how use of the term "until" fails to comport with *Winship,* and thus risks misleading the jurors, other standard pattern instructions throughout the nation use "unless" or "unless and until." (See e.g., ICJI (Idaho) No. 1501 ["unless"]; OUJIC (2nd Ed.) No. 1 [same]; *State v. Hutchinson* (Tenn. 1994) 898 S.W.2d 161 [same]; CJI

(New York) (lst Ed. 1983) No. 3.05, ¶ 2, sent.2 ["unless and until"]; KRS 532.025 (Kentucky) [same]; CJI (Washington D.C.) (4th Ed.) 1.03 [same]; UCrJI (Oregon) No. 1006 [same]; 1st Circuit Model Instructions Criminal No. 1.01 [same]; 8th Circuit Model Instructions Criminal No. 1.01 [same].)

Alternatively, it has been recommended that the jury be more directly instructed on this point as follows:

> The law presumes the defendant to be innocent of all the charges against him. I therefore instruct you that the defendant is to be presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt.

(Leonard B. Sand, et al., 1 *Modern Federal Jury Instructions*, § 4.01; Form 4-1 (1994).)

Another alternative is the following instruction from *United States v. Walker* (7th Cir. 1993) 9 F.3d 1245, 1250:

> The defendant is presumed to be innocent of the charges. This presumption remains with the defendant throughout every stage of the trial and during your deliberations on the verdict, and is not overcome unless from all the evidence in the case you are convinced beyond a reasonable doubt that the defendant is guilty.

Hence, the instruction in the present case was deficient because it implied that the prosecution would meet its burden. Moreover, the instruction also failed to assure that the presumption of innocence would remain in place throughout the trial and during deliberations.

C. The Term "Burden" Should Have Been Defined.

Because a "burden" in legal terms has a technical meaning it should be defined, *sua sponte*. (See *People v. McElheny* (1982) 137 Cal.App.3d 396, 403-04.) Hence, the jury should have been instructed as follows:

> A burden of proof draws a line. If the prosecution fails to cross that line, regardless of how close it may have come then the prosecution has not met its burden of proof.

(*People v. Mixon* (1990) 225 Cal.App.3d 1471, 1484.)

D. The Jury Should Have Been Instructed that the Prosecution's Burden Applied To Every Essential Element of the Charge.

Neither CALJIC 2.90 nor the specific CALJIC instructions which define the elements of the charged offenses contained an "application paragraph" which expressly informed the jury exactly what must be proved before Mr. Elliott could be convicted. The absence of such an "application paragraph" was reversible error. (Cf., *Plata v. State* (Tex. Crim. App. 1996) 926 S.W.2d 300.)

E. The Error Violated the Federal Constitution.

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Mr. Elliott's state (Art. I, sections 1, 7, 15, 16 and 17) and federal (Sixth and Fourteenth Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1;

Cage v. Louisiana (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

Moreover, the error also violated the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (Eighth and Fourteenth Amendments) which require heightened reliability in the determination of guilt and death eligibility before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) Furthermore, verdict reliability is also required by the Due Process Clause (Fourteenth Amendment) of the federal constitution. (*White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Further, because Mr. Elliott was arbitrarily denied his state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code, including Evidence Code sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343,346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795,804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Judgment Should Be Reversed.

The giving of an instruction which dilutes the standard of proof for conviction is reversible error per se. Any error in defining reasonable doubt

for a jury cannot be deemed harmless because the error goes to the very heart of our system of criminal trials and deprives the criminal defendant of his or her right to be convicted only upon a finding by the jury of guilt beyond a reasonable doubt as correctly defined. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) This court has reached a similar conclusion (*People v. Vann* (1974) 12 Cal.3d 220, 225-226).

Moreover, because the error violated Mr. Elliott's federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v.California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People* v. *Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].) Given the closeness of the evidence and the substantial impact of the error, the prosecution cannot meet this burden. Therefore, the judgment should be reversed under the federal harmless-error standard.

Finally, even if the error was not prejudicial as to guilt, it was prejudicial as to penalty, under both the state and federal standards of prejudice because it undermined the mitigating theory of lingering doubt. As such, Mr. Elliott's conviction must be reversed.

ERRORS AT SENTENCING

XX. THE COURT VIOLATED *FARETTA V. CALIFORNIA* BY FAILING TO DETERMINE MR. ELLIOTT'S COMPETENCY TO REPRESENT HIMSELF AND BY FAILING TO ADVISE MR. ELLIOTT OF THE DISADVANTAGES OF APPEARING WITHOUT COUNSEL.

A. Factual Background

On April 22, 1992, Mr. Elliott addressed the court and requested to discharge the services of defense counsel and to represent himself for the remainder of the proceedings. (13 RT 2766.) Mr. Elliott stated that he did not "trust" his attorneys, that they provided "false promises," that they "led [him] down a path full of lies," and that they provided him with "ineffective assistance of counsel." (13 RT 2767.) The court responded that he disagreed with Mr. Elliott's assessment of his representation but stated that "if you want to waive your right to have counsel and to proceed with the sentencing without counsel, I will give that right to do that." (13 RT 2768.)

The prosecutor interrupted, reminding the court that before Mr. Elliott is allowed to represent himself, "there statutorily has to be a motion for new trial made to preserve the appellate rights." (13 RT 2768.) After Mr. Elliott stated he would be able to file the motion, the court began to schedule the next hearing when the motion would be due. (13 RT 2768-69.)

The prosecutor interrupted again, reminding the court that it must follow "the statute and caselaw" before allowing Mr. Elliott to proceed *pro per.* (13 RT 2769.)

The prosecutor notified the court that in a separate case a different judge had granted Mr. Elliott such status after making all of the appropriate findings. (13 RT 2769.) She then stated:

> I am not sure but that it might be appropriate, given this is a death case, that before we relieve [defense counsel] again that we—that *your honor make the inquiry and the findings.*
>
> If we want to put it over a couple of days, I will bring in the appropriate paperwork and whatnot for your honor to make the appropriate findings. I know it has been done once before, ...

(13 RT 2769.) (emphasis added).

The court declined this option, and without looking at any of the prior court orders, competency findings, or medical documents, the court determined that Mr. Elliott "ha[s] the ability to go *pro per.*" (13 RT 2769.) The court explained:

> that the court has to find that [that the defendant] ha[s] a requisite understanding of the proceedings to go *pro per.* I feel from the comments that [Mr. Elliott] ha[s] made in the past, my observation of [him], I think [Mr. Elliott] ha[s] the ability to go *pro per*, if that's what [he] want[s] to do.
>
> I don't recommend it. I think it's an unwise decision for anyone to go *pro per*; but... because I think at this time the motion – the motion that is to me made is not nearly the complex matter that it would be to prepare a case and argue to

> a jury and to do all of the other things where an attorney's assistance would be absolutely required.

(13 RT 2769-2770.)

The court then asked the current defense attorney whether Mr. Elliott had "the requisite ability to understand [the] issues in the case," to which Mr. Ramirez replied, "he has always been rational and seems to understand everything that's going on." (13 RT 2770.)

The court agreed, and stated that it has no reason throughout these proceedings to doubt Mr. Elliott's ability to comprehend what was going on, *"notwithstanding the one bizarre incident that happened in this courtroom. But I feel that was an aberration and certainly wasn't typical."* (13 RT 2770.) (emphasis added).

The court then entered a formal finding that Mr. Elliott was able to represent himself after taking "judicial notice" that Mr. Elliott was "alert[] during all proceedings" and the purported "findings of fitness re: pro per status made by another judicial officer of this court on a prior date." (13 RT 2770; 4 CT 955.)

B. Legal Standards

On appeal, the government carries the burden of establishing the legality of the *Faretta* waiver. (*United States v. Mohawk* (9th Cir. 1994) 20 F.3d 1480, 1484.) A reviewing court evaluates the question with great care,

indulging "every reasonable presumption against waiver." (*Brewer v. Williams* (1977) 430 U.S. 387, 404.)

"It is fundamental that the right to counsel applies at all stages in a criminal proceeding where substantial rights of an accused may be affected. (*Mempa v. Rhay* (1967) 389 U.S. 128, 134.) A sentencing hearing is one such stage, and counsel must be provided at sentencing..." *People v. Hall* (1990) 218 Cal.App.3d 1102, 1105. "[T]he right to self-representation is found in the Sixth Amendment right to counsel and cannot be asserted without knowingly and intelligently waiving the right to counsel. Where a defendant is permitted to represent himself or herself without knowingly waiving the right to counsel and all its attendant benefits, the right to counsel has been violated." (*Id* at 1107 (citations omitted).)

C. The Trial Court Did Not Rely On Sufficient Evidence When Finding That Mr. Elliott Was Competent To Represent Himself.

A criminal defendant must be mentally competent to stand trial. (*Drope v. Missouri* (1975) 420 U.S. 162.) Where the evidence before a trial court raises a *bona fide* doubt as to the defendant's competency, due process requires the court *sua sponte* to order a competency hearing. (*Pate v. Robinson* (1966) 383 U.S. 375, 385.) A defendant's decision to forgo counsel and represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 may be granted after the court determines that the defendant is competent to represent himself. (*Id.* at 835.) "[T]he competency standard

for self-representation is the same standard for standing trial." (*Godinez v. Moran* (1993) 509 U.S. 389, 397-98.) This standard is met upon evidence that the defendant has a "rational understanding" of the proceedings. (*Id.* at 397-98.)

The trial court erred because it did not base its competency findings on proper evidence. First, the court concluded that Mr. Elliott was competent based on the court's own observations of Mr. Elliott's "comments" and the court's "observation" of him at trial. (13 RT 2769.) Mr. Elliott never testified at trial. The only comments that the court observed were made for limited durations sporadically throughout trial. Even if Mr. Elliott's interactions were more extensive, "[t]he manner in which a defendant conducts his defense cannot establish his state of mind at the time he opted for self-representation." (*United States v. Aponte* (9th Cir. 1978) 591 F.2d 1247, 1250.)

Next, the court concluded that Mr. Elliott was competent after questioning Mr. Elliott's attorney. Mr. Ramirez's lay opinion is not evidence because "counsel is not a trained mental health professional, and his failure to raise petitioner's competence does not establish that petitioner was competent." (*Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1088-1089.)

The court also improperly took "judicial notice" of a prior court's finding of competency without even reviewing the order or looking at the

results of the prior psychological examination or determining whether or not such an examination was actually conducted. Such assumptions that are not supported by evidence are unreasonable determinations of fact pursuant to 28 U.S.C. § 2254. This is particularly troubling because Mr. Elliott's behavior exhibited *after* the finding of competency undermined the continued credibility of that determination. Here, the court specifically ignored plain indicia of what could be Mr. Elliott's mental illness. Mr. Elliott threw three apples at the jury and judge during trial, showed up at his trial wearing similar glasses to those the gunman allegedly wore during the Lucky's Market incident – despite his failure to previously have worn glasses,[53] and in open court, made a number of statements suggesting paranoia or a failure to appreciate reality. For instance, Mr. Elliott declined appointed counsel because *"I feel they are spies of the court."* (13 RT 2778.) (emphasis added). In addition, at trial, Dr. Ronald White, a clinical and forensic psychologist testified that Mr. Elliott "does have emotional problems, personality problems that are very, very pervasive and affect him very much." (13 RT 2669.)

It is a well-established fact that competency is a mental status that is not static and may change during the course of a defendant's trial. (*See, e.g., Sell v. United States* (2003) 539 U.S. 166, 179–82 (commenting on

[53] Peggy Patterson, Mr. Elliott's aunt, testified that Mr. Elliott has never worn glasses, for either cosmetic or vision-correction purposes. (9 RT 1726.)

medical procedures a State may constitutionally provide to a defendant to restore him to competency).) The trial court therefore erred in presuming that a competency evaluation conducted over a year ago by a different court and a report that the court in fact never reviewed would be conclusive proof of Mr. Elliott's competency at the time of his sentencing. Indeed, the court erred by ignoring behavior he described as "bizarre." (13 RT 2770.) The court was required to order an evaluation to determine whether this "bizarre" behavior — coupled with the additional comments of paranoia and delusions — rendered Mr. Elliott unable to continue with his case, especially in the capacity of representing himself. The court thus erred and erroneously granted Mr. Elliott's *pro per* status without the needed medical documentation to verify his competency. A new trial is therefore warranted.

D. The Court Failed To Properly Advise Mr. Elliott Of The "Dangers And Disadvantages of Self-Representation" Before Allowing Him To Represent Himself.

A defendant's decision to forgo counsel and represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 is valid if it is "timely, not for the purposes of delay, unequivocal, and knowing and intelligent [citations]." (*United States v. Erskine* (9th Cir. 2004) 355 F.3d 1161, 1167.) To guarantee that the "*Faretta* waiver" is knowing and intelligent, "the district court ***must*** insure that [the defendant] understands

1) the nature of the charges against him, 2) the possible penalties, and 3) the "dangers and disadvantages of self-representation [citations]." (*Id.*) (emphasis added.) The Ninth Circuit has held that the "preferred procedure" to ensure the validity of a *Faretta* waiver "is for the district court to discuss each of the three elements with the defendant on the record in open court [citations]." (*United States v. Farhad* (9th Cir. 1999) 190 F.3d 1097, 1099-1100.)

The Ninth Circuit has determined that a trial court's compliance with *Faretta* includes a situation in which the trial court "immediately placed [a defendant] under oath and h[e]ld a hearing in open court," during which the court "informed [the defendant] of the charges against him," "the possible penalties he faced if convicted," "the 'core functions' of an attorney that [the defendant] would be expected to perform," "the superior ability of a lawyer to handle those tasks," the precise tasks the defendant would be required to take, and that "there were resources, such as investigators and legal research tools, that were unavailable to [the defendant], but which were available to attorneys." (*Farhad*, 190 F.3d at 1100–1101.)

By contrast, the record shows that the trial court at Mr. Elliott's trial did not conscientiously give the appropriate *Faretta* advisals. The court at first was going to grant Mr. Elliott's *pro se* request without any hearing, only to be reminded by the prosecutor that he must comply with *Faretta.* The extent of the court's subsequent addressing of this issue was simply a

remark that the remaining work that needed to be done did not seem particularly complicated and the assistance of a lawyer did not seem necessary. What is notable is that the prosecutor had to remind the court and to notify the defendant that he had to file a motion for a new trial to secure his right to appeal.

In California, the Motion for a New Trial is more than a mere formality. If a defendant fails to file an adequate motion for a new trial, he or she risks forfeiting the opportunity to challenge substantive and procedural errors that occurred at trial. (*See, generally, People v. Cordova* (1967) 253 Cal.App.2d 434, 436, (listing cases in which issues were preserved and raised in a motion for a new trial).)

The United States Supreme Court has recognized that the preparation of a motion for a new trial is beyond the capacity of a layperson. "Navigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals, . . . [such as a defendant], who ha[s] little education, learning disabilities, and mental impairments. (*Halbert v. Michigan* (2005) 125 S.Ct. 2582, 2593 [citing *Evitts v. Lucey* (1985) 469 U.S. 387, 393 ("[T]he services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits."); *Gideon v. Wainwright* (1963) 372 U.S. 335, 345 ("Even the intelligent and

educated layman has small and sometimes no skill in the science of law." [internal citations omitted]).)

Moreover, in California, a motion for a new trial provides a cognizable remedy for a defendant. A new trial will be granted if: (1) evidence is newly discovered; (2) evidence is not cumulative; (3) evidence is "such as to render a different result probable on a retrial of the cause;" (4) "the party could not with reasonable diligence have discovered and produced it at the trial;" and (5) the "facts be shown by the best evidence of which the case admits." (*People v. Martinez* (1984) 36 Cal.3d 816.)

This second matter is even more relevant to the present case in light of the fact, that as will be developed at habeas, new evidence was discovered before Mr. Elliott's sentence that would have raised a cognizable issue as to his innocence. Although such an issue can be presented in his habeas petition, over fourteen years have passed since his conviction during which this issue certainly would have been presented for the court's review if Mr. Elliott had been provided with effective assistance of counsel.

The court therefore was remiss by failing to properly advise Mr. Elliott of the exact disadvantages of preparing a new trial motion, representing himself at sentencing, and preparing for his appeal. Although it is true that Mr. Elliott's representation of himself at this stage may not be as complicated as representing oneself during an entire capital trial, the trial

court erred by failing to inform Mr. Elliott of the precise responsibilities he was assuming.

The record shows that Mr. Elliott did not appreciate what he was undertaking by relieving counsel at this stage. At his sentencing hearing, Mr. Elliott immediately asked for a 30-day continuance because he had not prepared the written motion for a new trial. (13 RT 2776.) Mr. Elliott also did not act in any manner that showed his knowledge of the procedural and substantive rights conferred to him at sentencing. (*See, e.g.*, 13 RT 2776–84.) Mr. Elliott's level of unpreparedness presents a reasonable inference that if he had been properly advised of the nature and scope of work he was undertaking, Mr. Elliott may have made a different decision. At a minimum, the facts fail to establish that the trial court complied with due process by properly securing a *Faretta* waiver. When the "record reveals that [the defendant] did not understand these consequences when he opted for self-representation," remand is proper. (*See United States v. Erskine* (9th Cir. 2004) 355 F.3d 1161, 1171 (granting a new trial to a defendant when the trial court failed to determine that the defendant "understood the possible penalty he faced at the time of his *Faretta* waiver" and that the defendant "did *not* understand these consequences when he opted for self-representation") (emphasis in original).) Due to these violations of Sixth Amendment right to counsel under the federal constitution, and under the

correlative provisions of the California constitution, a new trial is warranted.

THE CONSTITUTIONAL AND MORAL/NORMATIVE INFIRMITIES OF CALIFORNIA'S DEATH PENALTY AS APPLIED TO MR. ELLIOTT'S CASE.

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

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration of each claim in the context of California's entire death penalty system.

To date, the Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. 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) 126 S.Ct. 2516, 2527, fn. 6;[54] see also, *Pulley v. Harris*

[54] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that

(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.)

When 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. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the

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the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, "is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at p. 2527.)

victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

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

A. Appellant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad.

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)"

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against Mr. Elliott the statute contained twenty-six special circumstances [55] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and

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

unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law. [56]

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[56] In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas

B. Mr. Elliott's Death Penalty Is Invalid Because Penal Code § 190.3(a) as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of The Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. [57] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three

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petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

[57] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

weeks after the crime, [58] or having had a "hatred of religion,"[59] or threatened witnesses after his arrest, [60] or disposed of the victim's body in a manner that precluded its recovery.[61] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa*, *supra*, 512 U.S. at pp. 986-990, dis. opn. of Blackmun, J.)

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[58] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).
[59] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).
[60] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.
[61] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, *cert. den.* 496 U.S. 931 (1990).

Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Id.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary and Capricious Sentencing And Deprives Defendants of the Right to a Jury Determination of Each Factual Prerequisite to a Sentence Of Death; It Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its

"special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to condemn a fellow human to death.

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

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

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But this pronouncement has been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; *Blakely v. Washington* (2004) 124 S.Ct. 2531 [hereinafter *Blakely*]; and *Cunningham v. California* (2007) 127 S.Ct. 856 [hereinafter *Cunningham*].

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

In *Ring*, the High Court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.* at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. *Any* factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the High Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington*, *supra*, 124

S.Ct. at p. 2535.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Id.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 2543.)

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

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by

the defendant or proved to a jury beyond a reasonable doubt." *(United States v. Booker, supra*, 543 U.S. at p. 244.)

In *Cunningham*, the high court recently rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (127 S.Ct. at 858.) In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

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

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

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is

finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors. As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (13 RT 2744), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

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

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[62] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at p. 460)

the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[63]

This Court has repeatedly sought to reject the applicability of *Apprendi* and *Ring* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32; *People v. Prieto* (2003) 30 Cal.4th 226, 275.) It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases.

In *People v. Black* (2005) 35 Cal.4th 1238, 1254, this Court held that notwithstanding *Apprendi, Blakely*, and *Booker*, a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence; the DSL "simply authorizes a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (35 Cal.4th at 1254.)

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

The U.S. Supreme Court explicitly rejected this reasoning in *Cunningham.*[64] In *Cunningham* the principle that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt was applied to California's Determinate Sentencing Law. The high court examined whether or not the circumstances in aggravation were factual in nature, and concluded they were, after a review of the relevant rules of court. (*Id.*, pp. 6-7.) That was the end of the matter: *Black's* interpretation of the DSL "violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." *(Cunningham, supra*, p. 13.)

Cunningham then examined this Court's extensive development of why an interpretation of the DSL that allowed continued judge-based finding of fact and sentencing was reasonable, and concluded that "it is comforting, but beside the point, that California's system requires judge-determined DSL sentences to be reasonable." (*Id.*, p. 14.)

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[64] *Cunningham* cited with approval Justice Kennard's language in concurrence and dissent in *Black* ("Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Black*, 35 Cal.4th at 1253; *Cunningham, supra,* at p.8.)

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the very inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that "[t]he high court precedents do not draw a bright line"). (*Cunningham, supra,* at p. 13.)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, *the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed.*

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

This holding is simply wrong. As section 190, subd. (a)[65] indicates, the maximum penalty for *any* first degree murder conviction is death. The top of three rungs is obviously the maximum sentence that can be imposed pursuant to the DSL, but *Cunningham* recognized that the *middle* rung was the most severe penalty that could be imposed by the sentencing judge without further factual findings: "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham, supra*, at p. 6.)

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

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater

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

> punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

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

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at p. 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the *further findings* that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (2006).

It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88). This Court has recognized that a particular special circumstance can even be argued to

the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 863-864.)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency (Ariz.Rev.Stat. Ann. section 13-703(E)), while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances (section 190.3). There is no meaningful difference between the processes followed under each scheme.

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at p. 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at p. 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether, as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

b. *Whether Aggravating Factors Outweigh Mitigating Factors is a Factual Question That Must be Resolved Beyond a Reasonable Doubt.*

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that the statutorily-specified finding as to the relative weightiness of aggravating and mitigating circumstances is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Az. 2003) 65 P.3d 915, 943; *accord, State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450; see also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring, supra*, 536 U.S. at pp. 608, 609:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum

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

The capital sentencing scheme presents an identical violation of the Sixth Amendment: Here, the jury was instructed that "To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." CALJIC 8.88 (1989 Revision.) (4 CT 928.) This instruction makes clear that for the penalty of death, an aggravating circumstance – a fact – must be found. By failing to require that it be found unanimously, and beyond a reasonable doubt, Mr. Elliott's sentence runs afoul *Apprendi* and its progeny.

The last step of California's capital sentencing procedure, the decision whether to impose death or life, cannot be characterized as a merely a moral and a normative one. This Court errs greatly in using this characterization to allow the findings that make one death-eligible to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. *Cunningham* made clear that "broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular

case, does not shield a sentencing system from the force of our decisions." After *Cunningham*, it has been made plain that this Court's refusal to accept the applicability of *Apprendi, Ring, Booker* and *Blakely* to the death-eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

c. *The Requirements of Jury Agreement and Unanimity*

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *People v. Stanley* (2006) 39 Cal.4th 913, 963.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to Mr. Elliott's jury requiring jury agreement on any particular aggravating factor.

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

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor

– including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. [66] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

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

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323,

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[66] See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

334. [67]) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra,* 524 U.S. at pp. 731-732; *accord*, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring*, 536 U.S. at p. 609). [68] See Section D, *infra.*

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated. [69] To apply the

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

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

[69] The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but

requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause (see Section D, *post*), and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury. (See *Richardson v. United States* (1999) 526 U.S. 813, 815-816.)

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

a. *Factual Determinations*

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at

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in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. *Imposition of Life or Death*

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397

U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Ca1.3d 306 (same); *People v. Thomas* (1977) 19 Ca1.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Ca1.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky*, *supra*, the U.S. Supreme Court reasoned:

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

(455 U.S. at 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at 363.)

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

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v.*

Missouri (1981)] 451 U.S. 430, 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

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

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional.

(*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[70] The same analysis applies to the far graver decision to put someone to death.

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. (c).) Capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501

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

U.S. 957, 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra;* Section D, *post*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, *supra*.)

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra* [statute treating a jury's

finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

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

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51 (emphasis added), the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme *so lacking in other checks on*

arbitrariness that it would not pass constitutional muster without comparative proportionality review."

California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris, supra,* 465 U.S. at 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

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

the entire California sentencing scheme (see *Kansas v. Marsh*, *supra*), this absence renders that scheme unconstitutional.

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

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

a. Factual Background

During closing argument of the penalty phase, the prosecution conceded that Mr. Elliott did not have any prior convictions to consider as a factor in aggravation. (13 RT 2701.) It presented the following as aggravating factors: (1) the special circumstances arising from the murder

of Patrick Rooney (13 RT 2699) and (2) evidence of conduct relating to four separate crimes. (13 RT 2700-01.)

Any use of unadjudicated criminal activity by the jury as an aggravating circumstance under section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by Mr. Elliott and devoted a considerable portion of its closing argument to arguing these alleged offenses.

1) The Hughes Market Shooting and Robbery (December 29, 1987).

As is described in detail in Argument VI, *supra,* there is very little evidence that Mr. Elliott had any connection to the Hughes Market shooting and robbery. The prosecution relied upon the testimony of one highly unreliable witness whose description of Mr. Elliott includes numerous discrepancies. There was no physical evidence linking Mr. Elliott to the crime.

Mr. Elliott was originally charged with attempted murder, mayhem, and second degree robbery in connection with this incident. (17 Supp. CT 4415-4416.) After being filed with the Boys Market and Lucky's Market

offenses, the counts were severed and remained pending in the downtown court during the Norwalk trial. (1 RT 45.) This matter never went to trial and Mr. Elliott never was convicted for any charge arising out of this incident. (11 RT 2231.) Subsequently, the prosecution dismissed the charges. (18 Supp. CT 4722-43.)

The prosecutor argued that the jury should consider this evidence as an aggravating factor making Mr. Elliott eligible for the death penalty. (11 RT 2225-26, 13 RT 2688.)

2) Non-Violent Misdemeanor Arising from Officer Kuhn Incident (June 25, 1988).

As is described in detail in Argument XI, *supra*, on June 25, 1988, Deputy John Kuhn arrested Mr. Elliott on misdemeanor gun possession charges. The arrest led to his conviction for possession of a loaded weapon in a public place. (11 RT 2210.)

The state introduced evidence of the circumstances of this arrest as aggravation at the penalty phase pursuant to Penal Code section 190.3(b). The defense objected to the admission of a conviction for a non-violent misdemeanor for this purpose. (11 RT 2297; 3 CT 888-899.) The court overruled the objection and admitted the testimony of the arresting officer to show "the potential for violence" exhibited by Mr. Elliott's conduct. (11 RT 2297.)

At the penalty phase closing argument, the prosecution argued that the jury should consider Officer Kuhn's testimony when deciding whether or not Mr. Elliott should die. (13 RT 2701.)

3) Subsequent Violent Conduct Arising Out of Bank of America Robbery (December 5, 1988).

On December 5, 1988, Hojatola Bouroumand, a local business owner, was carrying a plastic bag filled with cash to deposit at the Bank of America branch located in Rancho Cucamonga. (11 RT 2307-08.) On his walk to the bank, someone from behind him grabbed the bag. (11 RT 2309.) Mr. Bouroumand turned around and within "a second, a moment, a short moment," the robber fired a gun, hitting Mr. Bouroumand's hand and permanently severing 3 fingers. (11 RT 2314, 2310-11.) Mr. Bouroumand did not testify about the description of the robber at the time of the incident. (11 RT 2308-14.) The robber fled to a waiting white van and rode away. (11 RT 2312.)

Mr. Elliott pled guilty to second-degree robbery in connection with this incident. (11 RT 2315.) Because this conviction occurred after the underlying offense for which Mr. Elliott was found guilty, it was not admitted as a prior felony conviction. (1 Supp. CT 1-5; 11 RT 2209, 2316.) The court, however, admitted proof of Mr. Elliott's plea agreement to "tie in [Mr. Bouroumand's] testimony," which would constitute an aggravating

factor if the state could demonstrate Mr. Elliott's violent conduct beyond a reasonable doubt. (11 RT 2209, 2316, 13 RT 2701.)

4) Subsequent Violent Conduct Arising Out of Car Jacking (March 11, 1989).

On March 11, 1989, Robert Reynolds exited a grocery store in the city of Ontario, California. (12 RT 2343.) Mr. Reynolds was seated in his van preparing to leave, when Mr. Elliott approached and ordered him out of the van. (12 RT 2343.) Mr. Reynolds initially refused and Mr. Elliott responded by pulling out a gun and repeating his order. (12 RT 2344.) Mr. Reynolds complied, and Mr. Elliott climbed into the driver's seat. (12 RT 2345.) While Mr. Elliott was attempting unsuccessfully to start the van, Mr. Reynolds struck Mr. Elliott in the head. (12 RT 2345.) Mr. Elliott fired his gun and Mr. Reynolds ran away. (12 RT 2345.)

Mr. Elliott did not shoot at Mr. Reynolds, but in the confusion shot himself in the leg. (12 RT 2346.) The police apprehended Mr. Elliott as he was fleeing the scene. (12 RT 2328.) The prosecution presented testimony regarding this incident under the theory that it constitutes violent conduct and should aggravate his penalty. (13 RT 2701.)[71]

The court informed the jurors that they could rely on these four incidents as aggravating factors in the weighing process necessary to determine if Mr. Elliott should die. (13 RT 2743-45.) It instructed the

[71] Mr. Ramirez did not ask any questions of the state witnesses. (RT 2346, 2349, 2352.)

jurors that they could consider the aggravating circumstances if the juror was "satisfied that the defendant did in fact commit these acts." (13 RT 2743.) They were not told that they each had to find beyond a reasonable doubt that the defendant was in fact the perpetrator of each offense. (13 RT 2743-45.) Although the jurors were told that all 12 must agree on the final sentence, they were never told that before they could rely on any aggravating factor in the weighing process, they had to unanimously agree that, in fact, it was the defendant who had committed the crimes alleged in any of the four aggravating factors presented by the prosecution. (13 RT 2743-45.)

If anything, the instructions in this case suggested just the opposite. The jury was told that it was "not necessary for all the jurors to agree" on whether or not the defendant committed the offense used as the aggravating factor. (13 RT 2743.) The individual nature of each juror's role was emphasized. This was in stark contrast to the guilt phase, where the jury was given instructions that explained they had to unanimously agree on the defendant's guilt, the degree of the homicide, any special findings associated with the count, and the special circumstances alleged.

As is more fully discussed below, this aspect of section 190.3, subdivision (c) is unconstitutional. Under authority from the United States Supreme Court, defendants have a federal constitutional right to a jury trial on the factual allegations that can expose them to a death sentence. As

currently construed, section 190.3, subdivision (c) — which permits jurors to sentence a defendant to death by relying on prior conviction allegations on which they have not agreed — violates this right. In addition, without instructions requiring juror unanimity on the prior conviction allegations, section 190.3, subdivision (c) allows jurors to impose death based on unreliable factual findings which have never been deliberated, discussed or debated in violation of the Eighth Amendment's ban on unreliable penalty phase procedures.

b. The United States Supreme Court's Decision In Ring v. Arizona (2002) 122 S.Ct. 2428 — Holding that the Sixth Amendment Right to a Jury Trial Applies to Aggravating Factors Used In Capital Sentencing — Requires a New Penalty Phase in this Case.

The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The Supreme Court has held, however, that the version of the Sixth Amendment applied to the states through the Fourteenth Amendment, does not require that the jury be unanimous in non-capital cases. (*Apodaca v. Oregon* (1972) 406 U.S. 404 [upholding conviction by 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [upholding a conviction obtained by a 9-3 vote in a non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (*Williams v. Florida* (1970) 399 U.S. 78 [approving the use of six person juries in criminal cases].)

Yet the High Court has also made clear that even in non-capital cases, when the Sixth Amendment does apply, there are limits beneath which the states may not go. For example, in *Ballew v. Georgia* (1978) 435 U.S. 223 the Court struck down a Georgia law allowing criminal convictions with a five person jury. Moreover, the Court has also held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (*Brown v. Louisiana* (1979) 447 U.S. 323; *Burch v. Louisiana* (1978) 441 U.S. 130.) Thus, when the Sixth Amendment applies to a factual finding—at least in a non-capital case – although jurors need not be unanimous as to the finding, there must at a minimum be significant agreement among the jurors.

Of course, prior to June 2002, none of the High Court's law on the Sixth Amendment applied to the aggravating factors set forth in section 190.3. The reason was simple; prior to June 2002, the Sixth Amendment right to a jury trial simply did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (*Walton v. Arizona* (1988) 497 U.S. 639, 649.) In light of *Walton*, it is not surprising that the Court had on many occasions specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating evidence. (*See, e.g., People v. Taylor* (2002) 26 Cal.4th 1155, 1178; *People v. Hines* (1997) 15 Cal.4th 997, 1077; *People v.*

Ghent (1987) 43 Cal.3d 739, 773.) In *Ghent* for example, the Court held that such a requirement was unnecessary under "existing law." (43 Cal.3d at p.773.)

This "existing law" changed in *Ring v. Arizona* (2002) 122 S.Ct. 2428, when the United States Supreme Court overruled *Walton* and held that the Sixth Amendment right to a jury trial applied to "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at 2443. *Accord Id.* at 2445 [Scalia, J., concurring][noting that the Sixth Amendment right to a jury trial applies to "the existence of the fact that an aggravating factor exist[s]."].) In other words, absent a numerical requirement of agreement in connection with the aggravating factors set forth in section 190.3, subdivisions (b) and (c), both sections violate the Sixth Amendment as applied in *Ring*. Because on this record there is no way to tell if all twelve jurors would have agreed the state had proven Marchand Elliott was the person who committed each, or any, of the four crimes presented as aggravating factors, the error cannot be deemed harmless. (*See People v. Crawford* (1982) 131 Cal App.3d 591, 599 [instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all twelve jurors would necessarily have reached a unanimous agreement on the factual point

in question]; *People v. Dellinger* (1985) 163 Cal. App.3d 284, 302 [same].)

[72]

c. Section 190.3, Subdivision (b) Is Unconstitutional Because, Absent Instructions Requiring Jury Unanimity On The Prior Conviction, It Allows Jurors To Impose The Death Penalty Based On Unreliable Factual Findings Which Have Never Been Deliberated, Debated or Discussed.

The United States Supreme Court has taken cognizance of the fact that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida* (1977) 430 U.S. 349, 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Locket v. Ohio* (1978) 438 U.S. 586, 604.) For this reason, the Court has not hesitated to strike down penalty phase procedures that increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-330; *Green v. Georgia* (1979) 442 U.S. 95; *Locket v. Ohio, supra*, 438 U.S. at pp. 605-606; *Gardner v. Florida, supra*, 430 U.S. at pp 360-362.) The Court has made clear that defendants have a "legitimate interest in the character of the procedure which leads to the imposition of sentence even if

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[72] This assumes that a harmless error analysis can apply to *Ring* error. In *Ring*, the Supreme Court did not reach this question, but simply remanded the case. Even if this is not structural error, it is not harmless.

[they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida, supra,* 430 U.S. at p. 358.)

In this case the California legislature has provided that evidence of a defendant's prior felony convictions can be presented during the penalty phase. (Penal Code section 190.3, subdivision (b).) Before the factfinder may consider such evidence it must find that the State has proven the conviction beyond a reasonable doubt. As noted above, however, under current California law, members of the jury may individually rely on this (and any other) aggravating factor each of the jurors deems proper as long as the jurors all agree on the ultimate punishment. Because this procedure totally eliminates the deliberative function of the jury which guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement on enhanced reliability in capital cases. (*See Johnson v. Louisiana* (1972) 406 U.S. 356, 388-389 [Douglas, J., dissenting]; *Ballew v. Georgia* (1978) 435 U.S. 223; *Brown v. Louisiana* (1979) 447 U.S. 323.)

In *Johnson v. Louisiana, supra*, a Supreme Court plurality held that the version of the Sixth Amendment, applied to the states through the Fourteenth Amendment, did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of 9-3. (406 U.S. at pp. 362, 364.) In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous verdicts reduced deliberation between the

jurors and thereby substantially diminished the reliability of the jury's decision. This was so, he explained, because,

> nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required... even though the dissident jurors might, if given the chance, be able to convince the majority.

(406 U.S. at pp. 388-389.)

The Supreme Court has since fully embraced Justice Douglas's observations about the relationship between jury deliberation and reliable factfinding. In striking down a Georgia law allowing criminal convictions with a five person jury, the Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate factfinding..." (*Ballew v. Georgia, supra*, 435 U.S. at p.232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Court has recognized that "reliquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana, supra*, 447 U.S. at p. 333. *See also Allen v. United States* (1896) 164 U.S. 492, 501 ["The very object of the jury system is to secure uniformity by comparison of views, and by arguments among the jurors themselves."].)

These observations about the effect of jury unanimity on group deliberation and factfinding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for reliable

factfinding determinations is substantially greater. Second, and unlike the Louisiana schemes involved in *Johnson, Ballew* and *Brown*, the California scheme does not require even a majority of jurors to agree that prior criminal conduct occurred before relying on such conduct to impose a death penalty. As such, once deliberations begin, "no deliberation at all is required" on this factual issue. (*Johnson v. Louisiana, supra*, 406 U.S. at p. 388, Douglas, J., dissenting.) Given the constitutionally significant purpose served by jury deliberation on factual issues, and the enhanced need for reliability in capital sentencing, a procedure which allows individual jurors to impose death on the basis of factual findings which they have neither debated, deliberated or even discussed is unreliable and, therefore, constitutionally impermissible.

The U.S. Supreme Court's decisions in *U. S. v. Booker*, *supra*, *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous

finding; nor is such an instruction generally provided for under California's sentencing scheme. Thus, a new penalty phase is required. (*See Johnson v. Mississippi* (1988) 108 S.Ct. 1981, 1987 [harmless error analysis is inappropriate when trial court introduces evidence which violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing].

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

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.) This is particularly relevant in the present case, where the prosecution's closing argument dismissed the difficulties Mr. Elliott suffered in his childhood, minimizing any emotional disturbances and other mental health difficulties the defense presented in mitigation.

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

As a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were

relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

In order to clarify this matter, defense counsel requested an instruction that specifically delineated the aggravators from the mitigators. It read, in relevant part:

> The factors set forth in subparagraphs (a) and (b) above are the only factors that can be considered by you as aggravating factors. However, you may find one or more of these factors to be [a] mitigating factor[s]. You are not required to find that any of these factors are aggravating. It is up to you to determine whether these factors exist, and if they do exist, whether they are mitigating or aggravating.
> The factors set forth in subparagraphs [(c) through (l)] below can only be considered by you to be mitigating factors. The absence of a mitigating factor is not, and cannot be considered by you as, an aggravating factor.

(3 CT 854.) This instruction was denied by the trial court. (Id.)

Without the instruction requested by defense counsel, the jury was also left free to aggravate a sentence upon the basis of an *affirmative* answer to one of these questions, and thus, to convert mitigating evidence

(for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider "whether or not" certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft*, *supra*, 23 Cal.4th at pp. 1078-1079, 99 Cal.Rptr.2d 1, 5 P.3d 68; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887, 47 Cal.Rptr.2d 219, 905 P.2d 1305.) Indeed, "*no reasonable juror could be misled by the language of section 190.3 concerning the relative aggravating or mitigating nature of the various factors.*" (*People v. Arias, supra,* 13 Cal.4th at p. 188, 51 Cal.Rptr.2d 770, 913 P.2d 980.)

(*People v. Morrison* (2004) 34 Cal.4th 698, 730; emphasis added.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 32 Cal.4th at pp. 727-729.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors

have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424.)[73]

The very real possibility that appellant's jury aggravated his sentence upon the basis of nonstatutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest – the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775) – and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].

The likelihood that the jury in appellant's case would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's misleading and erroneous statements during penalty phase closing argument. Specifically, the

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[73] There is one case now before this Court in which the record demonstrates that a juror gave substantial weight to a factor that can only be mitigating in order to *aggravate* the sentence. See *People v. Cruz*, No. S042224, Appellant's Supplemental Brief.

prosecution structured her entire argument around the framework that evidence fit squarely into one of three categories: 1) aggravation, 2) mitigation, or 3) "so what." (13 RT 2680.) By repeatedly mischaracterizing the mitigating evidence by placing it into the "so what" category, the prosecution further complicated the jury's already complex task of determining, under the confusing instructions, the existence of mitigation and the weight it should have been given.

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Whether a capital

sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. The Instructions Defining The Scope of The Jury's Sentencing Discretion and The Nature of Its Deliberative Process Violated Appellant's Constitutional Rights.

The trial court's concluding penalty-phase instruction in this case was an adapted version of CALJIC No. 8.88. (4 CT 928.) That instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed because it did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects. This flawed instruction violated appellant's fundamental rights to due process (U.S. Const., 14th Amend.), a fair trial by jury (U.S. Const., 6th and 14th Amends.), and a reliable penalty determination (U.S. Const., 6th, 8th and 14th Amends.) and requires reversal of his sentence. (*See, e.g., Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

1. The Instruction Caused The Jury's Penalty Choice To Turn On an Impermissibly Vague and Ambiguous Standard Which Did Not Provide Adequate Guidance and Direction

Pursuant to CALJIC No. 8.88, the question of whether to impose a death sentence hinged on whether the jurors were "persuaded that the aggravating circumstances [we]re so substantial in comparison with the

mitigating circumstances that it warrant[ed] death instead of life without parole." (4 CT 928.) However, the words "so substantial" provided the jurors with no guidance as to "what they ha[d] to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) Using that phrase violated the federal constitution because it created a vague, directionless, and unquantifiable standard, inviting the sentencer to impose death through the exercise of "the kind of open-ended discretion held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (*See Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.) [74]

[74] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (*See Gregg v. Georgia* (1976) 428 U.S. 153, 202.)

Appellant acknowledges that this Court has opined that, in this context, "the differences between [*Arnold* and California capital cases] are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. Appellant submits that the differences between those cases do not undercut the Georgia Supreme Court's reasoning.

This case has at least one quality in common with *Arnold* and *Breaux*: it featured penalty-phase instructions which did not "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Arnold*, *supra*, 224 S.E.2d at p. at p. 391.) The instant instruction, like the one in *Breaux*, uses the term "substantial" to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty.

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those identified in *Arnold*, because No. 8.88 governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance. Nothing about CALJIC No. 8.88 "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) Because the

instruction rendered the penalty determination unreliable, the death judgment must be reversed.

2. *The Instructions Failed To Inform The Jurors That The Central Determination Is Whether The Death Penalty Is The Appropriate Punishment, Not Simply An Authorized One.*

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Brown* (1985) 40 Cal.3d 512, 541; *see also Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307.) However, CALJIC No. 8.88 does not make that standard of appropriateness clear. Telling the jurors they may return a judgment of death if the aggravating evidence "warrants" death does not inform them that the central inquiry is whether death is the appropriate penalty.

A rational juror could find in a particular case that death was warranted but not appropriate, because "warranted" has a considerably broader meaning than "appropriate." Merriam-Webster's Collegiate Dictionary (10th ed. 2001) defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found that such a sentence was permitted, not that it was "especially suitable," fit,

and proper, i.e., appropriate.[75] The error of failing to articulate burdens of proof or even persuasion (see Penalty Phase Burden of Proof Argument XIX, *supra*) and the one complained of here thus compound each other. If death is "warranted" in the sense given above, and the jury does not understand that the burden of persuasion is on the prosecution, it can miss the need to decide whether death is appropriate.

Whether death is "warranted" is decided when the jury finds the existence of a special circumstance authorizing the death penalty. (*See People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, even if the jury makes the preliminary determination that death is warranted or authorized it may still decide that penalty is not appropriate.

Further, the instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to a "justified and appropriate" penalty. (4 CT 928.) That reference did not tell the jurors they could only return a death verdict if it was appropriate. At best, it contradicted the final statement of the jury's task, leaving this Court unable

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[75] This Court has many times cautioned the CALJIC Committee against lifting language from appellate opinions for use in jury instructions. (*See People v. Colantuono* (1994) 7 Cal. 4th 206, 222, fn. 13 and cases cited.) The language challenged here is, however, identical to that used in *People v. Brown*, *supra*, 40 Cal.3d 512, in emphasizing that the evidence has to *justify* a death sentence, in a setting where the other sentencing option already reflects the aggravated nature of special-circumstances murder. (*Id.* at p. 541, fn. 13.)

to determine which rule the jury applied. (*Francis v. Franklin* (1985) 471 U.S. 307, 322–325 & fn. 8.)

This crucial sentencing instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.) and denies due process. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) The judgment must therefore be reversed.

3. The Instructions Failed To Inform The Jurors That They Were Required To Impose Life Without The Possibility of Parole If They Found That Mitigation Outweighed Aggravation.

Section 190.3 directs that after the jury considers the aggravating and mitigating factors, it "shall impose" a sentence of imprisonment for life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Cal. Pen. Code §190.3.) The United States Supreme Court has held that this requirement is consistent with the individualized consideration of the defendant's culpability required by the Eighth Amendment. (*See Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language is not included in CALJIC No. 8.88, which tells the jury that death may be imposed if the aggravating circumstances are "so substantial" in comparison to the mitigating circumstances that

death is warranted. Use of the phrase "so substantial" does not properly convey the "greater than" test mandated by section 190.3. CALJIC No. 8.88 would permit the imposition of a death penalty whenever aggravating circumstances were "of substance" or "considerable," even if outweighed by the mitigating circumstances. Because it fails to conform to the specific mandate of section 190.3, CALJIC No. 8.88 violates the Fourteenth Amendment. (*See Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 (emphasis original).)

This Court has approved the language of CALJIC No. 8.88 on the basis that since it states that a death verdict requires that aggravation outweigh mitigation, "it [i]s unnecessary to instruct the jury of the converse." (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant respectfully asserts that the Court's conclusion conflicts with numerous opinions disapproving instructions emphasizing the prosecution's theory of a case while minimizing or ignoring the defense theory. (*See e.g., People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *see also Reagan v. United States* (1895) 157 U.S. 301, 310.)

The law does not rely on jurors to infer one rule from the statement of its opposite, and it recognizes the bias in doing so. (*See People v. Moore*, *supra*, 43 Cal.2d at pp. 526–527.) Thus, even assuming that the instruction at issue here was a correct statement of law, it stated only the conditions under which a death verdict could be returned, and not those under which a verdict of life was required.

It is well settled that in criminal trials the jury must be instructed on any defense theory supported by substantial evidence. (*See People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) Denying that fundamental principle in appellant's case deprived him of due process. (*See Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, CALJIC No. 8.88 is not saved by the fact that it is a sentencing instruction, as opposed to one guiding the determination of guilt or innocence, since reliance on such a distinction would violate equal protection. (*See* U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, slighting a defense theory in instructions not only denies due process, but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the case. (*See Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir.

1978) 573 F.2d 1027, 1028.) Reversal of appellant's death sentence is required.

4. Conclusion

As set forth above, CALJIC No. 8.88, failed to comply with the requirements of the due process clause of the Fourteenth Amendment, and the cruel and unusual punishment clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

E. The California Sentencing Scheme Violates The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States

Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protection guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[76] as in *Snow*,[77] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.

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

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

(See also, *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.[78]

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

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, *supra*) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-

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[78] This is particularly troubling given that at jury selection, the venire had been specifically assured that the execution of innocent persons is not their concern because California had *additional* safeguards that other States did not have. [See Argument V, *supra*.]

capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, *supra.*) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[79]

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra.*)

F. Even If The Absence Of The Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate To Ensure Reliable Capital Sentencing, Denying Those Safeguards To Capital Defendants Violates Equal Protection.

As noted previously, the United States Supreme Court has repeatedly said that heightened reliability is required in capital cases, and that courts must be vigilant in ensuring procedural fairness and accuracy in fact-finding. (*See, e.g., Monge v. California* (1998) 524 U.S. 721, 731-

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

732.) However, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to ones charged with noncapital crimes, in violation of the constitutional guarantee of equal protection.

"[P]ersonal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) In the case of interests identified as "fundamental," courts "subject[] the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing both that it is justified by a compelling purpose, and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*, 17 Cal.3d at p. 251; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.) The State cannot meet that burden here, because in capital cases the state and federal equal protection guarantees apply with greater force, and the scrutiny of the challenged classification is stricter, because the interest at stake is life itself.

The denial of the safeguards of the requirement of written jury findings, unanimous agreement on aggravating factors, and the disparate treatment of capital defendants as set forth in this argument, violated appellant's right to equal protection. The procedural protections outlined in these arguments, but denied capital defendants, are especially important in

insuring reliable and accurate fact-finding in capital trials. (*Monge v. California, supra*, 524 U.S. at pp. 731-732.)

G. The Penalty Jury Should Also Have Been Instructed on the Presumption of Life.

In noncapital cases, and at the guilt phase of a capital trial, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (*See Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence.

Mr. Elliott submits that the trial court's failure to instruct the jury that the law favors life, and presumes life imprisonment without parole to be the appropriate sentence, violated his rights to due process of law (U.S. Const., 14th Amend.; Cal. Const. art. I, §§ 7 & 15), to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th and 14th Amends.; Cal. Const. art. I, § 17), and to the equal protection of the laws (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.)

This Court has held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit" provided the state properly limits death

eligibility. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) However, as the other subsections of this argument, in conjunction with the other arguments made in this brief, demonstrate, California's death penalty law is remarkably deficient in the protections required for the consistent and reliable imposition of capital punishment, and a compensatory presumption of life instruction is thus constitutionally required.

H. Conclusion

For all the reasons set forth above, appellant's death sentence must be reversed.

XXII. DUE TO THE EXTRAORDINARY DELAY IN THIS CASE, THE PENOLOGIAL JUSTIFICATION FOR EXECUTING MR. ELLIOTT HAS BEEN EXTINGUISHED, WHICH MAKES CAPITAL PUNISHMENT AN INHERENTLY EXCESSIVE PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

A. Factual Background

Mr. Elliott was sentenced to death on June 3, 1992. Almost fifteen years have elapsed between the time of his conviction and the ***start*** of his appeals process. It is reasonable to anticipate that Mr. Elliott's appeal process will exceed twenty years. Due to the inordinate delay from the time of his sentence to the end of the review process, if an execution is ordered, it will violate the Eighth Amendment. The extraordinary delay has stripped Mr. Elliott's execution from its original penological justification, which as applied to Mr. Elliott, is an inherently excessive punishment that no longer serves any legitimate purpose. Because the inordinate delay in this case has caused and will continue to cause Mr. Elliott extreme psychological and physical stress while he is on death row, the facts unique to the execution of Mr. Elliott's sentence constitute cruel and unusual punishment, which warrant reversal. Reversal therefore is required.

B. In Violation of the Eighth Amendment, The State of California Has Uniquely Harmed Mr. Elliott By Causing Extraordinary Psychological Harm Arising From The 14-Year Delay Between His Sentence and The Filing Of His Appeal.

"Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." (*Roper v. Simmons* (2005) 543 U.S. 551, 568 (hereinafter "*Roper*").) The Eighth Amendment prohibits the imposition of the death penalty to "certain classes of offenders, such as juveniles . . . , the insane, and the mentally retarded, no matter how heinous the crime." *Id.*

The Eighth Amendment's prohibition against cruel and unusual punishment applies with equal force to Mr. Elliott who is unique among his peers. Mr. Elliott has waited nearly fifteen years for his opening brief to be filed, and during the entire time, has been confined to death row. It is most likely that Mr. Elliott's review process will exceed twenty years. As established by *Lackey v. Texas* (1995) 514 U.S. 1045, 1045–46, "having a death sentence hanging over one's head subjects one to extraordinary psychological duress, as well as the extreme physical and social restrictions that inhere in life on death row, and that it constitutes cruel and unusual punishment to impose such conditions of stress upon a death row inmate for a period of decades." (*Ceja v. Stewart* (9th Cir. 1998) 134 F.3d 1368, 1376 (Fletcher, J., dissenting).)

It is no answer to say that because the existing 14-plus-year delay to start the appeals process (and likely 20-year delay to complete the review process) has furthered review of his case, Mr. Elliott should excuse the otherwise crushing psychological harm arising from an inordinate delay. (*Cf. People v. (Carmen) Ward* (2005) 36 Cal.4th 186, 222 ("delay in the automatic appeal process is not a basis for concluding that either the death penalty itself, or the process leading to its execution, is cruel and unusual punishment").)

Unlike the factual record set forth in *Ward*, the State has uniquely and singularly harmed Mr. Elliott. This delay is not typical or routine. Indeed, in *Ward*, the claimed inordinate delay was twelve years from the sentence to the supreme decision. By contrast, Mr. Elliott has waited nearly fifteen years before his process has even begun. Moreover, the delay in this case has been attributed to the exceptionally disorganized record. (See Argument I, *supra.*)

It is axiomatic that once a party or the State assumes a duty, any subsequent negligence or dereliction of duty is a cognizable harm. (*See, e.g., Johnson v. Duffy* (9th Cir. 1978) 588 F.2d 740, 743 (in the Section 1983 context, "a [state officer] 'subjects' another to the deprivation of a constitutional right . . . if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made."))

With respect to Mr. Elliott, the State of California assumed the duty of keeping a record, preparing a record, and providing Mr. Elliott with a right to appeal and an appointed attorney to assist in his appellate defense. The State of California committed acts and omissions that prevented Mr. Elliott's appeal from being presented in a timely manner. Of greatest import, Mr. Elliott's record, although certified, is "a mess." It is incomplete, disorganized, and does not have all motions and evidence that were submitted at his trial. It is lacking some of the most important motions and hearing transcripts necessary for mounting a proper appellate defense. The State's inability to produce an organized, complete record directly contributed to a record correction process that lasted over seven years. The record correction process, undertaken by Mr. Elliott's prior appellate counsel, produced a still-inadequate record for appellate purposes. Both of Mr. Elliott's appellate attorneys cited the disorganized record as the cause of not producing a timely appeal.

Unlike the other cases that addressed this issue, Mr. Elliott has been uniquely harmed by the inordinate delay in even getting his case to the courthouse. Because the near fifteen-year delay does not arise from the routine and inherent delays in the appeals process, because the State is in large part responsible for these delays, and because Mr. Elliott will likely experience a number of additional years before there is a final decision, the uncertainty of his potential execution has caused extraordinary duress to

Mr. Elliott. As applied to Mr. Elliott, capital punishment is no longer a proportionate sentence. Capital punishment, when the appeal process begins after delay nearing fifteen years and is expected to last more than twenty years, is cruel and unusual punishment. Mr. Elliott's conviction must therefore be reversed.

C. The Extraordinary Delay Between The Date Of Mr. Elliott's Sentence And Any Resulting Execution Would Lack Penological Interests And Therefore Violate the Eighth Amendment.

The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." (*Gregg v. Georgia* (1976) 428 U.S. 153, 183.) When a proposed execution "ceases realistically to further these purposes . . ., its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes . . . [and] would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." (*Furman v. Georgia* (1972) 408 U.S. 238, 312–13 (White, J., concurring).)

As applied to Mr. Elliott, the ability of the State of California "to further the ends of retribution and deterrence has been drastically diminished as a result of the extraordinary period of time that has elapsed since the date of [Mr. Elliott's] conviction." (*Ceja, supra,* 134 F.3d at 1373 (Fletcher, J., dissenting).)

"For capital punishment to deter anybody it . . . must . . . follow swiftly upon completion of the offense." (*Furman,* 408 U.S. at 354 n.124 (Marshall, J., concurring).) The potential execution of Mr. Elliott that could occur more than 20 years from the date of his sentence therefore defeats the goal of deterrence.

The Supreme Court has recognized that an execution has the potential to provide moral and emotional closure to a community. (*See Gregg,* 428 U.S. at 182–85.) But retribution is a concept that has a limited application in capital punishment and "allowing the search for retribution to guide the State's hand in deciding where the axe shall fall is both distasteful and dangerous." (*Ceja, supra,* 134 F.3d at 1374 (citing *Gregg*, 428 U.S. at 182–85.))

"It is arguable that neither [retribution nor deterrence] retains any force for prisoners who have spent some 17 years under a sentence of death." (*Lackey,* 514 U.S. at 1045.) The extraordinary delay diminishes these goals because the justice system "simply cannot uncritically assume that the interests that legitimized that initial decision will continue to be vital and strong, no matter how many decades elapse before [a defendant's] execution is proposed to be carried out." (*Ceja, supra*, 134 F.3d at 1374.)

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Because the inordinate delay has extinguished the deterrence and retribution that may have been affected by an expeditious execution, the

passage of time as applied to Mr. Elliott takes his sentence outside of proportionate and appropriate punishments. Because his sentence no longer serves its penological purposes, it has lost its constitutional legitimacy and his sentence must be commuted to life. Moreover, the unique circumstances of the potential for twenty years of appeals in this case render Mr. Elliott's death sentence cruel and unusual punishment, and warrants resentencing to life without parole.

XXIII. MR. ELLIOTT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW AND THE EIGHTH AMENDMENT AS INFORMED BY INTERNATIONAL STANDARDS.

The United States is one of the few nations which regularly uses the death penalty as a form of punishment. (*See Ring v. Arizona* (2002) 536 U.S. 584, 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.) As the Canadian Supreme Court recently noted, the death penalty has been essentially abolished in 108 countries, including all the major democracies except the United States, India and Japan. (*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.)

The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Imposing a death sentence on Mr. Elliott after a trial that was unfair because of the reasons set forth above also violates international law. Because the international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment's determination of evolving standards of decency, Mr. Elliott raises this claim under that amendment as well. (*See Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J).)

A. International Law

1. Cruel, Inhuman, or Degrading Punishment

Article VII of the International Covenant of Civil and Political Rights (ICCPR) prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1992, and applies to the states under the Supremacy Clause of the federal Constitution. (U.S. Const. art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR as "the supreme law of the land. . . ." (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; *but see Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267–268.)

Mr. Elliott's death sentence violates the ICCPR. Because of the improprieties in the capital sentencing process challenged in this appeal, the imposition of the death penalty on Mr. Elliott would constitute "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. While this Court has previously rejected international law claims directed at the death penalty in California (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511), there is a growing recognition that international human rights norms in

general, and the ICCPR in particular, should apply to the United States (*see United States v. Duarte-Acero*, *supra*, 208 F.3d at p.1284; *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).

2. Over-Use of Capital Punishment

Assuming arguendo that capital punishment itself is not contrary to international norms of human decency, using it as regular punishment for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, certainly is. The International Covenant on Civil and Political Rights, article 6(2), states: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes. . . ." The Human Rights Committee established under this treaty states that this section must be "read restrictively to mean that the death penalty should be a quite exceptional measure." (General comment, International Covenant on Civil and Political Rights. Article 6.) Since the law of nations considers it improper to use capital punishment as regular punishment, it is unconstitutional in this country because international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112.)

3. General Right to Fair Hearing

In addition, under international law, everyone is entitled to a fair hearing. This right encompasses all the procedural and other specific

guarantees of a fair trial laid down in international standards, but is wider in scope. It includes compliance with national procedures, provided they are consistent with international standards. Despite fulfilling all national and international procedural guarantees, however, a trial may still not meet the criterion of a fair hearing. (Universal Declaration of Human Rights, art. 10; of the ICCPR, art. 14(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(1); American Declaration of the Rights and Duties of Man, art. XXVI; American Convention on Human Rights, art. 8.)

In other words, the right to a fair trial is broader than the sum of the individual guarantees, and it depends on the entire conduct of the trial. (*See* Human Rights Committee General Comment 13, para. 5; Advisory Opinion of the Inter-American Court of Human Rights, OC-11/90, Exceptions to the Exhaustion of Domestic Remedies, 10 August 1990, Annual Report of the Inter-American Court, 1990, OAS/Ser L./V/III.23 doc.12, rev. 1991, at 44, para. 24.) The Inter-American Court on Human Rights has found that states may impose the death penalty only if they rigorously adhere to the fair trial rights set forth in the ICCPR. (OC-16/99, Inter-Am. Ct. H.R. (October 1, 1999).) Similarly, the Human Rights Committee has held that when a state violates an individual's due process rights under the ICCPR, it may not carry out his execution. (*See, e.g.*, *Johnson v. Jamaica*, No. 588/1994 (1996), H.R. Comm. para. 8.9; *Reid v.*

Jamaica, No. 250/1987, H.R. Comm. para. 11.5; Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, para. 12.2, reprinted in 11 Hum. Rts. L.J. 321 (1990).)

Given the absence of a fair trial in Mr. Elliott's case, as shown in an alarming number of arguments in this brief, executing the death judgment would violate Mr. Elliott's general right to a fair trial under international law.

Mr. Elliott asks the Court to reconsider its prior rejection of international law claims concerning the death penalty, and to find that his death sentence violates international law.

B. The Eighth Amendment, as Affected by International Standards

As noted above, the abolition of the death penalty, or its limitation to use as a punishment for exceptional crimes such as treason, is uniform in the nations of Western Europe. (*See, e.g., Stanford v. Kentucky*, *supra*, 492 U.S. at p. 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn).) Indeed, *all* the nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. ("Abolitionist and Retentionist Countries," http://www.deathpenaltyinfo.org/article.php?scid=30&did=140. See also Amnesty International, "Facts and Figures on the Death Penalty" (as of April 2007) at <http://www.amnesty.org>)

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment, because our Founding Fathers looked to the nations of Western Europe as models on the laws of civilized nations, and as sources for the meaning of terms in the Constitution. (*Miller v. United States* (1870) 78 U.S. 268, 315 (dis. opn. of Field, J., quoting 1 Kent's Commentaries 1); *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.)

"Cruel and unusual punishment" as defined in the Constitution is not limited to acts which violate the standards of decency existing in the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) Thus, if the standards of decency as perceived by the civilized nations of Europe have evolved, what the Eighth Amendment requires has evolved with them. The Eighth Amendment thus prohibits forms of punishment that are not recognized by several of our states and the nations of Europe, or that are used by only a handful of countries around the world – including totalitarian regimes with "standards of decency" antithetical to ours. (*See Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21 [basing determination that executing mentally retarded persons violates Eighth Amendment in

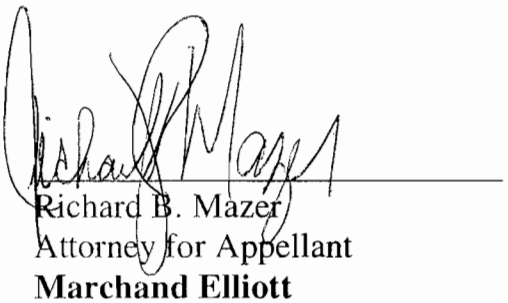
part on the views of "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31.)

No other nation in the Western world still uses or accepts the death penalty, and the Eighth Amendment does not permit our nation to lag so far behind. (*See Hilton v. Guyot*, *supra*, 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to the law of nations principle that citizens of warring nations are enemies].) California's use of death as a regular punishment violates the Eighth and Fourteenth Amendments, and Mr. Elliott's death sentence should therefore be set aside.

CONCLUSION

For all the foregoing reasons, Mr. Elliott's guilt and penalty verdicts must be reversed.

Dated: April 25, 2007.



Richard B. Mazer
Attorney for Appellant
Marchand Elliott

APPENDIX 1

Appendix 1

List Of The 10 "Yes/No" Questions Contained In The "Attitudes Toward Capital Punishment" Section Of The Juror Questionnaire Showing Identical Answers Given By Patricia Jones To Those Given By Actual Jurors And Alternates

Question	Patricia Jones' Answer	Answer by Juror or Alternate
101: "No matter what evidence is presented, would you refuse to vote "guilty" as to murder or refuse to find the special circumstances true, in order to keep the case from proceeding to the penalty trial, where the task would be to decide between life in prison without the possibility of parole?"	Checked "No" (CT 5:1264)	Checked "No": Juror Boardman (CT 13:3791) Juror Cormack (CT 13:3623) Juror Durant (CT 9:2322) Juror Lara (CT 12:3483) Juror Gollez (CT 13:3539) Juror Noyer (CT 6:1792) Juror McCracken (CT 4:1068) Juror McGee (CT 10:2671) Juror Morrissy (CT 10:2643) Juror Saiza (CT 7:2014) Juror Salazar (CT 6:1765) Alternate Garza (CT 8:2238) Alternate Marin (CT 5:1320) Alternate Reinke (CT 7:1932) Alternate Rubin (Supp. CT 7:1904)
102: "No matter what evidence is presented, would you always vote "guilty" as to murder and true as to special circumstances in order to assure that the case proceeds to the penalty trial, where the task would be to decide between life in prison without the possibility of parole?"	Checked "No" (CT 5:1264)	Checked "No": Juror Boardman (CT 13:3791) Juror Cormack (CT 13:3623) Juror Durant (CT 9:2322) Juror Lara (CT 12:3483) Juror Gollez (CT 13:3539) Juror Noyer (CT 6:1792) Juror McCracken (CT 4:1068) Juror McGee (CT 10:2671) Juror Morrissy (CT 10:2643) Juror Saiza (CT 7:2014) Juror Salazar (CT 6:1765) Alternate Garza (CT 8:2238) Alternate Marin (CT 5:1320) Alternate Reinke (CT 7:1932) Alternate Rubin (Supp. CT 7:1904)
103: "If you and the eleven other jurors found the defendant guilty of murder and found	Checked "No"	Checked "No":

special circumstances to be true, would you always vote against death, no matter what evidence might be presented or argument made during the penalty trial?"	(CT 5:1264)	Juror Cormack (CT 13:3623) Juror Durant (CT 9:2322) Juror Lara (CT 12:3483) Juror Gollez (CT 13:3539) Juror Noyer (CT 6:1792) Juror McCracken (CT 4:1068) Juror McGee (CT 10:2671) Juror Morrissy (CT 10:2643) Juror Saiza (CT 7:2015) Juror Salazar (CT 6:1765) Alternate Garza (CT 8:2238) Alternate Marin (CT 5:1320) Alternate Reinke (CT 7:1932) Alternate Rubin (Supp. CT 7:1904)
104: "If you and the eleven other jurors found the defendant guilty of murder and found a special circumstance to be true, would you always vote for death, no matter what evidence might be presented or argument made during the penalty trial?"	Checked "No" (CT 5:1265)	Checked "No": Juror Cormack (CT 13:3624) Juror Durant (CT 9:2323) Juror Lara (CT 12:3484) Juror Gollez (CT 13:3540) Juror Noyer (CT 6:1793) Juror McCracken (CT 4: 1069) Juror McGee (CT 10:2672) Juror Morrissy (CT 10:2644) Juror Saiza (CT 7:2016) Juror Salazar (CT 6:1766) Alternate Garza (CT 8:2239) Alternate Marin (CT 5:1321) Alternate Reinke (CT 7:1933) Alternate Rubin (Supp. CT 7:1905)
106: "Are there any religious reasons which would cause you not to vote for the death penalty?"	Checked "No" (CT 5:1265)	Checked "No": Juror Boardman (CT 13:3792) Juror Cormack (CT 13:3624) Juror Durant (CT 9:2323) Juror Lara (CT 12:3484) Juror Gollez (CT 13:3540) Juror Noyer (CT 6:1793) Juror McCracken (CT 4: 1069) Juror McGee (CT 10:2672) Juror Morrissy (CT 10:2644) Juror Saiza (CT 7:2015) Juror Salazar (CT 6:1766) Alternate Garza (CT 8: 2239) Alternate Marin (CT 5:1321) Alternate Reinke (CT 7:1933) Alternate Rubin (Supp. CT 7:1905)
107: "Are there any religious reasons which	Checked	Checked "No":

would cause you to vote for the death penalty?"	"No" (CT 5:1265)	Juror Boardman (CT 13:3792) Juror Cormack (CT 13:3624) Juror Durant (CT 9:2323) Juror Lara (CT 12:3484) Juror Gollez (CT 13:3540) Juror Noyer (CT 6:1793) Juror McCracken (CT 4:1069) Juror McGee (CT 10:2672) Juror Morrissy (CT 10:2644) Juror Saiza (CT 7:2015) Juror Salazar (CT 6:1766) Alternate Garza (CT 8:2239) Alternate Marin (CT 5:1321) Alternate Reinke (CT 7:1933) Alternate Rubin (Supp. CT 7:1905)
109: "Regardless of aggravating or mitigating factors, do you feel the death penalty should always be imposed upon everyone who kills another human being?"	Checked "No" (CT 5:1265)	Checked "No" Checked "No": Juror Boardman (CT 13:3792) Juror Cormack (CT 13:3624) Juror Durant (CT 9:2323) Juror Lara (CT 12:3484) Juror Gollez (CT 13:3540) Juror Noyer (CT 6:1793) Juror McCracken (CT 4:1069) Juror McGee (CT 10:2672) Juror Morrissy (CT 10:2644)"Each case would have to be reviewed." (CT 10:2645) Juror Saiza (CT 7:2015) Juror Salazar (Supp. CT 6:1625) "It would determine the way the crime was committed" (Supp. CT 6:1626) Alternate Garza (CT 8:2239) Alternate Marin (CT 5:1321) Alternate Reinke (CT 7:1933) Alternate Rubin (Supp. CT 7:1905) "It depends on the circumstances" (CT 7:1906)
115: "Do you feel that life without the possibility of parole is a severe punishment? Please explain:"	Checked "yes" "They will be locked up forever with the thought of	Checked "yes" Juror Boardman (CT 13:3793) "Never being set free." (CT 13:3793) Juror Cormack (CT 13:3625) "That is not an easy life" (CT

	what they did." (CT 5:1266)	13:3625) Juror Durant (CT 9:2324)"It should be appropriate for the crime." (CT 9:2324) Juror Lara (CT 12:3485) "Depends on evidence" (CT 12:3485) Juror Gollez (CT 13:3541) "living the rest of one's life in jail is a very severe punishment" (CT 13:3541) Juror Noyer (CT 6:1794) "Takes...[illegible]" (CT 6:1794) Juror McCracken (CT 4:1070) "If the crime...[illegible]" (CT 4:1070] Juror McGee (CT 10:2673) "Life is actually over for them" (CT 10:2673) Juror Morrissy (CT 10:2645) "But ok if warranted" (CT 10:2645) Juror Saiza (CT 7:2016) Juror Salazar (CT 6:1767) "Freedom is lost." (CT 6:1767) Alternate Garza (CT 8:2239)"This person will never be free to live on a free country." (CT 8:2239) Alternate Marin (CT 5:1322) "For some cases. Depends on the case." (CT 5:1322) Alternate Reinke (CT 7:1934) Alternate Rubin (Supp. CT 7:1906) "Knowing you will never have freedom again is an awful thought" (Supp. CT 7:1906)
116: "Do you feel that death in the gas chamber is a severe punishment? Please explain"	Checked "yes" with no explanation (CT 5:1366-67)	Checked "yes" with no explanation: Juror Saiza (CT 7:2016-17) Alternate Marin (CT 5:1322-23) Alternate Reinke (CT 7:1934-35)
119: ("[S]hould you be selected to sit as a juror on this case, do you feel you are able and willing to completely put aside any thought or concern relating to penalty issues while you	Left Blank (CT 5:1267.)	Left Blank Juror Noyer (CT 6:1795)

deliberate guilt or innocence on these charges? Yes ___ No___"		

APPENDIX 2

Appendix 2

List of Twelve Questions Calling for Substantive Responses Contained in the "Attitudes Toward Capital Punishment" Section of the Juror Questionnaire Showing Substantially Similar Answers Given by Patricia Jones to Those Given by Selected Jurors and Alternates

Question	Patricia Jones' Answer	Answer by Juror or Alternate
99: "What is your opinion regarding the death penalty?"	"I feel a little uneasy with the death penalty, never really gave it a deep thought." (CT 5:1263)	Juror Saiza: "I don't know if I could sentence someone to the death penalty." (Supp. CT 14:3748) Juror Gollez "I don't think it serves its purpose it is no punishment for the criminal but for the people he leaves behind." (CT 13:3538-39)
100: "What is your opinion regarding life in prison without the possibility of parole?"	"A little more comfortable with that . . . As it not taking a life." (CT 5:1264)	Juror Durant: "I support it in some circumstances when the crime wasn't of a particularly heinous nature. This is a serious penalty to consider." (CT 9:2322) Juror Saiza: "I am in favor of this, I believe this would be a lesser sentence than the death penalty." (CT 7:2014) Alternate Marin: "Depending on the case, life imprisonment might be the wiser choice than the death penalty." (CT 5:1320) Juror McCracken: "If this person killed someone but has a chance of rehabilitation in prison and change their behavior." (CT

		4:1068)
105: "What do you think of the Biblical saying 'an eye for an eye?"	"It's not always true in all cases." (CT 5:1265)	Juror Durant: "I don't believe in it and feel it is an unproductive policy. There seems to be no other good coming from this than that of satisfying our pangs of vengeance." (Supp. CT 2:422) Juror McGee "I think that was true in Biblical times, but not always for today." (CT 10:2672) Juror Cormack "I don't agree with it." (CT 13:3624) Juror Salazar "Does not apply to everything." (CT 6:1766)
108: "If you have spiritual and/or religious beliefs, please state any advisement and /or written quotes or passages which you have seen or heard that you feel may pertain to the issue of the death penalty v. life in prison without the possibility of parole:"	"---" (CT 5:1265)	Juror Boardman [blank] (CT 13:3792) Juror Cormack [blank] (CT 13:3624) Juror Lara [blank] (CT 12:3484) Juror Gollez "None" (CT 13:3540) Juror Noyer None (CT 6:1793) Juror McCracken "None" (CT 4:1069) Juror McGee [blank] (CT 10:2672) Juror Morrissey [blank] (CT 10:2644) Juror Saiza [Blank] (CT 7:2015) Juror Salazar "---" (CT 6:1766) Alternate Marin

		"None" (CT 5:1321) Alternate Reinke [blank] (CT 7:1933) Alternate Rubin [blank] (Supp. CT 7:1905) Compare: Alternate Garza: "Tho[u] shall not kill the Ten Commandments" (CT 8:2239)
110: "Overall, in considering general issues of punishment, which do you think is worse for a defendant: Death [or] Life in prison without the possibility of parole. Please explain."	Chose "Life in prison without the possibility of parole" and explained, "With death it[']s over. Life in prison is like a living death." (CT 5:1266)	Juror Salazar: Chose LWOP and explained, "Nobody likes being lock[ed] up until you die—freedom gone." (CT 6:1767) Juror McGee: Chose LWOP and explained, "Knowing you have lost all—never to regain a full life" (CT 10:2673) Juror Gollez: Chose LWOP and explained, "A person would hurt more by knowing he/she would never be free" (CT 13:3541) Juror Boardman: Chose LWOP and explained, "Having to live forever with your crime." (CT 13:3793)
111: "When a jury votes that a person be sentenced to life in prison without the possibility of parole, what does that mean to you?"	"They will never be free." (CT 5:1266)	Juror Alvarez "It means life imprisonment without the possibility of parole, it[']s worst [sic] than death." (CT 12:3401) Juror Boardman "Must stay in prison, without ever being set free." (CT 13:3793) Juror Cormack "A person should spend the rest of his natural life in prison" (CT 13:3625)

		Juror Durant That he will be in jail for the rest of his life unless the [illegible] decides otherwise." (CT 9:2324) Juror Lara "Being locked up for the rest of your life" (CT 12:3485) Juror McCracken "That person will never get out of prison. That person will be there for the rest of their life." (CT 4:1070) Juror McGee "That they will spend the rest of their life in jail." (CT 10:2673) Juror Saiza "Will no longer have the freedom to live their life as a free person" (Supp. CT 14:3751) Juror Salazar "Freedom is lost" (CT 6:1767) Alternate Garza "He or she will spend the rest of his or her life in prison.' (CT 8:2240) Alternate Marin "That the jury recommends that they (defendant) will spend the rest of their year[s] imprisoned." (CT 5:1322) Alternate Reinke "The live the rest of their lives behind bars." (CT 7:1934) Alternate Rubin "That he spend the rest of his life in prison" (Supp. CT 1906)
112: "When a jury votes that a person be sentenced to death in the gas chamber, what does that mean to you?"	"It was too quick and easy." (CT 5:1266)	Juror Gollez "That his life will be taken and he will be deprived of

		suffering behind jail" (CT 13:3541) Juror Cormack blank (CT 13:3625)
113: "When a judge sentences a defendant to life in prison without possibility of parole, what does that mean to you?"	"They will never be let out of jail." (CT 5:1266)	Juror Boardman "Never getting out of prison." (CT 13:3793) Juror Cormack "He will be in prison the rest of his life." (CT 13:3625) Juror McGee "That they will be in jail the rest of their life." (CT 10:2673) Juror Gollez "He-she will spend the rest of his life in jail." (CT 13:3541) Alternate Garza "Spend the rest of his or her life in prison." (CT 8:2240) Alternate Reinke "The person spends the rest of their life in prison." (CT 7:1934) Alternate Marin "The defendant will spend the rest of his/her life in prison with no parole." (CT 5:1322)
114: "Without having heard any evidence in this case, what are your general thoughts about the benefit of imposing a death sentence of a criminal defendant?"	"NONE" (CT 5:1266)	Juror Alvarez "I don't have one" (CT 12:3401) Juror Boardman blank (CT 13:3793) Juror Cormack "I don't have any" (CT 13:3625) Juror Lara blank (CT 12:3485)

		Juror Gollez "none at this time" (CT 13:3541)
117: Do you feel the death sentence is imposed: Too often__ Too seldom __ Randomly __ About right ___ Please explain"	"I don't know." (CT 5:1267)	Juror Cormack "I really do not know" (CT 13:3626) Juror Lara "Not sure" (CT 12:3486) Juror Gollez "Don't know" (CT 13:3542) Juror Morrissey "Don't know" (CT 10:2646)
118: "Please describe what you have seen, read, or heard about the death penalty from any media source: Please describe your reaction to what you saw, read, or heard:"	left blank (CT 5:1767)	Juror Lara Left blank (CT 12:3486) Juror Saiza Left blank (CT 7:1935) Alternate Reinke Left blank (CT 7:1935)
119: Having answered the above questions regarding your views on the sentences of death and life without the possibility of parole, should you be selected to sit as a juror on this case, do you feel you are able and willing to completely put aside any thought or concern relating to penalty issues while you deliberate guilt or innocence on these charges? Yes ___ No___ Please explain."	left blank (CT 5: 1267)	Juror Noyer left blank (CT 6:1795)

APPENDIX 3

Appendix 3

List of Jurors and Alternates Selected, By Gender and Race
List of Peremptory Challenges, By Party, Gender, and Race

Selected Jurors

1. Joy Boardman (F/W Italian 13 CT 3770)
2. Sandra Saiza (F/H 7 CT 1993)
3. Rebecca Lara (F/H 12 CT 3462)
4. Linda McGee (F/W 10 CT 2650)
5. Brenda McCracken (F/W 4 CT 1047)
6. Gay Cormack (F/W English and German 13 CT 3602)
7. Erline Noyer (F/W 6 CT 1772)
8. Gary Salazar (M/H – Mexico 6 CT 1744)
9. Luis Alvarez (M/Pacific Islander, Philippines 12 CT 3378)
10. Sandra Gollaz (F/Mexican American 13 CT 3518)
11. Peter Durant (M/W Irish 9 CT 2301)
12. Martha Morrissy (F/Anglo/English/Irish 10 CT 2622)

Alternates

1. Larry Rubin (M/W) (7 CT 1883)
2. Irene Marin (F/H) (5 CT 1299)
3. Debra Rice (F/W) (7 CT 2077)
4. Toni Reinke (F/W German) (7 CT 1911)

Peremptories

Number	**Prosecution Challenges**	**Defense Challenges**
1	Vincent Ramirez (M/H) Mexican (6 CT 1523)	Mary Stephen (F/w) (4 Supp. CT 1044)
2	Elaine Garcia-Diaz (F/H) Mexican American (4 CT 1131)	Alice Pearson (F) (No race indicated)
3	Guadalupe Ortega (F/H) Mexican American (5 CT 1383)	Yoshiko Sasahara (F/O) Japanese American (1 Supp. CT 232)
4	Fern Roux-Clough (F/W) (8 CT 2189)	Mrs. Winkelhorst (F/W) (6 CT 1634)
5	Karen Timian (F/W) Finnish (7 CT 1939)	Beatrice Serafin (F/H) (13 CT 3658)
6	Kelly Esquivel (F/H) Mexican American (10 CT 2846)	Carolyn Berens (F/W) (5 CT 1327)

7	Roberta Perez (F/W) (8 CT 2161)	Eugene Klusman (M/W) (10 CT 2706)
8	Marcus Wilk (M/W) Anglo (6 CT 1606)	Fred Johnson (M/W) Caucasian, Nordic (10 CT 2594)
9	Angela Ferrans (F/W) Caucasian Croatian (10 CT 2818)	Claudia Graham (F/W) (5 CT 1271)
10	Patricia Jones (F/B) (5 CT 1243)	William Atkins (M/W) English (7 CT 1826)
11	Barbara Graffius (F/W) European (4 CT 1159)	Jean Zeppetella (F/W) White, Italian (8 CT 2133)
12	Gladys West (F/W) German (5 CT 1355)	Joyce Allen (F/W) (12 CT 3416)
13	Estelle Brannon (F/W) Italian (6 CT 1550)	Enrico Fabiero (M/O) Filipino, Asian (8 CT 2245)
14	Mary Garcia (F/H) *questionnaire missing	Florence Mirjahangir (F/O Filipino) (4 CT 1019)
15	Myron Glasper (M/B) (5 CT 1494)	Mary Pelletier (F/W) White, Czechoslovakian, Polish(3 Supp. CT 596)
16	Ines Abeyta (M/H) (12 CT 3434)	Laura Coble (F/W) White, Mexican (7 CT 1883)
17	Laurie Hoskins (F/W) (10 CT 2762)	Arthur Modica (M/W) Scicilian (8 CT 2105)
18		Frank Parth (M/W) German (4 CT 1075)
19		Lee Flory (M/W) German, English (10 CT 2790)
20		Terrence Knott (M/W) (10 CT 2874)

Pros: 6 of 17 on Hispanics
8 of 17 on Whites
2 of 17 on Blacks

Def: 1 of 20 on Hispanics
15 of 20 on Whites
3 of 20 on Other
0 of 20 on Blacks
1 Unknown

Alternates

Prosecution Challenges	**Defense Challenges**
Thomas Coxson (M/W) (7 CT 1799)	Linda Isham (F) (No race indicated)
Angelita Oliva (F/H) American of Mexican decent (4 CT 1187)	Nancy Alvarez (F/W) English Welsh (5 CT 1438A)
Scott Donnelly (M/W) (9 CT 2426)	Sam Tan (M/O Indonesian) (7 CT 2021)
Angela Ferrer (F/H) (4 CT 1103)	Janice Morris (F/W) (7 CT 2049)
Pros: 2 of 4 on Hispanics 2 of 4 on Whites	Def: 1 of 4 on Other 2 of 4 on Whites 1 Unknown

Note: Where the gender of the venireperson was ambiguous from the first name, the gender was made plain by the court or counsel's reference to individuals by Mr., Mrs., or Miss.

CERTIFICATE OF SERVICE

I, the undersigned, certify:

That I am over the age of eighteen years, and not a party to the within cause; I am employed in the City and County of San Francisco, State of California; my business address is 99 Divisadero Street, San Francisco, California 94117.

On this date I caused to be served on the interested parties hereto, a copy of:

APPELLANT'S OPENING BRIEF

(X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, California, addressed as set forth below;

Ms. Mary L. Jameson
Deputy Clerk
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Thomas Hsieh
Attorney General's Office
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I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge, and that this Certificate has been executed on April 25, 2007 at San Francisco, California.

CHERRI PLAINFIELD