SUPREME COURT COPY

No. S029843

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JAMES DAVID BECK and GERALD DEAN CRUZ,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Alameda

HONORABLE EDWARD M. LACY JR , JUDGE

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAMES DAVID BECK and GERALD DEAN CRUZ, Defendants and Appellants.	No. S029843 (Alameda County Sup. Ct. No. 110467)

APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment imposing a verdict of death and it is automatic under Penal Code section 1239, subdivision (b).

STATEMENT OF CASE

By information filed on December 21, 1990 in the Stanislaus County Superior Court, appellant GERALD DEAN CRUZ, along with codefendants JAMES DAVID BECK[1/], RONALD WAYNE WILLEY, and JASON IAN LAMARSH,[2/] was charged with four counts of violation of

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[1] Beck's conviction and sentence of death are on appeal in this proceeding.

[2] In the Stanislaus County Municipal Court, the original complaint had charged the four defendants named in the information as well as

(continued...)

Penal Code section 187, murder, and with one count of violation of Penal Code section 182, subdivision (a)(1), conspiracy to commit murder. As to the conspiracy count, six overt acts were alleged. As to each of the five counts, an allegation under Penal Code section 12022.5, that LaMarsh personally used a firearm, was included. As to each of the counts, an allegation under Penal Code section 12022, subdivision (b), that all defendants personally used deadly and dangerous weapons, to wit, baseball bats, knives and batons, was included. An additional allegation was included that the offenses charged in counts I through V were "a special circumstance" within the meaning of Penal Code section 190.2, subdivision (a)(3). (3CT:820-826.) On December 21, 1990, appellant and codefendants Beck, LaMarsh and Willey entered pleas of not guilty as to each count, and denied all enhancement and special circumstance allegations. (3CT:827.)

On December 13 and 26, 1991, testimony was taken in appellant's motions to suppress evidence seized at his Finney Road residence and from two storage lockers. The trial court granted the motion in part and denied it in part as to the Finney road search, and denied the motion as to the storage lockers. (5CT:1212, 1217-1218.)

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[2] (...continued)
Richard John Vieira and Michelle Lee Evans. (3CT:798-801.) Evans entered into a plea bargain with the prosecution in return for her testimony, and her case was severed from the others during the preliminary examination (1CT:94-95; 2CT:431-433), after which she testified against her codefendants at the preliminary examination and at trial. (*Ibid*; 24RT:4174 ff.) Vieira's case was severed from the others during the preliminary examination (3CT:730-733) and was tried separately from the other defendants, prior to trial in this case. This Court has affirmed the judgment of death in Vieira's case. (*People v. Vieira* (2005) 35 Cal.4th 264.)

On February 10, 1992, Beck's motion for a separate trial was denied. (6CT:1517.) On the same day, motions for separate trial by appellant and LaMarsh were denied. (*Ibid.*) A motion for separate penalty phases was granted as to all four defendants, with appellant to go first, Beck second, LaMarsh third, and Willey fourth. (6CT:1517-1518.) Throughout trial, severance motions were made or renewed by each of the defendants. All were denied. (See 6CT:1626, 7CT:1760, 1765-1766, 1770.)

On February 21, 1992, on the People's motion and without objection, the information was amended on its face by striking Overt Act #1 to Count V (conspiracy) and renumbering the remaining overt acts. (6CT:1612-1613.) On this same date all of the defendants unsuccessfully requested that the jury questionnaire include a question that would inquire into the prospective jurors' perception of the meaning of the term "life without the possibility of parole." (6RT:1175-1177, 1612-1613.) Subsequently, defense counsel unsuccessfully requested that the trial court reconsider its ruling because the questionnaires revealed the prospective jurors were skeptical that life without parole meant just that. (10RT:1914-1915.) Also on this date, LaMarsh requested individual and sequestered death-qualification voir dire of all prospective jurors; appellant subsequently joined in that motion, which the trial court denied. (5CT 1250-1251, 6CT 1613, 1674.) Appellant subsequently, and unsuccessfully, renewed his request for individual, sequestered voir dire on numerous occasions during jury selection. (E.g., 10RT:1845, 1861-1863, 11RT:2071, 2072, 2116, 12RT:2159, 2202, 2243-2244, 2250, 13RT:2281, 2299, 2340, 2379, 14RT:2417, 2425-2426, 2430-2431, 2503, 2529, 2602.)

On March 10, 1992, during jury selection, appellant made a motion for mistrial based upon the prosecution's statement of grounds for a

challenge for cause in the presence of the prospective jurors. The motion was denied. (6CT:1674.) On March 11, 1992, the trial court denied appellant's request to permit questioning of prospective jurors for the purpose of exercising peremptory challenges, and appellant's objection to the court's failure to ask written follow-up questions submitted by appellant was overruled. (6CT 1675-1676; 11RT:1967-1971.) On March 18 and 19, 1992, three prospective jurors were excused for cause over defense objection. (6CT:1701, 1703.) On March 19, 1992, 12 jurors were sworn to try the case. (6CT:1704.) On March 23, 1992, four alternate jurors were sworn. (6CT:1712.)

On April 21, 1992, a motion pursuant to Penal Code section 1118.1 was denied as to all defendants. (7CT:1750.) Appellant's case-in-chief began that day. (*Ibid.*) On April 27, 1992, a motion for mistrial and for a separate trial due to claimed prejudice resulting from appellant's testimony was made by LaMarsh and Willey, and was denied. (7CT:1760.) On April 28, 1992, motions for mistrial due to misconduct by counsel for Willey were made by appellant and Beck, and were denied. (30RT:5220-5255.)

On April 30, 1992, Beck's case-in-chief began. (7CT:1764.) LaMarsh's case-in-chief began on May 4, 1992. (7CT:1765-1766.) That day, appellant, joined by Beck, made a motion for mistrial and for a separate trial upon the trial court allowing prejudicial character evidence against appellant to be introduced by LaMarsh and Willey. The motion was denied. (32RT:5458-5463, 5469-5470.) That same day, appellant made another motion for mistrial based upon misconduct by counsel for Willey in his cross-examination of a witness eliciting inadmissible testimony damaging to appellant. The motion was denied. (7CT:1765-1766.)

On May 8, 1992, Willey's case-in-chief began. (7CT:1769.) On

May 11, 1992, Willey moved for mistrial and for a separate trial on the grounds that he was denied the opportunity to present evidence necessary to his defense. LaMarsh joined. The motion was denied as to both defendants. (7CT:1770; 34RT:5954-5955.) On May 12, 1992, a motion by Willey for dismissal pursuant to Penal Code section 1118.1 was denied. (7CT:1771-1772.) On May 13, 1992, the People presented their case in rebuttal, and appellant's case in surrebuttal was presented. (7CT:1773-1774.) On May 18, 1992, LaMarsh's case in surrebuttal was presented. (7CT:1792-1793.)

On May 19, 1992, the matter was submitted to the jury for deliberations. (7CT:1794.) On May 20, 1992, a motion for mistrial was made by appellant, Beck and Willey after it was found that autopsy reports concerning the four victims, which had been marked as exhibits but not admitted into evidence, had been sent into the jury room with the other exhibits. The trial court denied the motion for mistrial, but left open the possibility of replacing any jurors affected by the autopsy reports with alternate jurors. (7 CT 1795; 37 RT 6787-6793, 6804-6813.) On May 26, 1992, after questioning the jurors, the trial court found that no prejudice had resulted from the autopsy reports having been provided to the jury. (7 CT 1824.)

On June 4, 1992, the tenth day of deliberations, the jury reported that they had reached verdicts as to two defendants, but not as to the other two, and delivered verdicts finding Beck and appellant guilty on all counts, with findings as to both that the special circumstance allegation, the personal use of deadly and dangerous weapons, and all five overt acts alleged as to the conspiracy charge were true. (9CT:2270-2285.) The jury declared itself unable to reach a verdict as to LaMarsh and Willey, and a mistrial was

declared as to those two defendants. (9CT:2270-2271.)

On June 17, 1992, the People's motion to consolidate the penalty trials of appellant and Beck was denied. (9CT:2336.) On June 23, 1992, the People presented their case-in-chief in the penalty phase against appellant, and appellant's case-in chief- began. (9CT:2338.) On July 1, 1992, the case was submitted to the jury for deliberations on penalty as to appellant. That day, they returned verdicts of death as to appellant. (9CT:2413-2420, 2402-2406.)

On July 13, 1992, the People presented their case-in-chief in the penalty phase against Beck. (9CT:2422.) On July 14, 1992, Beck's case-in-chief began. (9CT:2423.) On July 23, 1992, the People presented a rebuttal case. The case was thereafter submitted to the jury for deliberations on penalty as to Beck. (10CT:2444-2445.) On July 24, 1992, the jury returned verdicts of death as to Beck. (10CT:2446-2451, 2532-2536.)

On August 21, 1992, the court denied appellant's motion pursuant to Penal Code section 190.4, subdivision (e), for modification of the jury's verdict of death. (10CT:2562.) On October 23, 1992, the court denied Beck's motion pursuant to Penal Code section 190.4 subdivision (e) for modification of the jury's verdict of death. (10CT:2649.) On the same date, the trial court denied motions for new trial by both appellant and Beck, and pronounced judgment, sentencing both appellant and Beck to death. (10CT:2649-2650, 2654-2659.)

STATEMENT OF FACTS

I. THE GUILT PHASE

A. Overview

Six people – appellant, David Beck, Jason LaMarsh, Ronald Willey, Richard Vieira and Michelle Evans – were charged with murder and conspiracy in connection with the May 21, 1990 deaths of Franklin Raper, Dennis Colwell, Richard Ritchey and Darlene Paris. Vieira was tried separately, convicted and sentenced to death. Evans negotiated a plea agreement with the state and received immunity.[3] She became the prosecution's key witness. Severance motions by appellant, Beck and LaMarsh were denied, and the four were tried together. A jury convicted appellant and Beck of four counts of first degree murder with special circumstances and one count of conspiracy. The jury was unable to reach a guilt verdict as to LaMarsh or Willey.[4] At separate penalty phases, the jury sentenced appellant and Beck each to death.

Appellant, Beck, LaMarsh and Willey each testified at the guilt phase of the trial. Their defenses conflicted in key respects; but their testimony consistently confirmed that what occurred on May 21, 1990 was not the product of any deliberate, premeditated, or conspiratorial plan, but rather the senseless, unintended culmination of escalating fears and hostilities. Although certain of appellant's co-defendants implicated others in specific

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[3] Evans's plea agreement provided her a three-year suspended sentence with a maximum of eight months of actual jail time, six of them served at the time she was released, well before appellant's trial. (24RT:4174-4176, 4287, 4289, 4291; 25RT:4377; see also Exh. 152.)

[4] LaMarsh and Willey were retried and each convicted of four counts of second degree murder. (*People v. LaMarsh and Willey*, Nos. 110467-C and 110467-D.)

acts of violence, only LaMarsh accused appellant of inflicting any blow to any victim – the victim the prosecution accused LaMarsh himself of having killed.

Only two independent witnesses implicated appellant directly in any way. Earl Creekmore, a neighbor, testified that he witnessed an altercation outside the Elm Street house, and saw someone make a "cutting motion" across Ritchey's throat. However, Creekmore identified appellant as that person only after seeing him on television, having failed to identify him from photographs shown him by the police or in person at the preliminary examination. At the time of the homicide Creekmore saw only a "heavy set guy" whose facial features he could barely distinguish. Kathleen Moyers, another neighbor who saw a struggle outside the Elm Street house that night, but wasn't wearing her glasses, thought appellant resembled one of the two people she saw struggling with a third person. The crime scene investigation yielded no fingerprints, shoe prints, blood-typing data, or other evidence directly linking appellant to any homicide victim or weapon. Nor could the prosecution's forensic experts conclusively link appellant to any victim.

For want of concrete, credible evidence of appellant's guilt, the prosecution was left with Evans's testimony as to what occurred the night of the homicides. The version she gave the jury – in which appellant orchestrated an elaborate, armed invasion of the Elm Street house – was merely the latest in a series of conflicting accounts, given over the course of multiple pre-trial interviews with law enforcement, in a secretly tape-recorded conversation with Beck, at the preliminary hearing, and after her release from custody. Moreover, because Evans testified at trial that she left the house before any violence broke out, she logically could not, and did not, directly implicate appellant in any homicide.

In the end, the prosecution's theory was as muddled as Evans's testimony. In his closing argument the prosecutor essentially ignored the evidence impeaching Evans and vouched for her veracity: "I would submit to you that Michelle Evans is the only defendant in this case that told you the whole truth and nothing but the truth." (37RT:6722.) Presumably because Evans's testimony failed directly to attribute any homicidal act to any particular defendant, the prosecutor was forced to rely principally on a conspiracy theory, conceding the evidence did not squarely explain what occurred at the Elm Street house. For example, after attempting to persuade the jury that appellant had slashed Richey's throat, notwithstanding Willey's testimony that Beck had done so, the prosecutor stated: "If you want to believe it was Dave Beck that killed him out there or cut his throat out there, that's fine, too. I really don't care. They're all equally liable." (37RT:6745.)

B. The Camp and Its Residents

In May 1990, appellant was living in Salida, California, in an area known locally as "the Camp," with his common law wife Jennifer Starn and their two infant daughters. The Camp consisted of several tiny cabins once used by farm workers, and a number of trailers. (21RT:3545, 3571-3573, 3577-3578, 3644-3655; Exhs. 131, 136, 137.) Appellant and his family lived in a one-room cabin. David Beck and Richard Vieira shared a nearby "Prowler" trailer. Appellant had known Beck for seven or eight years; Vieira for four or five years. Over the years appellant, Starn, Beck and Vieira had shared two other residences in the area. (21RT:3568, 3573-3576; 24RT:4181; 28RT:4902; 29RT:5009-5016, 5135-5136, 5143; 30RT:5287-5288, 5373, 5389-5391, 5405-5406.)

Jason LaMarsh, a drug dealer and methamphetamine user, frequently visited various residents of the Camp. In May 1990 he often slept in a small

trailer, next to the Prowler. His girlfriend Michelle Evans, a methamphetamine user known as "Missy," visited the Camp often and stayed with LaMarsh. (25RT:4421-4422; 32RT:5595-5596, 5598-5599; 33RT:5803-5804, 5830-5831.) Ron Willey lived in nearby Ceres, California, but occasionally visited the Camp. He had known appellant, Beck and Vieira for several years. (34RT:5956-5958, 5960, 6139-6140.) Appellant, Starn, Beck, LaMarsh, Vieira, Willey and Evans often ate and socialized together, and with other Camp residents, around a barbeque and picnic table set up outside appellant's house. (30RT:5176-5177, 5199-5200.)

C. Frank Raper and His Cohorts

Franklin Raper, a middle-aged drug addict and dealer, moved his trailer into the Camp, without a rental agreement or permission from the landlord, about a month after appellant and his family had moved there. (21RT:3576-3580; 28RT:4902-4903; Exh. 125.) Raper's arrival transformed life at the Camp from peaceful to hostile. Raper spent his days drinking Thunderbird (a fortified wine) and using drugs. He used methamphetamine on a daily basis, smoked PCP when he could get it and injected heroin. Raper's trailer was a twenty-four-hour drug-trafficking center. His drug-cohorts included Dennis Colwell, James ("Fat Cat") Smith, Debbie ("Little Debbie") Smeltzer and David Jarmin. Cars pulled up at all hours of the day and night, with other "undesirable" types running in and out of the trailer, conspicuously buying, selling and using drugs, including methamphetamine, cocaine, heroin, PCP and Valium. (22RT:3762, 3766, 3775-3777, 3784-3787; 23RT:4108-4109; 24RT:4270-4271.)

Neighbors at the Camp became alarmed when their children began finding used syringes, hypodermic needles and other drug paraphernalia on the ground outside Raper's trailer. Kevin Brasuell's wife Dee Ann wrote a

letter to the Camp's landlord asking that Raper and Fat Cat be evicted from the site, and Starn prepared a petition calling for the eviction of Raper, Fat Cat and Little Debbie; but Raper and his associates remained, and the drug trafficking continued. (21RT:3556-3558. 3580-3581, 3651-3652; Exh. 134.)[5]

Raper was generally belligerent, confrontational and violent. He strong-armed an older Camp resident, Elmer ("Jiggs") Bridges into letting him plug an extension cord into his cabin to use his electricity, and badgered him into giving him money. (19RT:3289-3290, 21RT:3581-3582.) Prior to moving his trailer to the camp, Raper had parked it in a lot next to an auto repair shop in Salida owned by the Boyntons. He provoked a fight with the Boyntons, who had complained to the police about garbage and used syringes piled up outside Raper's trailer, and who refused to syphon gas for Raper from one of the cars on their lot. (27RT:4648-4651.)

Raper typically carried a knife and had a history of hostile run-ins with law enforcement. For example, in an April 1989 confrontation with a Deputy Sheriff Jane Irwin, in which she was forced to call for backup and draw her firearm out of concern for her safety, Raper was found to have an 11-inch survival knife, a 10-inch straight razor, a curved knife, an ice pick, a syringe, a bottle of Thunderbird and what appeared to be a hand-rolled, marijuana cigarette in his possession. He was described as "combative" and "uncooperative." (28RT:4878-4880, 4882-4885, 4894.)

D. Escalating Hostilities

Hostilities between Raper and his crowd and the other residents of the

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[5] Unlike Raper, LaMarsh did not conduct his drug trafficking business at the Camp.

Camp continued to escalate. Raper and LaMarsh developed a particularly hostile relationship. For example, one day in March 1990, when LaMarsh had passed out in Raper's trailer, David Jarmin came in and stole LaMarsh's gun. LaMarsh thought Raper had stolen it and, a few weeks later, attacked Raper's trailer with a baseball bat. Raper's friend Fat Cat responded by striking LaMarsh with a lamp. (24RT:4190-4191; Exh. 131.) LaMarsh told a number of Camp residents how much he hated Raper and wanted to "get his hands" on him. (20RT:3387-3388.) A few days after the homicides LaMarsh told his friend Richard Ciccarelli that Raper had "put out a contract" on him. (19RT:3285-3286, 3294.)

The children's discovery of the used syringes and drug paraphernalia further exacerbated the hostility between the residents of the Camp and Raper and his cohorts. In April 1990 a group of Camp residents, including Kevin Brasuell, David Williams, appellant, Beck, Vieira, and LaMarsh, hitched Raper's trailer to Beck's van, and hauled it to 5223 Elm Street, where Evans's sister, Tanya Miller, rented a house. About an hour later Raper's car was pushed out of the Camp and set on fire. A number of Camp residents, including Beck, LaMarsh and Vieira, participated. LaMarsh threw a half-full five-gallon gas can on the car and Vieira threw a match onto it. (21RT: 3585-3590, 3593-3594, 3627-3628; 29RT:5029-5033; 32RT:5685-5687; 33RT:5821-5824.)

Although Raper initially stayed in his trailer in front of 5223 Elm Street, he gradually insinuated himself into the house permanently – "conning" and "wheedling" his way in. (Miller had moved out after receiving a 30-day notice to quit). Once Raper was in, he let Colwell move in as well. Miller repeatedly asked Raper to leave, as did her friend David Jarmin, to no avail. Miller was concerned Raper was stealing from her, and

allowing others to help themselves to her clothes and other possessions. (22RT:3763-3766; 23RT:4089-4091.)

Raper continued to antagonize the Camp residents. His drug-trafficking activities persisted unabated. He was abusive and hostile, repeatedly threatening Camp residents. He pulled a knife on appellant, accused him of burning the car, and threatened to kill him. (29RT:5160-5161, 5165; 30RT:5247-5248.) He went to the Camp, sometimes with Colwell, to yell threats and obscenities at appellant, such as, "Pretty soon. Maybe today, maybe tomorrow, you won't know" and "I'll kill you, fat S.O.B." (29RT:5168-5170.) He tore down appellant's fence and made further threats, banging on appellant's house as he drove by. When appellant called 911 the sheriff's deputy who came to the Camp told appellant he was familiar with the problems Raper was causing. Appellant effected a citizen's arrest, which only angered Raper more, and led to more threats. (29RT:5066-67, 5050-5051.)

Raper also repeatedly threatened LaMarsh – "I'll kill you, you fucking punk" – and Evans.– "I'll kill you, you bitch." LaMarsh felt he could not turn his back on Raper. (32RT:5638-5640, 5699; 33RT:5707-5709.) In addition, Evans repeatedly informed appellant that Raper had asked his "biker" friends to come help him assault everyone at the Camp. Appellant took these threats seriously: he reported the threats to the Sheriff's Office, and he, Beck and Vieira started daily and nightly "watches" as a precaution. (29RT:5064-5065; 30RT:5233-5236, 5238-5239.)

E. The May 18, 1990 Confrontation

On May 18, 1990, Miller was served with a 3-day notice to quit. Evans offered to help her move her furniture out. That evening Evans, appellant, Beck, LaMarsh, Willey and Vieira went to the Elm Street house,

taking Beck's van and LaMarsh's pick-up truck. Appellant brought a 12-pack of beer, as a peace offering, to share with Raper and his associates. Raper, Ritchey, Paris and Colwell were there, among others. (24RT:4189; 29RT:5033-5037, 5042-5044; 34RT:5968-5870, 6046-6047.)

Shortly after appellant and the others arrived a fist fight broke out between Raper and LaMarsh – Raper accusing LaMarsh of burning his car, LaMarsh accusing Raper of stealing his gun. Others present intervened and the fight broke up. The residual tension prompted Evans, appellant, Beck, LaMarsh, Willey and Vieira to leave, without taking any of Miller's furniture. They returned to the Camp. (24RT:4186-4190, 4319-4320; 29RT:5052-5053; 32RT:5624-5627, 5687.)

Five minutes later they heard Raper's car, cruising slowly past the Camp, driving up one side of the street and down the other – "like it was casing the place." (29RT5054.) Willey and LaMarsh went out to investigate. Willey pulled Colwell from the car. Colwell took out an ice pick and threatened Willey. Willey, LaMarsh and Beck roughed Colwell up. LaMarsh and Willey then drove off in Raper's car, urinated in the back seat, and brought the car back. Colwell got back in the car and left. (24RT:4191-4197; 25RT:4407; 29RT:5055-5059; 32RT:5688-5691; 33RT:5711; 34RT:5971-5974, 6053-6060, 6111-6112.)

F. The May 20, 1990 Homicides

It is common ground that appellant, Beck, LaMarsh, Willey, Vieira and Evans went to the Elm Street house at about midnight on May 20, 1990; that Raper, Colwell, Paris and Ritchey were killed later that night; that each suffered a different configuration of blunt trauma injuries and knife wounds; that each had a small, distinctive non-fatal stab wound on the neck; and that a baseball bat (Exhibit 18), a police baton (Exhibit 19), a K-Bar knife (Exhibit

20) and sheath, two camouflage masks and a dark knit cap were recovered at the scene. However, appellant, Beck, LaMarsh, Willey and Evans, each of whom testified at the guilt phase, gave differing accounts of what occurred. The other witnesses who testified to what they saw, or might have seen, that night likewise gave inconsistent and generally unreliable testimony. No clear picture emerges, much less any definitive scenario that squarely implicated appellant in any homicide.

1. The Prosecution's Case

a. Michelle Evans's Testimony

Evans, who was granted immunity, gave multiple, varying accounts of the May 20, 1990 homicides. She was interviewed at least five times by Sheriff's Officers and Detectives before trial and made statements to a number of her friends about what occurred the night of the homicides. At trial she testified as follows:

On May 20th she went to the Camp at about 6:00 p.m., with LaMarsh. She still wanted help moving her sister's things out of the Elm Street house. Appellant asked her to draw a floor plan of the Elm Street house. Only appellant and Starn were present when she did. (24RT:4198-4201.)[6] Beck and Vieira arrived at the Camp at about 9:00 p.m. (24RT:4203.) LaMarsh drove to Ceres to pick up Willey, and the two arrived back at the Camp at around 9:30 p.m. or 10:00 p.m. (24RT:4204.) LaMarsh and Evans spent some time alone in his trailer, and Evans told LaMarsh she was breaking up with him. (32RT:5634, 5696; 33RT:5843.)

Some time later appellant, Beck, LaMarsh, Willey, Vieira and Evans

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[6] Despite an extensive investigation of appellant's residence and its environs within hours of the homicides, no such floor plan or map was ever offered or admitted into evidence.

were together in LaMarsh's trailer. Starn came in and out once or twice. According to Evans, appellant announced they were going over to the Elm Street house to "do them all and leave no witnesses." Evans testified, on the one hand, that to her "do them" meant kill them. On the other hand, she testified she understood it simply meant beat them up; that no one would be killed. (24RT:4209, 4211-4212, 4338-4339.) At some point Evans called her sister and told her not to go to the Elm Street house that evening. (24RT:4334.)

According to Evans, appellant then gave out assignments, using the floor plan Evans had drawn: Evans and LaMarsh were to enter through the front door. Evans could enter without a problem because she was Miller's sister. LaMarsh was to accompany her for protection, as Raper had recently threatened her. Evans was to go into the house, get everyone into the living room, and then go into the back bedroom. She was to open the back bedroom window to let Beck and Vieira in, and tell Beck how many people were in the house. Vieira was to recheck the rooms and guard the hallway to make sure no one could get out. Beck's assignment was to go in the back window with Vieira. Appellant and Willey would enter by the front door. (24RT:4207-4211, 4336.) Evans did not attribute to appellant any further instructions, such as who was to do what to whom once they were at the Elm Street house, or what they would do or where they would go once they had "done them all." (25RT:4362-4367.)

After this alleged discussion they all left the trailer. According to Evans, appellant handed Willey an 8-inch knife called a "Wildcat," with serrated edges on both sides; Beck had his M-9 knife, in a dark green sheath;

Vieira had a baseball bat;[7] LaMarsh had his aluminum baseball bat and his .22 caliber handgun; appellant had a black police baton and a serrated K-Bar knife; and Evans had a small "survival" knife, with a fixed blade and serrations on one side. (24RT:4215-4222, 4225-4226; 25RT:4369.)

Evans testified that at about midnight she, appellant, Beck, Vieira, LaMarsh and Willey headed for the Elm Street house, in appellant's white Mercury Zephyr. Appellant dropped Evans and LaMarsh off and they went in; LaMarsh left his baseball bat outside. Raper was seated in an armchair, sharpening a survival knife. Colwell was also in the living room. Paris and Ritchey were in the kitchen area snorting lines of methamphetamine. They offered her a line of the drug but she declined. (24RT:4225-4229, 4323; 25RT:4370.) Evans looked in the garage, then walked down the hall to the back bedroom. She roused a young woman named Donna Alvarez and told her to get her things and get out. (24RT:4229-4230, 4323.) Evans then went into the bedroom, closed the door and opened the window. She saw Beck, Vieira, Willey and appellant coming toward the house. She testified they were all dressed in camouflage outfits and were wearing camouflage paint ball masks. (24RT:4230-4233.)

According to Evans, appellant yelled, "Get 'im," and Willey ran toward the front of the house. (24RT:4234.) Beck came in through the bedroom window, pulled out his knife and handed Evans the sheath. He went down the hall toward the living room. Vieira came in the same window, with his baseball bat. He was wearing a knit ski cap as well as a mask. He checked the bathroom and closet, and then ran down the hall. (24RT:4235-

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[7] Evans did not know whether Vieira had a knife or not. (24RT:4420.)

4237.) Evans then heard screams coming from the front of the house; she could tell it was Paris. According to Evans, Beck was in the living room at that point. (24RT:4237; 25RT:4409-4410, 4423.)

Evans testified she then climbed out the bedroom window and headed toward the car. She looked back toward the house and heard someone, possibly Colwell, yell, "Help me! Help me!" She saw Willey sitting on someone, in the street. Then a car pulled up across the street and two of "the guys" ran towards it. (24RT:4237-4241, 4262.)

Next she saw appellant and Willey bending over the person Willey had been sitting on. Appellant was wearing a mask and had a baton in his hand. She testified she saw appellant "doing something" to the man in the street but could not tell "what exactly they were doing." They went back in the house; then appellant, Willey, Beck, LaMarsh and Vieira came running out together and headed toward the car. (24RT:4241-4242.)

LaMarsh reached the car first, his baseball bat in hand. The others arrived a few minutes later. LaMarsh hit the ground a few times with his bat. They were all "hyped up." (24RT:4242-4244, 4424-4426.) Evans testified she saw blood on appellant and on Beck, but could not see well enough to tell whether Willey, LaMarsh or Vieira, who were in the back seat, had blood on them. Beck's M-9 knife was "covered in blood." Willey demanded he be taken home. With appellant at the wheel, they headed to Willey's house, in Ceres.

Evans testified that en route Vieira announced he had tossed the K-Bar knife, the baton and one of the baseball bats into the field as he ran toward the car. (24RT:4248-4249.) When LaMarsh said he was not sure Raper was dead, appellant allegedly responded, "Oh he's dead. He's very dead." Somebody said, "Yeah, he's dead, I saw his face crumble on the way out the

door." Beck lamented they "only got three dudes and a chick." Willey announced that "some guy watched him kill Ritchey out front." Evans testified, over defense counsel's objection, that appellant "was mad [the guy] wasn't killed because it (sic) was a witness. They were supposed to do them all and leave no witnesses." (24RT:4249-4250.)

According to Evans, when they arrived at Willey's house they hosed themselves off; Vieira also washed the blood off appellant's shoes and out of the car. Appellant, Beck, Willey and LaMarsh then put their clothes in the washing machine. Beck washed his knife, and then they put the weapons that Vieira had not discarded on a table; Evans gave her knife back to appellant. These weapons, and two masks, were placed under the house. Vieira and Willey said they had left their masks behind. (24RT:4251-4254, 4226; 25RT:4400.) They then discussed alibis. Beck said he was going to a motel, and appellant said he was going to his mother's house to feign being ill. (25RT:4373-4374, 4411-4412.)

Evans and LaMarsh spent the night at Willey's house. Willey, his girlfriend Patricia Badgett, and his roommate Jason Williamson were also there. (Badgett was in Willey's room but appeared briefly at the door when he and the others first arrived. Williamson never appeared.) Appellant, Beck and Vieira left. While at Willey's house, LaMarsh told Evans that he had bashed Raper's head in with his baseball bat. He also told her that at the Elm Street house he had run through the bedroom, jumped out the window, grabbed his bat, and came back in. People in the house were running for the door and almost got out, but LaMarsh swung his bat and knocked three of

them down.[8] (25RT:4391-4392, 4396, 4397.)

The next morning Willey's roommate drove Evans home and dropped LaMarsh off "somewhere in Oakdale." (24RT:4258-4259.)

b. Other lay prosecution witnesses

Donna Alvarez testified she went to the Elm Street house on May 20, 1990, at about 8:00 p.m., with Ritchey. She was ill and homeless and needed a place to rest. When they arrived she was introduced to Raper and several other people in the living room and kitchen. She went straight to the back bedroom and went to sleep. A few hours later Evans woke her and ordered her to take her things and go elsewhere. (17RT:2984-2987, 2990-2992, 3001-3003, 3007-3008.) Alvarez sat briefly in the living room, where Raper was sitting, sharpening a knife, then headed into the front bedroom, with Ritchey. As they entered they were immediately confronted by a man with a "semi-automatic type"gun in his hand. He pulled back the slide and said, "Everybody into the living room." Alvarez ran into the kitchen and hid behind a counter. She saw Evans in the back bedroom doorway, staring down the hall. Alvarez then went into the garage, where she hid for a moment under a pile of clothes. She heard scuffling or wrestling noises from inside the house, and a woman scream. She made her way outside, knocked at several houses and eventually was admitted to one where the residents called the police. (17RT:2984-2989, 2992-2999, 3001-3005.) At trial Alvarez identified LaMarsh as the man with the gun. (17RT:2990-2992, 3000; Exhs. 87, 88 and 89.)

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[8] At trial Evans at first claimed she did not remember LaMarsh saying anything about killing Raper, but then admitted that in a letter written to her attorney she stated LaMarsh had laughed and bragged about killing Raper. (25RT:4391-4392, 4395-4396.)

On May 20, 1990, Earl Creekmore was living at the intersection of Curtis and Mason Streets, near the Elm Street house. He testified he had had six or seven beers that evening, after work. At around midnight he heard someone run along the side of the house and bump into the window air conditioning unit. He grabbed a crowbar and went outside, where he saw two men fighting, about 20 to 25 feet away. He heard someone say, "Oh God, help me." (20RT:3410-3414, 3462.) Creekmore estimated one of the assailants to be 6"1" or 6'2," with a ponytail, wearing a long-sleeved, button-type shirt; the other was about 5'11" and heavyset, weighing 200 to 225 lbs., wearing a red baseball cap, bib overalls, and possibly a yellow shirt, with short sleeves. (20RT:3414-3418, 3431.) The heavyset man went into the Elm Street house. A few seconds later someone came back out. It was dark, but Creekmore thought it was the same man. (20RT:3417-3418.) Creekmore testified that the man who came out of the house grabbed the man on the ground and made a cutting motion across his throat. Creekmore did not see anything in the man's hands. (20RT:3418-3420, 3460-3461.)

Creekmore asked the two men what was going on, but they did not respond. (20RT:3428.) As he went back into his house he looked over his shoulder and saw the man with the pony tail swinging what looked like a 2-by-4. Creekmore's roommate, Wanda Vineyard, had called 911 to report a fight. She then called again to report that the man had been killed. (20RT:3430-3435.)

Creekmore was unable to identify anyone from the photographs he was shown by police. At the preliminary hearing, which appellant, Beck, LaMarsh, Willey and Vieira attended, Creekmore testified that he did not know what the two individuals he saw in the street looked like, other than their height and weight. (20RT:3443-3444, 3464.) Having then seen

appellant and Willey on a television newscast, at trial Creekmore identified Willey as the pony-tailed person and appellant as the heavy-set man. (20RT:3436-3437.)

Kathy Moyers testified that at about midnight on May 20, 1990, she was driving up to her boyfriend's house, opposite 5223 Elm Street, and saw three men scuffling in the street. One was falling down; the other two were picking him up. When she got out of her car she heard the one man say, "Please don't, no, please," and, "help me." (17RT:2927-2932.)

She did not see any weapons, but saw blood on the tee-shirt of the man on the ground.[9] (17RT:2933, 2946, 2948, 2971.) She described the heavier of the other two men as about 5'8" tall, weighing about 260 pounds, dark complexioned, and wearing dark clothes (possibly a jogging suit) and a ski cap. She testified that appellant resembled that person. (17RT:2933-2937.) She described the other man as about 5'5" tall, weighing 145 to 160 pounds, with light colored hair worn in a pony tail. She testified that Willey's hair was the same color, but not the same length, as that person's, and, when shown a photo of Willey, stated that his hair was both the same color and the same length. (17RT:2933-2937; Exh. 83.) Moyers, who is near-sighted, was not wearing her glasses the night of the incident. (17RT:2948.)

Moyers went into her boyfriend's house and called 911. Looking out her window she then saw the two men go into the house. Four or five minutes later four people came out of the house, including the two who had just gone in. One of the other two was of medium build, the other was smaller. According to Moyers they were all dressed the same, in dark

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[9] Ritchey was wearing a black tee-shirt. (27RT:4751; 28RT:4824.)

clothing, possibly jogging suits or jeans, with dark sweatshirts or shirts. Moyers thought all four had ski caps on, not camouflage face masks. They stood for a moment talking, then walked out to the street, looked down at the man lying there, walked over toward Moyers' car, where they stood mumbling and talking for a minute or two, and then walked off toward the railroad tracks. (17RT:293843-2945; Exh. 23.)

William Duval, who lived three doors down from 5223 Elm Street, testified that at about 11:00 p.m. to 11:30 p.m. on May 20th he drove past that house on his way home. The front door was open and he could see Raper and another person inside, drinking beer. (19RT:3314-3318, 3347.) At about 12:30 a.m. or 12:45 a.m. something hit his bedroom window. He looked out and saw a woman going across his lawn on her hands and knees. He went outside and saw four men leaving the Elm Street house, over 100 feet away, moving single file at a double-time,"dog trot" pace, with their arms in "post arms" position. (19RT:3320-3328.) Duval could not identify any of the men he saw, but, based on seeing them in court, thought Beck could be either the first or second in line, as could Willey; appellant the third; and LaMarsh the fourth. He thought Vieira, who he had seen at the preliminary hearing, was a little shorter than LaMarsh, but had a similar complexion.[10/] (19RT:3326-3327, 3334-3335.) Duval did not see any weapons. (19RT:3328.) They all appeared to be wearing tee-shirts and jeans. (19RT:3326, 3347.) He could not tell whether they were wearing masks. (19RT:3352-3353.)

Phillip Wallace testified that in May 1990 he was living in Manteca

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[10] Counsel for all parties stipulated that the last person in the line was in fact Vieira. (19RT:3351-3352.)

with Rosemary McLaughlin, Beck's former girlfriend. He stated that a day after the homicides he spoke with Beck, who said either "I" or "we" "slit some throats." (22RT:3797-3798, 3800, 3805.) Wallace also testified he had "traded" an M-9 knife with appellant. (22RT:3803, 3813-3815, 3826; Exh. 117.) On cross-examination he denied knowing that McLaughlin used to sneak away from him to visit Beck at the Camp, or that this would make him jealous. (22RT:3806.)

c. Forensic Evidence

Dr. William Ernoehazy, a contract pathologist for Stanislaus County, testified that Raper, found seated in an arm chair in the living room, suffered multiple head injuries, a broken left arm, and a stab wound to the right side of the neck; that the stab wound was made by a single-edged knife, possibly smaller than a K-Bar knife (which is a single-edged, non-serrated knife); and that each of the four victims had this same, distinctive stab wound to the neck. Ernoehazy testified further that Raper's death was attributable to his head injuries, which could have been caused by a baton, baseball bat, pipe, iron bar, the handle of a hatchet, or similar blunt force instrument, but most likely were inflicted by a baseball bat. (18RT:3087-3097, 3110-3112, 3138-3144.)

Colwell, whose body was found on the kitchen floor, suffered cuts and stab wounds to his face, multiple stab wounds to his skull, basal skull fractures, stab wounds to the chest wall and left anterior wall, slicing wounds to the neck, and the distinctive stab wound to the right side. Ernoehazy attributed the cause of death to the stab wounds, which he opined could have been caused by "just any kind of knife," and noted that some of Colwell's stab wounds had "sharp corners," while others had "one blunt and one sharp corner," suggesting more than one knife was used.

Ernoehazy concluded the skull fractures were attributable to a blunt force instrument with a pattern, such as the handle of a K-Bar or like military knife, but not a baton. (18RT:3099-3103.)

Paris, who was found on the kitchen floor, suffered multiple contusions, a deep slicing wound across the neck, a slicing stab wound to the chest, and the same stab wound to the neck as the other victims. Ernoehazy concluded that certain of her contusions were likely caused by a baton. He attributed the cause of death to her "cut throat," but also suggested that a "stab-cut wound combination" to the anterior chestwall, might have been fatal if left unattended. (18RT:3103-3110.) He concluded that "the most likely instrument" that caused her "cutting and slicing and stabbing wounds" was a K-Bar knife. (18RT:3132; Exh. 20.)

Ritchey was found on the street in front of the Elm Street house. Ernoehazy found he had suffered stab and slashing wounds to the chest, slicing wounds to the throat, and the same distinctive stab wound to the neck that the other victims exhibited. Ernoehazy concluded that because one of the stab wounds had two sharp corners with patterned abrasions, it was likely caused by a double-edged, serrated knife. Ernoehazy attributed the cause of death to the chest wounds. (18RT:3077-3086.)

Toxicological examinations revealed that Raper had alcohol, amphetamine, methamphetamine and phencyclidine (PCP) in his blood; that Ritchey had methamphetamine in his blood and urine; that Paris had amphetamine, methamphetamine and alcohol in her blood; and that Colwell had no drugs or alcohol in his system. (18RT:3113-3117, 3170-3174; Exh. 113.)

Criminalist Marianne Vick examined blood samples from all four victims and from appellant, Beck, LaMarsh, Willey, Vieira and Evans.

(22RT:3869-3873, 3920-3924.) She concluded that blood stains from the baton were consistent with Colwell's blood, and that blood stains from the baseball bat and the K-Bar knife were consistent with Paris' blood. (22RT:3877-3881, 3908, 3910, 3963-3964.) Only one of the two masks had blood on it. As to two blood stains found on the inside of that mask, she excluded everyone but Ritchey as the possible source; one blood stain on the exterior of the mask could have come from one or more of the victims. (22RT:3881-3883, 3896, 3934-3936, 3964-3965.) One pair of Vieira's camouflage pants had blood stains that could have come from Ritchey or Vieira. On another pair three stains could have been Vieira's, and one could have been either his or appellant's. A stain on Vieira's boots could have been either appellant's or Vieira's. (22RT:3883-3885, 3967-3968.) A 10"-long light brown hair found on the knit cap did not match anyone's hair. (22RT:3913-3918.) No one obtained the clothes Evans was wearing the night of the homicides. (27RT:4765-4766.) The state also failed to have appellant's cane analyzed, and failed to even collect the iron bar, the chrome table leg or the knives found inside the house. (16RT:2827-2828; 28RT:4838-4840, 4852; 30RT:5273; Exhibit 166.)

Appellant's Mercury Zephyr was seized, and various carpet samples from the interior collected. (16RT:2789-2791.) Criminalist John Yoshida testified that blue fibers found under the grip of the baton came from the carpet of a car of similar year and similar color to the Zephyr. (22RT:3927-3928, 3958-3959, 3971-3972, 3977-3979, 3982-3983; Exh. 148.) Robert Crayton testified that the tires from the car were consistent with tire marks found near the railroad tracks, but could not be positively identified as having made the marks. (16RT:2900-2902; Exhibit 40.)

2. Defense Case

a. Impeaching Michelle Evans

Evans gave multiple conflicting accounts of what occurred at Elm Street the night of the homicides and thereafter, and acknowledged at trial she had "lied to many people on many occasions regarding this case." (24RT:4306.) She was first interviewed on May 22, 1990, shortly after her arrest. She had yet to review any police reports but told Detectives Ottoboni and Larson that she had seen blood on the kitchen floor; that she had seen Paris lying under the kitchen table; that she had seen a short man of Mexican extraction, who she described as "the little guy," going toward Paris (28RT:4922-4925); that she had seen Raper pull a knife on LaMarsh, or had heard that he did; that she had seen LaMarsh strike Raper with a bat and "some other dude" then bash Raper's head in; that the "the guys" who took over beating Raper "didn't even know [she] was standing there" (28RT:4932-4937); that both Colwell and Ritchey were in the street, but that Colwell was dragged back into the house; and that Beck was not at the crime scene. (28RT:4926, 4940.)

At trial Evans changed course and claimed the "stories" she had told Ottoboni and Larson were "very bullshit stories;" that when she spoke to Ottoboni she was under the influence of Valium, that she could barely sit up in her chair, and that she did not remember what she told Ottoboni, but that she lied and was a "smart aleck." (24RT:4280, 4306.)[11] On the other hand, she also testified that when she spoke to Ottoboni and Larson she knew what had actually happened but "was trying to cover for everybody when

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[11] Detective Ottoboni testified that Evans appeared to be intoxicated, but was alert and both physically and mentally able to give a statement. (28RT:4927-4828.)

[she] gave those statements." (25RT:4446.)

Detective Deckard interviewed Evans at least four times. On May 22, 1990 she told him she was being 100 percent truthful, but insisted that what she had told Detectives Ottoboni and Larson was 90 percent lies. When Deckard then interviewed Evans again in July 1990, with her counsel present, she admitted that what she had told him May 22nd was also 90 percent lies. (27RT:4758-4762.) During the July interview[12] Evans presented Deckard with a written statement she had prepared a month after the incident, at her attorney's request, with the assistance of her cellmate, Ivy Martin. (27RT:4707; Exh. 158.) She testified that she had followed her attorney's instruction to set out "every detail" as to "exactly what happened," and that what she had written in the statement was true. (25RT:4462, 4389-4390.) In this statement she reported that "Jason bragged about how he beat Franklin [Raper] to death and that he hit three of them with a bat and that it knocked all three of them down." (25RT:4396-4397.) Her written statement said nothing about appellant coming out of the house and doing anything to Ritchey. (25RT:4475.)

Deckard interviewed Evans again in October 1990, after she had entered into her plea agreement with the prosecutor. Thereafter, in a telephone interview, she contradicted her prior statements yet again, now admitting for the first time that she herself was armed the night of the homicides, with a knife. One of the conditions of the original plea agreement was that she not have been armed. The prosecution then entered into a second plea agreement with Evans, which dropped that condition.

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[12] The July interview was not recorded nor was it the subject of any written report by Detective Deckard, at the request of Evans's attorney. (27RT:4715-4718, 4733.)

(27RT:4713-4714, 4724.)

A number of lay witnesses also testified regarding Evans's credibility and her history of threatening and violent conduct. James Richardson testified that the night after the homicides he drove Evans to Salida, then to Oakdale, and was with her when she was arrested. Evans told Richardson she had seen the homicides the night before and had laughed, and that she had actually planned the killings herself. (26RT:4567-4571, 4573.)

Michelle Mercer, who had known Evans for 10 to 15 years, testified Evans had a reputation in the community for dishonesty and violence, and that Evans had threatened and assaulted her several times. Mercer also testified that in July, 1991, shortly after Evans had been released from custody pursuant to her plea bargain, she admitted being involved in Paris' murder and described in detail how "they" sliced Paris' throat. Evans also told Mercer she "loved every minute of what Raper got" and was happy to be part of it. (26RT:4531-4533, 4551-4552, 4554-4557.) Mercer also testified that a week or more before the homicides she found Evans and Paris half undressed, kissing, in the back bedroom of the Elm Street house.[13] (26RT:4533-4534.) Paris had also dated LaMarsh. It was Mercer's understanding that Paris and Evans were "sharing" LaMarsh. (26RT:4554.)

In July 1991, Evans also had an altercation with Sheri Trammel, in which she threatened to slice Trammel "like [she] sliced the rest."

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[13] The trial court excluded proffered testimony from Mercer that Paris subsequently told her she was forced to sleep with Evans, that she did not like it, that she had told Evans she no longer wanted to submit to it, and that Evans was very upset to hear this. (26RT:4546-4547.)

(24RT:4301-4302.)

b. Appellant's Case

Appellant testified on direct examination that he did not kill anyone on May 20 or 21, 1990 and did not enter into any conspiracy to have anyone killed. (29RT:5008-5009.)

On cross-examination he explained that on May 20th Evans and LaMarsh arrived at his house late afternoon or early evening. Evans wanted to retrieve come clothes from the Elm Street house, possibly a wedding gown or other valuable heirloom, because she was worried it would be stolen or destroyed. When she told him Raper had threatened to kill her, appellant replied that Raper had threatened to kill him, too. (29RT:5060-5063; 30RT:5175-5176, 5244-5246.) Evans also told appellant she had learned that Raper was going to call his "biker" friends that night, to have them kill everyone at the Camp. Appellant was concerned, as he knew that various motorcycle gang members used to frequent Raper's trailer, and he had been told of such plans by Raper at least twice in the weeks before May 20, 1990. (29RT:5064-5065; 30RT:5233-5239.) When Beck and Vieira returned home from work they too were concerned. Beck then went to pick up Willey in Ceres. (29RT:5064; 30RT:5179.)

Appellant testified that Evans persisted in wanting to go to the Elm Street house, with appellant and the others going along for protection. So he, Beck, LaMarsh, Willey, Vieira and Evans went there, in appellant's Mercury Zephyr. Appellant had his cane with him; his baton was in his car, where he kept it. LaMarsh had a baseball bat. Vieira always carried a K-Bar knife. Evans had a baseball bat and a small K-Bar knife. She had asked appellant for a knife because she had seen Raper sharpening one earlier. Appellant did not recall seeing Beck with any weapon.

(29RT:5069-5070, 5073, 5077-5078, 5085-5086; 30RT:5268-5271.) Appellant did not know anyone had a gun. (29RT:5126-5127.)

There was no map or floor plan, and appellant denied giving out "assignments" or handing out weapons. The only plan they had was that if no one were home Evans would go in, with LaMarsh, to retrieve what she wanted. He, Beck, LaMarsh and Willey would be there just in case of trouble; he did not want all six of them going in, as they had two nights earlier. If someone were home, he would not drop them off. (29RT:5080, 5081-5083.)

When they got to the Elm Street house there was no sign of cars or bikers, so appellant dropped Evans and LaMarsh off. He reminded them to leave their bats outside. (29RT:5078-5079, 5081, 5085-5087; 30RT:5181-5183, 5240-5242.) He then parked the car across the railroad tracks, where it would not attract attention, in case Raper's friends came by, but where he could see the house so he could pick Evans and LaMarsh up when they came out. (29RT:5080; 30RT:5240.)

Beck, Willey and Vieira stepped out of the car to better see the house. Neither Willey nor Beck appeared to have a weapon; Vieira had the baton. Suddenly Beck, Willey and Vieira started running toward the house. Appellant got out of the car and heard someone say something like, "he's gone crazy." (29RT:5085, 5089-5091.) Appellant started toward the house, with his cane. He saw two people fighting, moving towards the street. He learned later it was Willey and Ritchey. Willey was wearing his camouflage pants. As appellant approached them he noticed someone else nearby and heard him say, "what's going on?" Appellant gestured to Willey and said, "let's go," but the two kept fighting. (29RT:5092-5095, 5127; Exh. 166.)

Appellant went into the house and saw Raper sitting in his chair, looking "incapacitated." Colwell and Vieira were scuffling on the floor, with Colwell on top of Vieira, who was holding the baton. Beck picked Colwell up and threw him off Vieira. Beck had nothing in his hands; appellant could not tell whether Colwell had anything in his. Appellant told Beck someone was outside with Willey, and Beck ran outside. (29RT:5097-5102; 30RT:5183-5185.) Appellant yelled, "let's go," to Vieira, who was hitting Colwell with the baton. Colwell charged Vieira, who dropped the baton and pulled out his knife. Appellant repeated, "let's go, now." (29RT:5102-5105; 30RT:5185-5186.) He then saw Evans pop up from behind the kitchen counter. (29RT:5103-5104; 30RT:5187, 5230.)

Appellant went out the front door and headed toward the car. Vieira, then Evans, ran past him. By the time he got to the corner, Beck was at his side. When they got to the car LaMarsh and Willey were already there. (29RT:5107-5111.) Appellant wanted to go home, but Willey insisted he be taken to his house, so they headed for Ceres. (29RT:5117-5118.)

At Willey's house they went inside. Appellant denied asking Vieira to get rid of weapons, to wash out the car, or to wash blood off his shoes; there was no blood on his shoes. (29RT:5119-5120; 30RT:5227.) Evans had sprinkles of blood on her face, but no one else had any blood on them. (29RT:5126.) Appellant called Starn and asked her to get a motel room in Oakdale, where he joined her later, with Beck and Vieira. (29RT:5123-5124; 30RT:5258.)

c. Beck's Case

On May 20th, Beck and Vieira spent the day installing a floor for a man named Bruce Porter, who described the two men as professional, courteous and friendly; neither appeared nervous or concerned. (20RT:3478.) When they returned to the Camp at about 7:30 p.m. Evans was there. She said she had gone to the Elm Street house to get some things, but Raper had refused to let her take them and had threatened her and the Camp residents. Beck testified he believed Raper was going to enlist his many drug-trafficking associates to help kill him and his friends. (20RT:3472-3479, 3486-3488; 30RT:5342-5346, 5290-5294.) He went to Ceres to get Willey, for additional protection. (30RT:5359.)

Beck's testimony regarding what occurred at the Camp before the group went to the Elm Street house was generally consistent with appellant's. There was no map or floor plan, no meeting in anyone's trailer, no "assignments" or talk of anyone entering the house through the window; no distribution of weapons. (30RT:5295-5296, 5386-5387.) The only weapons Beck saw were two baseball bats: LaMarsh had one and Evans had the other. He saw no weapons on Willey. Vieira always wore his K-Bar knife (except at work), and appellant kept a baton in his car. Beck testified he was unarmed and was wearing grey sweat pants, a tee-shirt and tennis shoes. No one was wearing a mask, hat, cap or other headgear. (30RT:5295-5297, 5333, 5386-5387, 5394.)

Beck testified that they went to the Elm Street house so Evans could retrieve some clothes. They dropped her off in front, with LaMarsh, and parked the car on the other side of the railroad tracks, where they could see the house. Willey, Vieira and Beck got out of the car and walked toward the house because it seemed to be taking too long for Evans to be getting

her things, and they wanted to get closer in case something happened. (30RT:5298-5301.)

Beck testified that when they heard a girl scream he, Vieira and Willey started running toward the house. As they approached a man came out and got into a fight with Willey. Vieira got to the house and went in. Beck followed him in, fearing it was Evans who was screaming. (30RT:5301-5304, 5332, 5346-5348, 5398-5399, 5407-5408.) LaMarsh was standing in front of Raper, holding a baseball bat. Raper was slumped down in his chair and "didn't look good." (30RT:5304-5305, 5324-5327, 5410-5413.) Evans was on top of a woman he later learned was Paris, holding her head and punching her. Colwell was on top of Vieira, who was on his back holding the baton. Beck hit Colwell with his fists a few times, picked him up, and threw him off Vieira. As Vieira got up, Beck heard appellant say there was someone outside by Willey. Beck ran past appellant and went outside. (30RT:5305-5307, 5339-5340, 5348-5354.)

Beck testified that when he got outside he saw Willey standing over a man lying on the ground. The man did not look dead and Beck saw no blood on either of them. Beck noticed that Willey was looking at another man, who was walking away. Beck said, "let's go," and Willey headed for the car. (30RT:5420-5424.) Appellant then came out of the house and Beck walked with him back to the car. Vieira, then Evans, ran past them. (30RT:5308-5309, 5362-5364.)

When they got back to the car they took Willey home. Beck testified that no one had any blood on them, and that the only weapon he saw was LaMarsh's baseball bat. When they got to Willey's house they all went inside. No one washed any clothes. Appellant, Vieira and he then left and went to a motel, where Starn had rented a room. (30RT:5311-5316.)

d. LaMarsh's Case

Although LaMarsh implicated himself, and Evans, in the homicides, his testimony was fundamentally adverse to appellant's case. For example, he testified, over objection, that he regarded appellant, Beck and Vieira as a survivalist group; that appellant had recruited him to join the group and pledge his loyalty with a blood oath; that Vieira was made to stand at attention by appellant and was beaten by Beck; and that appellant owned about 30 firearms, including M-16's, AK's and machine guns. (32RT:5616-5620, 5599-5601; 33RT:5862-5863.)

With respect to the events of May 20, 1990, LaMarsh testified that he arrived at the Camp, with Evans, at about 6:00 p.m. He acknowledged using methamphetamine earlier that day, and during the preceding week. He left the Camp that evening to go to Modesto, where he twice attempted to purchase marijuana, at appellant's behest. When he returned, appellant, Starn, Beck, Vieira, Willey and Evans were all there. (32RT:5631-5634, 5692-5695; 33RT:5802, 5804-5805, 5838-5839, 5840-5842.) He and Evans had a heated discussion in the small trailer, culminating in her breaking off their relationship. He then left again for Modesto, returning to the small trailer at about 11:30 p.m. (32RT:5634-5635, 5695-5697; 33RT:5768, 5843.)

Appellant, Vieira and Evans then came in and told him they were going over to the Elm Street house so Evans could get some of her sister's things. Evans wanted LaMarsh to go with her. Beck and Willey then came in, roughhousing. According to LaMarsh, appellant then said, "If anything happens we'll take care of you," referring to Evans and LaMarsh, and they all then left the trailer. There was no meeting with appellant, Beck, Willey, Vieira and Evans; the only time all six of them were together was when

Willey and Beck came in, and they all left the trailer immediately thereafter. Nor did LaMarsh ever see a map or floor plan of the Elm Street house. (32RT:5636-5637, 5697-5698, 5700-5701; 33RT:5711, 5713, 5716-5617, 5767-5768, 5844.)

LaMarsh testified that he had his aluminum baseball bat; that Vieira had a baseball bat with" The Edge" written on it, and had the knife he usually wore, on his belt; that appellant had a baton, as well as a knife on a belt; and that Beck had a knife in a green sheath. There was nothing unusual about them having these weapons that night; "[t]hat was an everyday thing, you know." (32RT:5705.) He did not know whether Evans had any weapons, and saw none on Willey. Unbeknownst to the others, LaMarsh also had a gun in his left pants pocket – a loaded, black semiautomatic, registered to Beck. LaMarsh was anticipating that Raper and Colwell would be there, and expected that there would be trouble, given the hostility between Raper and his friends and the residents of the Camp. (32RT:5681-5682, 5640-5641, 5646 5701-5705.)

According to LaMarsh, appellant, Beck, Vieira and Willey were wearing camouflage clothing. Willey had his hair in a ponytail. Vieira wore a black stocking cap, appellant a red cap with a heart and a picture of Bart Simpson. LaMarsh did not see any masks. (33RT:5721, 5766, 5872; 32RT:5702-5703; 33RT:5815.)

When they got to the Elm Street house LaMarsh and Evans went inside. LaMarsh testified he left his bat outside because to bring it in would have meant "instant trouble." (32RT:5646-5647.) Raper, Paris and Ritchey were in the kitchen. Colwell was lying on the couch. Raper was sharpening a knife and said something like, "I'll kill you, you bitch," to Evans. He looked "real mean" and said something threatening to LaMarsh

as well. Evans went down the hall and banged on the back bedroom door. Sensing he was not welcome in the house, LaMarsh went into the other bedroom. Donna Alvarez, Ritchey and Colwell came in, and Ritchey told him it was time for him to leave, in a threatening manner that led LaMarsh to believe he was about to be physically ejected from the house. LaMarsh pulled out his gun, cocked it, pointed it at Ritchey, and yelled, "Get the fuck out of here, man." They took off running. LaMarsh was not sure which way they ran, but thought Ritchey went down the hall towards Evans. LaMarsh jumped out the window, put the gun back in his pocket, grabbed his bat and went back inside through the front door, to get Evans. (32RT:5648-5652; 33RT:5725, 5728-5737, 5740-5741, 5809-5813, 5845-5848.) Meanwhile, Ritchey had run outside. (32RT:5652-5653.)

LaMarsh testified that when he got back in the house Raper came at him with a knife, yelling, "I'll kill you, you fucking punk." LaMarsh struck Raper with his bat, breaking his arm. Appellant then came in and hit Raper on the head two or three times with the baton, with big, awkward swings. Raper backed up, his head down, and stumbled back into the chair. (32RT:5656-5657; 33RT:5746-5749, 5827, 5862, 5865. 5870-5871, 5873-5875.) Evans came out from behind the counter and went down the hall. Vieira was trying to pull Paris out from under the table. Beck was bent over Colwell, who was on his back kicking. Colwell reached for the knife in Beck's hand, but Beck stabbed him in the stomach. (32RT:5657-5658; 33RT:5747, 5751-5755, 5859.) LaMarsh testified he thought Beck was wearing a camouflage mask. (33RT:5766; 5853; Exh. 22.)

LaMarsh followed Evans down the hall and into the back bedroom. He looked out the window, saw Evans heading towards the tracks, and jumped out the window himself. He saw a woman drive by and park across

the street. He ran around to the front of the house, looked in, and saw Raper, seated in his chair, his hair wet with blood. He heard fighting in the kitchen; like people were being "stabbed or hit real hard." (32RT:5658-5660; 33RT:5755-5758.)

LaMarsh testified he felt "scared," and ran to the car. When he got to the car Evans was there. He hit the ground with his bat a few times; he was frightened and angry. Then the others arrived. According to LaMarsh, Vieira tossed his bat out of the car and appellant "threw his weapons [away]" -- a baton and "something else." Appellant did not have his cane. Beck had a knife. Beck had blood on his hands and arms; Vieira on his legs and hands; Willey on his hands. LaMarsh was not sure but thought appellant had blood on him as well. (32RT:5662; 33RT:5719-5721, 5872-5873.) At that point no one had a mask. (33RT:5818, 5853.)

According to LaMarsh, on the way to Willey's house appellant said, looking at Beck, "You know what we did back there was real serious." Beck said, "Yeah." Appellant asked Evans, "How many people were in the house?" Evans replied there were five. Appellant asked Beck, "Well, how many did we get?" When Beck said four appellant said, "Fuck. One got away." When he asked, "Who all did we get?" Beck replied, "Dennis, some dude, a chick and Frank. When Beck confirmed they were all dead LaMarsh said, "Well Frank ain't dead." Beck said, "I seen his face crumble on the way out the door. He's dead." LaMarsh testified that he wanted to get rid of his baseball bat, but that Beck told him to hang on to it. LaMarsh put the bat on the floor and held his gun in his hands. He testified he was afraid "they" were going to kill him and Evans. (32RT:5663-5664.)

When they got to Willey's house, everyone went inside, after "washing the blood off." LaMarsh testified that appellant had blood on his

knees and shoes; he had Vieira clean his shoes, and the car. Appellant at some point said to Beck, "We're going to have to get an alibi." Appellant then called Starn, and then left with Beck and Vieira. While LaMarsh and Evans were alone, Evans put a small survival knife on the night stand. LaMarsh gave Willey the gun he had. (32RT:5667-5670; 33RT:5717-5719, 5721-5723.)

The next morning when LaMarsh woke up Beck was there, wearing grey sweat pants and no shirt. According to LaMarsh, Beck had three or four "fresh" looking scratches on his stomach. (33RT:5871-5872.) When he left Willey's house LaMarsh went to Oakdale, then to Salida, and eventually fled to Oregon. (32RT:5671-5675.)

LaMarsh also called Rosemary McLaughlin, who gave testimony damaging to appellant's case. She testified she had known appellant, Beck and Vieira for several years, had lived with them in Modesto, and was Beck's girlfriend for a time. (31RT:5540-5543, 5554-5555, 5559-5560, 5564-5565.) According to McLaughlin, appellant and Beck treated Vieira as subservient; they told him what to do and he did it on command. (31RT:5542-5543.) Appellant gave orders around the house and Beck, Vieira and she obeyed him. He would discipline them if they did not obey, but not physically hurt them. She testified that she never seen Beck refuse to do anything appellant wanted him to do. (31RT:5599-5564.)

McLaughlin also testified that appellant called her on May 20, 1990, in the evening, to ask her to come over to the Camp with her boyfriend. He wanted them to stay with Jennifer while they went over to "even the score in a fight" with Fat Cat and others, at a house in Salida. (31RT:5546-5548.)

According to McLaughlin, Beck came over to her house the day after the homicides, while she was cooking dinner. He said he had come because

"everybody had to separate." He told her Vieira had been ordered to clean blood off of everyone's shoes, at Willey's house. He also said that on his way to her house he had stopped to buy a new pair of shoes (white sneakers), because he could not get his old ones clean. Beck also said something to the effect that they "had to do them," which McLaughlin took as a reference to the people who had been killed the night before. (31RT:5549-5550, 5553-5554, 5566.)

LaMarsh also called Dr. Thomas Wayne Rogers, a forensic pathologist. Having reviewed Dr. Ernoehazy's autopsy report and photographs regarding Raper, he testified that four linear lacerations on the top of Raper's head could have been caused by a variety of different instruments. Between a baseball bat and a police type baton, he thought a baton more likely caused the lacerations, but conceded he had never examined baton-inflicted injuries to the head before, and could not rule out a bat having caused those injuries. (31RT:5511, 5516-5518, 5523-5524, 5529, 5534-5536; Exh. 173.) Dr. Rogers also opined that wounds above Raper's right and left eyebrows could have been caused by the knob end of a baseball bat or by a pistol. (31RT:5518, 5525-5526, 5528.)

Finally, LaMarsh called Gant Galloway, a research pharmacist and Assistant Professor at the University of California, San Francisco, who testified concerning the effects of various street drugs, including methamphetamine. He described methamphetamine, known as crank, speed, or crystal, as a powerful stimulant that makes users more aggressive and more prone to act on paranoid fears. Someone under the influence of a high dose of methamphetamine would be more likely to unreasonably suspect someone was watching or intending to harm them, or to feel their life was in danger from a given set of circumstances. With chronic use,

there is a build-up of changes in the brain, longer periods of sleep deprivation, and likely a variety of derangements, including paranoia. (33RT:5773-5774, 5787-5788, 5790-5792, 5798-5799.)

Galloway testified that the level of methamphetamine in Raper's system was quite high, equivalent to a dose of about 500 milligrams, whereas pharmaceutical doses are in the 2.5 to 15 milligram range. Galloway explained that a dose of 500 milligrams can lead to aggressive, violent behavior. He would treat a person under the influence of such a high dose with great care and consideration before going into a room with them alone. (33RT:5775.)

Galloway also testified that PCP, found at a moderate level in Raper's blood, is a dissociative anesthetic, which causes a disassociation between what happens to one's body and what is experienced in the mind. When PCP is used as a street drug reactions vary, but violence is common. (33RT:5776.) PCP also causes a release of adrenaline which, coupled with the alteration of perceptions and the disassociation from pain, makes someone under the influence of PCP very difficult to restrain. (33RT:5776-5777.) According to Galloway, a person with Raper's level of PCP might not feel his arm being broken, such that the injury might not stop him from becoming violent himself. (33RT:5784.) Moreover, the PCP in combination with the methamphetamine probably had additive effects in increasing the likelihood Raper was combative. Finally, Galloway noted that Raper's blood alcohol level of .11% would have added to the disinhibition caused by the PCP and methamphetamine. (33RT:5777-5778.)

e. Willey's Case

Like LaMarsh, Willey gave testimony adverse to appellant. For

example, he testified that appellant, Vieira and Beck were very close; that appellant and Beck were like best friends; that Beck always did whatever appellant asked, including inflict pain on Vieira; and that appellant told Vieira what to do, how to act, and even when to go to bed. (34RT:5960-5962, 6140-6141.) He testified that appellant had LaMarsh put his fingerprint in blood on a piece of paper as Willey had done five years earlier. (34RT:5964-5967, 6030.)

Willey testified that appellant called him on May 20, 1990, at about 11:00 p.m., and said he wanted his help moving furniture. Willey initially agreed to help, but then called back to say he was not feeling well. But Beck was apparently already en route and arrived about 11:30 p.m. According to Willey, Beck was unhappy to learn Willey did not want to go; he would have to move everything himself, as LaMarsh and Vieira were small and appellant had a bad back. Willey then agreed to go along. (34RT:5975-5978, 6061-6063.) He pulled on some camouflage pants, which he wore to work, and a sweatshirt. He put his hair in a ponytail on his way to Salida. (34RT:5978-5980, 6029, 6110.)

It was Willey's understanding they were going to the Elm Street house to see about moving furniture. (34RT:6074.) He did not see any diagram or map, nor did he hear any instructions about Beck or Vieira climbing through the window, any statements that they were going to "do them all and leave no witnesses" or kill anyone, or any discussion about weapons. Willey anticipated there might be a fight, but did not believe anyone would be killed. If there was a fight, Willey intended to help out. (34RT:5983, 6020-6021, 6067, 6124-6126.)

When they got to the Elm Street house appellant let LaMarsh and Evans out and drove off. (34RT:5984, 6074-6075, 6145.) When he asked

why they were not going in, too, or staying there to wait, appellant allegedly said he wanted to go park on the other side of the railroad tracks, "just in case somebody comes by." Appellant did not want any of Raper's friends to come and "jump" them. (34RT:5984-5985.)

Willey testified that LaMarsh had a baseball bat, that Vieira had baseball bat and a knife, that appellant had a baton and a knife, and that he had no weapons himself. (34RT:5991-5992, 6069-6074.) Appellant, Beck and Vieira were dressed as they generally dressed, in camouflage pants and camouflage jackets, over shirts. Appellant was wearing a red baseball cap. No one was wearing a mask. (34RT:5985-5987, 5991-5992.)

When they got out of the car and walked toward the house they saw Evans standing in the window. According to Willey, Beck and Vieira ran to the house and climbed in the window, while he and appellant kept walking, toward the front door. (34RT:5987, 6078-6080, 6126-6127.) LaMarsh was standing at the front door with his bat in his hand and said, "Hey, man, come on. The shit's starting." When Ritchey then ran out the door Willey tackled him, intending to beat him up. (34RT:5992-5994, 6082-6085.) Ritchey landed on his hands and knees. Appellant walked up, stopped for a minute and then walked toward the house. Willey kept fighting with Ritchey, getting him onto his back. Ritchey said, "Hey man. It's cool. It's cool." He did not stop fighting, though, so neither did Willey. (34RT:5994, 6085-6092, 6129-6130.) Someone came over and said, "Hey, man, what's going on?" Willey looked at him and he and Ritchey kept fighting. (34RT:5994, 6091-6093.)

Willey testified that about 20 to 30 seconds after appellant walked into the house Beck came running out and hit Willey, knocking him away from Ritchey. Beck fell across Ritchey, and then cut Ritchey's throat, using

two stokes, one to the left and one to the right. Willey heard Ritchey choking on his blood. (34RT:5997-5999, 6071, 6093-6095, 6102-6104; 35RT:6214-6215.) The person watching walked away. (34RT:6102, 6104-6105.)

Willey turned and saw appellant standing by the front door, his baton in hand. Willey approached the house and saw Vieira come running out, with a baseball bat but no knife, shutting the door. Willey saw Raper sitting in the chair, looking bloodied and dead, as though beaten on the head. (34RT:5999- 6001, 6094-6096.)

Appellant said, "Let's go," and Willey ran to the car. When he got to the car Willey saw that LaMarsh was already there, with his bat. Evans was in the car. Then Vieira, appellant and Beck, arrived. (34RT:6000-6002, 6095-6097, 6134-6135.) Beck had a large knife and had blood all over his arms. (34RT:6003.)

Willey's testimony as to the alleged conversation between appellant and Beck, to the effect that "one got away" essentially replicated LaMarsh's account. Willey testified that when he asked appellant whether he had seen "that guy standing out there in the front yard and that lady pull up," appellant said no, then started hitting the steering wheel again, swearing. According to Willey, appellant then started talking about wanting an alibi. (34RT:6005-6006, 6104-6106.) Appellant also said that he was sick, and might have to go to the hospital. (34RT:6119-6120.)

When they got to his house in Ceres, Willey went in to his bedroom and noticed he had blood on his hands, from Ritchey, and washed it off. He also had blood on his clothes. (34RT:6007.) Appellant called Starn, and told her to get a motel room in Oakdale, and that he would meet her there. (34RT:6008-6009.) According to Willey, appellant then instructed Vieira

to wash the blood off of appellant's shoes, to clean any blood out of the car, and to grab a gun from the glove box. (34RT:6009.) Appellant asked Willey to keep appellant's gun for him, and said he was leaving the bat and a knife with Willey, too. Willey put the bat and knife under the house. He later put appellant's gun in a box in his closet, along with a gun he had gotten from LaMarsh. (34RT:6013-6014, 6135-6136.) Appellant, Beck and Vieira left. Willey agreed to let LaMarsh and Evans stay the night. (34RT:6009-6011.)

Willey put his clothes in the washing machine, smoked marijuana with Evans, and then went to bed. (34RT:6011-6012.) He told Badgett that if anyone asked her where he was that night, to say he was home with her asleep, and she agreed. Willey testified that before he went to sleep, he locked his door and made sure Badgett was dressed, in case anything happened. He testified he was not sure if appellant or Beck would come back, or what they would do. (34RT:6012-6013, 6025-6026, 6109; see also 20RT:3497-3500.)

The next morning Willey and his roommate drove LaMarsh to Oakdale and Evans to Ripon. (34RT:6014.) When they returned Willey drove by himself to his secret fishing spot along the Tuolumne River. He took his camouflage pants, tennis shoes, 2 tee-shirts, sweatshirt, 2 knives, a baseball bat and a gallon of gasoline. He burned the clothes, hid the knives under cement slabs near the edge of the water, and threw the bat into the river. (34RT:6015-6016, 6108, 6110; 35RT:6215-6218.) There was blood on the larger of the two knives. (34RT:6017-6018.)

II. THE PENALTY PHASE

The trial court conducted separate penalty phase trials for appellant and Beck, with appellant proceeding first.[14] At appellant's penalty phase the prosecutor was limited to presenting evidence of conduct or incidents in which appellant had participated, but not Beck.

A. The Prosecution's Case

The prosecutor called Jennifer Starn, appellant's former common law wife, as the State's only penalty phase witness.[15] She testified that she met appellant in 1987, when she was 16 or 17 and appellant was 25. They began living together that summer, in Modesto, California, in an apartment on Liberty Street. About a year later they moved to a house on Claret Court, where they spent another year, before moving to the Camp, in Salida, in December 1989. She had three children with appellant, the oldest of whom was almost four when Starn testified. Starn met Vieira, McLaughlin and a man named Steven Perkins, Jr., at about the same time she met appellant. Vieira and Perkins lived with them on and off at the Liberty Street and Claret Court locations; McLaughlin lived with them for a time on Claret Court. (39RT:6979-6983.)

Starn testified that when Alexandra, their oldest daughter, was an

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[14] Since Beck's separate penalty phase was not part of appellant's trial, it is not summarized herein.

[15] Starn had two felony cases, charging possession of components with intent to make a destructive device, possession of a destructive device and explosion of a destructive device, pending against her in Stanislaus County. On June 19, 1992, Starn entered into an agreement with the prosecution providing that if she testified truthfully at the penalty phase of appellant's trial, the two felony cases pending against her would be dismissed. In the presence of the jury, appellant's counsel recited a stipulation to that effect. (9CT:2342; 41RT:7329-7330; Exh. 205.)

infant appellant struck her with "a lot of things," including a fly swatter and a ruler; that he gave Alexandra "clappings" with his hands (39RT:6990-6992); that he placed her in a halter-like contraption he had designed, with jars of water hanging from her legs, to strengthen her legs (39RT:6994-6995); that he put her in cold water and sprayed her with cold water, either to make her cry (to strengthen her lungs) or to try to stop her from crying (39RT:6995, 6997); that he punished her for crying by forcing her to stay upstairs alone in her room, in the dark, for six hours at a time. (39RT:7016, 7018.) She also testified that on a number of occasions appellant struck Vieira and Perkins in the stomach or chest, Perkins to the point of requiring hospitalization, in an attempt to make them strong (39RT:6983-6984, 6986-6987, 6998); that he once placed a rifle, which Starn believed was loaded, in McLaughlin's mouth, threatening to kill her, and did the same thing to her and to Vieira because he felt that they had to become better and stronger (39RT:6987-6988, 6999); that he used a Scorpion stun gun, which delivered an electric shock, on Vieira, and twice on her (39RT:6984-6986; Exhibit 192); that he struck her with his cane and other objects; that he threatened her, referring to the vows they had taken and saying, "Till death do us part, till death do us part, and the only way out of this relationship is when one of us dies" (39RT:6990-6992); and that when she was three months pregnant with their third child she spent four days in a women's shelter when appellant caused her to bleed by kicking her between her legs. However, she never mentioned the bleeding to anyone, even at the shelter, and did not seek any medical attention. (39RT:6989-6990, 7002, 7008-7009.)

On cross-examination Starn confirmed the hostility between Raper and the Camp residents. She testified that after Raper's trailer had been towed away he kept coming back and "starting trouble" with appellant, to

the point of threatening to kill him. (39RT:7003.) Starn recalled that on May 20, 1990, Evans was "nervous and high strung" and said something to the effect that Raper and his associates were on their way over, or planning to come over, to "wipe everybody out" at the Camp. (39RT:7005-7006.)

B. Appellant's Case

Hortencia Cruz, appellant's mother, testified that appellant was the youngest of her seven children. She had the older six when she was married to Jesus Hernandez, in Norwalk, in southern California. When she and Hernandez divorced, she moved north to Oakdale, near Modesto. (39RT:7021-7024, 7055.) There she and her boyfriend Aucensio Cruz and her daughter Esperanza ("Hope") lived and worked on a ranch owned by Drummond Sproul, an older man Hortencia and her former husband had known. At some point she bought a restaurant, where she did the cooking. They went out of business and moved back to Sproul's ranch when a bomb was thrown through the window of the restaurant. (39RT:7030-7037.) Hortencia testified that she worked hard on the ranch, and took care of Sproul in his old age. She expected to be compensated for her effort and to inherit from Sproul's estate. But when he died she was disappointed to learn he had left her nothing, and had purportedly had said Hortencia "wasn't worth a nickel." (39RT:7050-7055.)

Hortencia also testified regarding the deception and confusion surrounding her children's parentage. For example, she never told Aucensio she had been married before, and referred to her children from that marriage as her nieces and nephews. (39RT:7055-7059.) She also explained that when appellant was born she listed her friend Lawrence Jimmy Cox as the father, on appellant's birth certificate, and gave appellant the name Gerald Dean Lawrence Cox, even though Aucensio Cruz was in

fact appellant's father, because she was gravely ill and "didn't know what happened to Mr. Cruz," who had gone back to Mexico. When Aucensio returned from Mexico a year or two later he and Hortencia then married. (39RT:7022-7030.)

Some years later Hortencia's ex-husband told appellant that Aucensio was not his real father, but that Cox, "a drunk man," was. However, according to Hortencia, appellant was concerned not with who his father was, but with whether Hope was in fact his mother, and not his sister.[16] When Hortencia told appellant that she (Hortencia) was indeed his mother, appellant said, "'As long as I know who my mother is I don't care who my father is.' And that was it." (39RT:7043-7044.)

Hortencia also testified that appellant was not a difficult child; that she only spanked him once; that he read "very high intelligent books," including books about religion, even as a "very, very young boy" (39RT:7059-7060); that he once used religion to break a "voodoo witch doctor" spell Hope's boyfriend had put on Hope (39RT:7068-7070); that he was close to his brother Fred, who died after being "hit on the head" by his wife (39RT:7058-7059); that appellant "never had to go hungry" and "always had nice clothes to wear;" and that he knew right from wrong. (39RT:7062-7063.)

Hortencia's daughter Hope testified that she persuaded her mother to conceal her first marriage from Aucensio because her mother "deserv[ed] a new life." (39RT:7072-7073.) Hope acknowledged she was surprised when appellant was born and was unaware her mother had been pregnant. She

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[16] Hortencia was born in 1918, Hope in 1939 and appellant in 1962. (39RT:7119.)

denied being appellant's mother. (39RT:7074-7076.) She explained that they had decided to list James Cox as appellant's father and to give appellant an American sounding name, "because they always looked down on Mexican people." (39RT:7076-7077.) Hope also testified that appellant once asked her whether she, Hope, was in fact his mother, rather than his sister, because Marlene, Hope's sister, had told appellant this was so. (39RT:7096.)

Hope testified that over the years she had worked in a restaurant, picked and pruned fruit, worked in a store and sung on telethons, and that her mother had also done farm labor work, worked in the canneries, worked in restaurants and done ironing. (39RT:7078-7082.)

Hope reiterated that as a young boy appellant loved to read, and read everything "from chess to rockets to astrology, religions, different cultures of people, all those things." (39RT:7097-7098.) She testified that as a young adult appellant began to suffer from disabling back pain and used a cane; and that she helped raise appellant and loved him as though he were her son. (39RT:7108, 7117.)

Aucensio Cruz, who acknowledged he was illiterate and had difficulty speaking and understanding English, testified that he first learned he had a son when he returned to Oakdale from Mexico, when appellant was about two. (40RT:7174-7175, 7166.) He never had to discipline appellant, and never saw Hortencia strike him, because appellant was always "a good boy." (40RT:7167.) Aucensio testified that he saw the relationship between Hortencia and Hope as "like niece and aunt;" and that it was his understanding that his adoption of appellant "went through." (40RT:7174, 7168.)

Hartley Bush, the attorney Hortencia and Hope had consulted about

the adoption, then testified that he was in fact instructed to abandon the proceedings when the probation department expressed concern about "the stability of the marriage between Hortencia and Aucensio Cruz," and about Hortencia's age. (40RT:7184-7187.) Bush also testified that at about the same time he represented appellant in a minor juvenile proceeding, when appellant admitted being involved in spray-painting an automobile. (40RT:7187-7188.)

Marlene Hernandez, appellant's sister, acknowledged that when appellant was 14 she told him Hope was really his mother, not his sister, because that was what she believed. (40RT:7240-7241.) Marlene also testified that Hortencia and Hope raised appellant together, like two mothers, and that they quarreled with one another, were "wild and screaming at [appellant] all the time," and both struck appellant. (40RT:7242-7247.) According to Marlene, Hortencia in particular would discipline appellant with "anything she could get her hands on." (40RT:7245.) Marlene also described an incident in which Hortencia cut open a cat that she thought had eaten a canary, and a time when she cut the legs off a dog. (40RT:7300-7301.) Marlene testified that when appellant was an infant Hortencia and Hope did migrant farm work, sometimes living without running water and sleeping on dirt floors, and that she "was left with [appellant] like under the grape vines." (40RT:7243-7245.) Marlene said she left the Oakdale area when she was 14, and moved to southern California to be with her father, and that she harbors resentments toward her mother. (40RT:7247-7248.) Finally, she testified that she supported the death penalty, even for her brother. (40RT:7251.)

Armando Hernandez, appellant's oldest sibling, confirmed that Hortensia did not want Aucensio to know she had been married before and

had other children. When he visited he was not to call her "mom" and was referred to as a "friend." (40RT:7285.) Armando also confirmed that Hortencia had once cut open a cat to see if it had eaten a bird. (40RT:7302.)

Emmanuel Furtado testified that he had known appellant since they were in grammar school, where appellant had been teased and "picked on;" that appellant was good with cars; and that appellant was devastated by the death of their mutual friend, Alan Lutz, whom, appellant believed, had died needlessly in a car accident because the ambulance did not find him in time. (39RT:7129-7132.)

Sharon Dennis, appellant's fourth grade teacher, testified that appellant was not ambitious and was a poor student; that she did not recall him being teased or taunted; and that she remembered being told by another teacher that appellant didn't realize that his mother (Hortencia) was really his grandmother and his sister (Hope) was his mother. (40RT:7204-7206; 41RT:7384-7385.)

Appellant testified on his own behalf. He confirmed that he has always been troubled and confused about his parentage. As a child in grammar school he was surprised when he first heard himself called Gerald "Cox," and was troubled when he overheard someone talking about who his mother really was. (41RT:7331-7332.) He was also confused by the fact that some of his nephews – Armando's sons – were actually older than he was. (41RT:7352.) Appellant described himself as a loner as a child, who was teased and roughed up at school. (41RT:7332, 7340, 7369-7370.) He recalled that his education was often disrupted by the family's travels, that he was held back to repeat the third grade, that he felt he was twice unfairly punished by the principal, and that he dropped out of school in the tenth

grade. (41RT:7339-7344.) Appellant denied being "abused" by his mother, but acknowledged that Hortencia was "strict" and sometimes hit him, with a stick, hanger, iron cord, umbrella or cane. (41RT:7346-7347.)

Appellant testified that he loved his daughter Alexandra and used the "contraption" to help her stand and strengthen her legs. He "worked out" with her every day because he wanted the best for her. (41RT:7359-7360, 7377.) He denied hitting her in punishment but acknowledged swatting her legs with a flyswatter, to help her learn to crawl. (41RT:7363-7364.) Appellant testified that Starn resented the fact that he gave Alexandra all his attention and handled her better than she did. (41RT:7364.)

Appellant denied hitting Vieira or Perkins, and said that they would simply "play-fight" and spar. When he was no longer able to do so because he had developed problems with his back, they would spar without him. The stun gun, according to appellant, was an essentially harmless snake-bite remedy; he and Beck would "zap" each other with it just for fun. (41RT:7365-7367.)

Appellant described Sproul as like a grandfather or father figure, who was "the very best friend" he had. He confirmed said that Sproul told him that a "stool pigeon was about the lowest thing on the face of the earth . . ." (41RT:7349-7350.)

Appellant said he "felt bad" about the killings – particularly about Paris, whose death was so "unnecessary" and "unfair." (41RT:7356-7358.)

The defense also called Dr. Hugh Ridelhuber, a psychiatrist, who testified about the importance of knowing one's true parentage and of trust and honesty in the parent-child relationship. (41RT:7391-7397.) Ridelhuber opined that appellant was reluctant to rely on authority figures to protect his family when he perceived that they were in jeopardy.

According to Ridelhuber, appellant lacked trust in his first authoritarian figures, his parents, because he was unsure who his parents really were. For want of a firm sense of his own identity, Ridelhuber opined, appellant created the "oddball belief" about the origin of modern man – that "modern man, Homo Erectus, came from a union between out-of-space gods and earlier man." (41RT:7400-7402, 7445.) Appellant further lost respect for established authority figures, according to Ridelhuber, when his teachers failed to redress the wrong done to him by those who teased him and picked on him at school, when no one punished those who bombed the family restaurant, and when the ambulance did not reach Alan Lutz in time, when his mother's lawyer and the courts failed to secure his family an inheritance from Sproul, and when the police failed to protect him and his family from the likes of Franklin Raper, whom appellant perceived as a "mounting kind of catastrophic threat." (41RT:7411-7415, 7432-7436.) Ridelhuber opined that appellant likes authoritarian structure, and tried to create an authoritarian structure for himself. However, when in authority, appellant didn't quite know how to make decisions as an authoritarian figure. He's basically a very insecure and very anxious man who functions better and feels better where there's clear authority. Ridelhuber concluded that appellant would function well in prison, because there the authority structures are clear and consistent. (41RT:7415-7419.)

With respect to the homicides Ridelhuber stated it "was [his] assumption that [appellant] circled the wagons and decided to go over and kill Raper before Raper could kill him and his family." Ridelhuber opined that appellant's perception of a "catastrophic threat" would have included not only Raper, but others with Raper, including Ritchey, Paris and Colwell, perceived by appellant as "part of Raper's gang." (41RT:7465-7467.)

Ridelhuber administered a limited number of psychological tests, and interviewed appellant and Hope, but not Hortencia, Aucensio, Marlene, or Armando. (41RT:7400, 7416, 7438, 7457-7462.) Ridelhuber opined that appellant had an IQ of approximately 130. (41RT:7416.) Ridelhuber did not render a diagnosis for appellant, but opined that appellant met some of the criteria for "borderline personality" and "paranoia," within the meaning of the DSM-III, but suffered no "organicity" or psychosis. (41RT:7458-7459.)

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ARGUMENT

I

THE TRIAL COURT'S FAILURE TO SEVER APPELLANT'S CASE FROM THAT OF HIS CODEFENDANTS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND REQUIRES REVERSAL

Appellant unsuccessfully moved, prior to trial, to sever his trial from that of his codefendants, and repeatedly and unsuccessfully renewed that motion at trial, and requested a mistrial, due to the adversarial, antagonistic and prejudicial tactics of counsel for codefendants Willey and LaMarsh. Specifically, counsel for Willey and LaMarsh succeeded in introducing evidence which was inadmissible and prejudicial as to appellant; in the presence of the jury attempted, often in contravention of the trial court's rulings and admonitions, to elicit other evidence which was inadmissible and prejudicial as to appellant, in an effort to portray him as "an evil man"; improperly conducted themselves during trial in the presence of the jury, including denigrating or otherwise casting aspersions on counsel for appellant, and making speaking objections which conveyed prejudicial information to the jury; and, during their closing arguments and at other times, denigrated appellant's character and portrayed him, inter alia, as "the Master," a "master manipulator," "manipulative and deceptive," "intimidating" and exercising "absolute domination" over his confederates, in essence the ringleader and "mastermind" of a secretly-formed conspiracy which did not include their clients. The court's denial of appellant's severance and mistrial motions thus resulted in a fundamentally unfair guilt trial which denied appellant his Sixth and Fourteenth Amendment rights to due process, a fair trial and to counsel, and his Eighth and Fourteenth Amendment rights to a reliable determination of both guilt and penalty.

This improper and prejudicial joinder of appellant's case to that of his codefendants Willey and LaMarsh requires reversal of the entire judgment against appellant.

A. The Relevant Law Regarding Severance

Penal Code section 1098 provides that "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be jointly tried, unless the court orders separate trials." Generally, the decision whether to grant severance is left to the discretion of the trial judge. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286.) Regardless of any statutory preference for joint trials, a court retains the power to sever cases, otherwise properly joined, "in the interests of justice." (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285.)

While joint trials save time and expense, "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452; accord, *Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 939.) A reviewing court may therefore reverse a conviction when because of joinder, "gross unfairness" has deprived the defendant of a fair trial. (*People v. Ervin* (2000) 22 Cal.4th 48, 69, quoting *People v. Pinholster* (1992) 1 Cal.4th 865, 933.)

In *People* v. *Keenan* (1988) 46 Cal.3d 478, this Court warned that "severance motions in capital cases should receive heightened scrutiny for potential prejudice." (*Id.* at p. 500.) This principle is consistent with the Eighth Amendment requirement of heightened reliability in capital cases. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 376.)

Even if a motion to sever was properly denied at the time it was made, if the effect of joinder deprived the defendant of a fair trial or due

process of law, reversal is required. (See, e.g., *People v. Mendoza* (2000) 24 Cal.4th 130, 162; *People v. Arias* (1996) 13 Cal.4th 92, 127; *People v. Johnson* (1988) 47 Cal.3rd 576, 590; *People v. Boyde* (1988) 46 Cal.3rd 212, 232; *People v. Turner* (1984) 37 Cal.3rd 302, 313; *People v. Grant* (2003) 113 Cal.App.4th 579, 587; see also, e.g., *United States v. Ziperstein* (7th Cir. 1979) 601 F.2d 281, 286, cert. den. (1980) 444 U.S. 1031.) In this regard, error involving misjoinder affects substantial rights and requires reversal if it has a " 'substantial and injurious effect or influence in determining the jury's verdict.' " (*United States v. Lane* (1986) 474 US 438, 449, quoting *Kotteakos v. United States* (1946) 328 U.S. 750, 776; accord, *Zafiro v. United States* (1993) 506 US 534, 539; *People v. Grant, supra*, 113 Cal.App.4th at p. 588.) "In other words, the defendant must demonstrate a reasonable probability that the joinder affected the jury's verdict." (*People v. Grant, supra*, 113 Cal.App.4th at p. 588.)

This Court has recognized that conflicting defenses and likely juror confusion may require separate trials. (See, e.g., *People v. Hardy* (1992) 2 Cal.4th 86, 167; *People v. Massie* (1967) 66 Cal.2nd 899, 917; see also *People v. Champion* (1995) 9 Cal.4th 879, 904.) As to the circumstances under which severance is required due to conflicting defenses, this Court has turned to federal authority for guidance. (*People v. Hardy, supra*, 2 Cal.4th at pp. 168-170.) The essential consideration in determining whether defendants who are jointly charged should be separately tried is whether "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States, supra*, 506 U.S. at p. 539, cited in *People v. Cummings, supra*, 4 Cal.4th at pp. 1286-1287; accord, *United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1082

["The touchstone of the court's analysis is the effect of joinder on the ability of the jury to render a fair and honest verdict."].)

Under federal law, in order to challenge the failure to sever on appeal, the defendant must demonstrate that the effect of joinder compromised a specific trial right, prevented a reliable adjudication of guilt or innocence, or otherwise deprived him of a fair trial. This showing establishes both error and prejudice and requires reversal. (*United States v. Tootick*, *supra*, 952 F.2d at pp. 1082 -1083 ["in order to establish an abuse of discretion, the defendants must demonstrate that clear and manifest prejudice did in fact occur," such as to deny the defendant "a fair trial"; if he does so, both error and prejudice are established and reversal is required]; accord, *United States v. Mayfield* (9th Cir. 1999) 189 F.3rd 895, 906 [where reviewing court finds abuse of discretion in failing to sever trials of codefendants with inconsistent defenses based on "manifest prejudice" that resulted, there is no need for separate harmless-error analysis]; *United States v. Rucker* (11th Cir. 1990) 915 F.2d 1511, 1512 [in order to establish an abuse of discretion, appellant must demonstrate that he "suffered compelling prejudice" from joinder, which deprived him of fair trial]; *United States v. Romanello* (5th Cir. 1984) 726 F.2d 173, 177 [same].) Thus, similar to the line of California authority recognizing that gross unfairness from joinder requires reversal even if the motion to sever was properly denied at the time it was made, this analysis necessarily turns on events that occurred at trial and subsequent to the court's denial of severance.

In assessing the effect of joinder in such cases, a reviewing court should be guided by several fundamental principles. First, "[j]oinder is problematic in cases involving mutually antagonistic defenses because it

may operate to reduce the burden on the prosecutor. . . . [J]oinder may introduce what is in effect a second prosecutor into a case, by turning each codefendant into the other's most forceful adversary." (*Zafiro v. United States, supra*, 506 U.S. at pp. 543-544 (conc. opn. of Stevens J.); accord, *United States v. Mayfield, supra*, 189 F.3d at pp. 899-900; *United States v. Sherlock* (9th Cir. 1989) 962 F.2d 1349, 1363; *United States v. Romanello, supra*, 726 F.2d at p. 179.) "Cross examination of the government's witnesses becomes an opportunity to emphasize the exclusive guilt of the other defendant" and "closing arguments allow a final opening for codefendant's counsel to portray the other defendant" as the perpetrator. (*United States v. Tootick, supra*, 952 F.2d at p. 1082; accord, *United States v. Mayfield, supra*, 189 F.3d at p. 900.) "The existence of this extra prosecutor is particularly troublesome because the defense counsel are not always held to the limitations and standards imposed on the government prosecutor." (*United States v. Tootick, supra*, 952 F.2d at p. 1082.) Hence, the manner in which the codefendant conducts his defense may demonstrate prejudice and fundamental unfairness from joinder. (See, e.g., *United States v. Mayfield, supra*, 189 F.3d at pp. 900-902 [where codefendant's defense was that defendant was the perpetrator and his counsel used "every opportunity" to implicate defendant, defenses were antagonistic and joinder was prejudicial and deprived defendant of fair trial]; accord, *United States v. Tootick, supra*, 952 Fd.2d at pp.1084; *United States v. Romanello, supra*, 726 F.2d at pp. 178-181; *United States v. Johnson* (5th Cir. 1973) 478 F.2d 1129, 1133.)

Similarly, the prosecutor's argument is an important factor to consider in assessing the effect of joinder. (See, e.g., *United States v. Tootick, supra*, 952 F.2d at p. 1085 [finding reversible error in joinder of

trials of codefendants with antagonistic defenses based in part on prosecutor's closing argument mocking defendants for placing the blame on each other and the logical impossibility of accepting both defenses]; *United States v. Sherlock*, *supra*, 962 F.3d at p. 162 [finding reversible error in joinder of defendants with inconsistent defenses based on prosecutor's prejudicial argument utilizing evidence admitted against one defendant against them both].) Moreover, joining trials of codefendants with mutually antagonistic defenses may "invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt as to that particular defendant." (*Zafiro v. United States*, *supra*, 506 U.S. at p. 544 (conc. opn. of Stevens, J.).) This risk decreases the prosecution's burden of proof and is significant in assessing whether joinder affected the defendant's rights. (*Ibid.*)

Finally, the relative weight of the evidence against the defendants is an important factor to consider in assessing the harm from joinder. (See, e.g., *United States v. Mayfield*, *supra*, 189 F.3d at p. 907 [reversible error in denying motion to sever trials of codefendants with mutually antagonistic defenses in light of conduct of codefendant's counsel and fact evidence against defendant was not "overwhelming"].)

The application of these principles to the facts of this case plainly demonstrates that the joint guilt-phase trial resulted in gross unfairness to appellant at both the guilt and penalty phases which requires reversal of the entire judgment.

In assessing a claim of improper denial of severance, an appellate court "must weigh the prejudicial impact of all of the significant effects that may reasonably be assumed to have stemmed from the erroneous denial of a

separate trial." (*People v. Massie, supra*, 66 Cal.2d at p. 923.)

If the failure to grant a motion for severance results in prejudice so great as to deny a defendant a fair trial, it constitutes both an abuse of discretion by the trial judge and a denial of the defendant's federal constitutional rights to due process and to a fair trial under the Fifth, Sixth and Fourteenth Amendments. (*United States v. Lane, supra*, 474 U.S. at p. 449; *Belton v. Superior Court, supra*, 19 Cal.App.4th at p. 1285.) Such prejudice may arise when, inter alia, evidence is introduced from which the jury may infer a criminal disposition on the part of the defendant. (See *Webber v. Scott* (10th Cir. 2004) 390 F.3d 1169, 1177.) Because of the court's refusal to sever, appellant's trial essentially became more a forum for a general attack on his character than an inquiry on his guilt or innocence.

In short, the trial court's denial of appellant's numerous severance and mistrial motions compromised his constitutional rights by rendering his trial fundamentally unfair and depriving him of due process of law (see *Estelle v. McGuire* (1991) 502 U.S. 62, 68; *Grisby v. Blodgett* (9th Cir. 1997) 130 F.3d 365, 370; *Jammal v. Van de Kamp* (9th Cir.1991) 926 F.2d 918, 919-20), as well as his right to a reliable penalty determination. The judgments of conviction and death must therefore be reversed.

B. The Trial Court's Failure to Sever Appellant's Case from That of Codefendants LaMarsh and Willey Requires Reversal

1. Procedural History

a. Pretrial Motions to Sever

Prior to trial, codefendant Beck made a motion for separate trials on the ground that he had been informed by counsel for the three other codefendants of their intent to introduce evidence seized in a search of the

large trailer at the Camp, although the trial court had ruled that the prosecution was barred from introducing that evidence as the fruit of a warrantless search. (5CT:1397-1400; 6CT:1505, 1508.) The prosecution opposed Beck's severance motion on the ground that denial of severance is almost never reversed on appeal. (5CT:1415-1416.) The trial court denied Beck's motion. (5CT:1517.)

Appellant moved for separate trials from codefendants LaMarsh and Willey on the grounds that each of the defendants had made statements to the police at the time of their arrests, and that several searches had been conducted, out of which evidence had been suppressed as to some defendants, but not all. (5CT:1402-1405.)

LaMarsh joined in appellant's motion for severance, arguing that a joint trial would deny LaMarsh due process in that "no evidence points to Mr. LaMarsh as the person who inflicted fatal injuries to any victim," and that a joint trial would raise a strong probability that LaMarsh would be found guilty by association with the codefendants, who, according to LaMarsh's view of the discovery in this case, were members of an organized cult involved in satanic rituals. (15CT:3631-3639.)

At the hearing on appellant's motion, defense counsel Seymour Amster filed a declaration under seal, informing the trial court of direct conflicts between the defenses of appellant and Willey, and also between the defenses of appellant and LaMarsh. Amster pointed out that, as it stood pretrial, appellant and Willey were the only two defendants identified outside the house with Richard Ritchey, and thus had directly-conflicting defenses. He also explained that there was a direct conflict between LaMarsh and appellant as to which of them inflicted the fatal wounds on Franklin Raper, and that appellant expected to present evidence that

LaMarsh and Michelle Evans had entered into a conspiracy to kill the victims, which conspiracy did not include the other defendants, and after entering 5223 Elm Street first, started the altercation, which led to the other defendants being attacked when they arrived. (4RT:796; 17BCT:3993-3995.)

At the same hearing, Detective Deckard testified concerning the statements made by each of the codefendants. Deckard testified concerning statements by LaMarsh to Evans to the effect that appellant helped LaMarsh beat Raper. The statements were allegedly made at Willey's residence, after appellant, Beck and Vieira had left. (4RT:798, 800, 803-804, 806.) Evans also related various statements by codefendants in the car going to Willey's house. (4RT:799, 804-806.) Deckard testified that none of the four codefendants gave the police any statements implicating any of the other codefendants. (4RT:805.)

Appellant argued that evidence of LaMarsh's statement to Evans without appellant's presence would be inadmissible in a separate trial of appellant, and highly prejudicial. Appellant further argued that there may be conflicting defenses. (4RT:808-809.)

Ramon Magana, LaMarsh's attorney, argued that if tried together, none of the four codefendants would receive a fair trial given the circumstances of what took place and the varying bits of evidence applicable to one or some, but not all, of the codefendants. He argued that the question in terms of due process is whether a defendant is going to be tried by evidence and facts related to his own conduct, or that relating to the conduct of his associates; the jury would be unable to make distinctions, especially with four attorneys objecting, which would end up confusing the jury. He argued that evidence demonstrating that LaMarsh was not

culpable for the acts of codefendants could be lost in the advocacy of codefendants' counsel, depriving LaMarsh of a fair trial. (4RT:812-813.) Magana further stated that he intended to introduce documents and evidence regarding prior acts of codefendants, about which counsel for codefendants would undoubtedly object vigorously. Magana offered to provide the evidence he intended to offer to the trial court in camera. (4RT:813-814.) The trial court did not allow Magana to make such an in camera offer of proof.

In denying the motion for severance, the trial court stated:

> So far as inconsistent defenses are concerned, the Court is aware of no rule of law or case decision that says simply because two defendants' defenses don't match, they're entitled to separate trials. [¶] The Court feels that – that if evidence which is admissible is presented and the defendants have a full and fair opportunity to confront and cross-examine that evidence, they're entitled – they're receiving a fair trial. There's no due process violation.

(4RT:827.) After addressing a potential problem under *Aranda*,[17] the trial court denied the motion to sever. (*Ibid.*; see also 4RT:828.)

The prosecutor at first assured the trial court that he would not use LaMarsh's statements to Evans at Willey's home that implicated other codefendants who were not present. The statements made on the way to Willey's house, the prosecutor argued, were made by the codefendants in the presence of each other and therefore were adoptive admissions. (4RT:814-816.) The trial court found that the statement by LaMarsh to Evans at Willey's house, although possibly a problem, did not require

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[17] *People v. Aranda* (1965) 63 Cal.2d 518

severance, and denied the motion.[18] (4RT:825, 827-828.)

b. LaMarsh's Motion to Unseal Sealed Declaration of Appellant

Prior to trial, Magana appeared specially for Amster, with appellant, at an in camera hearing in another case,[19] at which a sealed declaration by appellant was submitted in support of a motion for a continuance in that case. (RT:2/13/92:1-3.) During jury selection in this case, Magana filed a motion to have that declaration unsealed, on the ground that it was not privileged. In a declaration, Magana stated that Amster had requested that he present appellant's declaration to the court in that case, and call appellant to further explain the need for a continuance if the declaration was insufficient. Magana reviewed the declaration before submitting it to the court, but when the court found it insufficient, Magana asked that the hearing be continued for Amster to present appellant's testimony on the issue. In his declaration, Magana stated that appellant's declaration stated that he had material evidence which would exculpate Jennifer Starn in that case, but that he could not testify until after the capital case was tried because his testimony would result in his conviction in the capital case. Magana further stated that he believed appellant would testify in the capital case and place the culpability for the capital offenses on LaMarsh and others, and that the declaration was therefore necessary for cross-examination of appellant. (15CT:3667-3672, 3676-3678.)

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[18] The prosecutor later withdrew his assurance about LaMarsh's statement at Willey's house, saying he would introduce it unless the trial court held that *Aranda* applied, in which case he would not use the statement. (4RT:828.)

[19] *People v. Jennifer Starn*, Stanislaus County Superior Court No. 261927.

Amster, in response, stated that he had not seen how the hearing in the Starn case had anything to do with appellant's capital case, and saw no conflict in having Magana make the appearance for him. He argued that had Magana perceived a conflict, he should have refused to appear on behalf of Amster as soon as the conflict became apparent to him. He also argued that appellant's declaration showed that he was asserting his Fifth Amendment privilege, not waiving it. He asserted that the only partial publication of the declaration happened "while Mr. Magana was representing" appellant, and that the attorney-client privilege extended to Magana as a result. Finally, he argued that the declaration was irrelevant for purposes of cross-examination. (6CT:1679-1684.)

At a hearing, Magana argued that he was asked to do a favor, and did not undertake to represent anybody except to present a declaration to the court, but that Amster's claim that Magana represented appellant required that the trial court determine whether there was a conflict. (12RT:2226-2227.) The trial court stated that any conflict would be between appellant and Amster, and that appellant, by appearing with Magana, would have waived the conflict. The trial court found that Magana had done nothing improper. (12RT:2227-2228.)

Magana then argued that since the declaration was given to him, and he was outside the lawyer-client relationship, it was not privileged, citing *Gonzales v. Municipal Court* (1977) 67 Cal.App.3d 111.

The trial court granted the motion, and unsealed appellant's declaration. (13RT:2320.) However, the contents of the declaration were not referred to in front of the jury, nor was the declaration introduced into evidence.

c. Motions Made during Trial and Evidence Presented As a Result of the Refusal to Sever

During trial, as the tactics of Magana and Willey's attorney, William Miller, became apparent, and as the trial court admitted evidence which was, at best, of marginal relevance or probative value to the charges against appellant, but highly prejudicial to appellant's defense, appellant renewed the motion for severance on a number of occasions. (21RT:3617; 31RT:5462, 5469-5470; 32RT:5602-5603.)

For example, when Magana asked witness Kevin Brasuell about the incident in which LaMarsh cut his hand and put a thumb print in blood on a paper, Amster objected to the evidence as prejudicial and inadmissible character evidence, and noted: "[T]he Court has a decision to make at this point. Probably the wisest decision would be a severance, but we did not do that.[20]" (21RT:3617.) The trial court overruled appellant's objection and allowed the evidence. (21RT:3620-3621.)

Prior to Magana's opening statement on behalf of LaMarsh, concerning the admissibility of testimony by Rosemary McLaughlin about the relationship of appellant, Beck and Vieira, Amster objected on the grounds that it was inadmissible character evidence under Evidence Code section 1101, was more prejudicial than probative under Evidence Code section 352, and was cumulative. (31RT:5454-5455, 5458-5463, 5474.) Amster cited, inter alia, *People v. Reeder* (1978) 82 Cal.App.3rd 543, to argue that if the trial court were to admit the evidence, then a mistrial and separate trials would be required. (31RT:5462.)

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[20] Referring to the trial court's denial of the severance motions pretrial.

Magana purported to rely upon a case named "*Castro*"[21] for the proposition that evidence of conduct was admissible to show a relationship between appellant, Beck and Vieira over a long period of time where they engaged in conduct at the direction of appellant. (31RT:5464.) He also argued that it would impeach appellant's denial of a leadership role, and of "order[ing] about" Beck and Vieira, and showed that appellant, Beck and Vieira "acted secretly, they often did things at cross purposes to other individuals. They operated behind other people's backs, never telling what they were doing." He argued that the evidence suggested that the three had a conversation out of the presence of Evans and LaMarsh and "engaged in a plan to do something inappropriate." (31RT:5465.) Miller agreed, and argued that excluding the evidence would deny Willey a fair trial. (31RT:5467-5468.) The prosecutor then argued that the relationship between appellant, Beck and other persons was relevant to the formation of the conspiracy and the willingness of certain people to go blindly along with whatever appellant suggested. (31RT:5468.)

Amster argued that the evidence which Magana sought to introduce constituted evidence of prior acts to show that appellant and Beck had a disposition or propensity to commit this crime, yet there was no evidence of a similar factual situation to show a common plan or design, and that the evidence would be so prejudicial that appellant was entitled to a separate trial, citing the Sixth, Eighth and Fourteenth Amendments. (31RT:5469-5470.)

The trial court ruled that the prior relationship of the parties and the

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[21] To appellant's knowledge, no such case standing for the proposition cited by Magana exists.

nature of the relationship would be probative of the identity of the planners of the incident, and would therefore be admissible under Evidence Code section 1101, subdivision (b). Although the trial court acknowledged that it would be prejudicial to appellant and Beck, it held that the probative value outweighed "the prejudicial value." (31RT:5470-5471.)

Magana then delivered his opening statement on behalf of codefendant LaMarsh, during which Magana graphically previewed the nature of his intended case, i.e., blame appellant for everything. (See, e.g., 31RT:5475-5476, 5481-5486.) He told the jury, for example, that appellant, Beck and Vieira "had all types of weapons. They had semiautomatic weapons. They had rifles, shotguns, knives. And he [LaMarsh] believes that they have a LAW's rocket or a LAW's rocket launcher. . . ." (31RT:5481.) Magana further told the jury that appellant, not LaMarsh, was the person who killed Raper, "hitting Mr. Raper on the head [with a baton] over and over. Jason had no idea that this was going to happen." (31RT:5485.) Magana also described LaMarsh as seeing Vieira, Beck and appellant with "blood on them" after the incident. (31RT:5486.)

Later, following McLaughlin's testimony, Amster unsuccessfully moved for a mistrial on two grounds: First, that when McLaughlin was asked if she was "afraid of these guys," she "visibly became shaken" and "was crying for, I would say, at least a minute, a minute and a half." This was in the presence of the jury. Second, because of Miller's "questions concerning the occult, as well as the other religious questions concerning Mr. Cruz and his relationship with Mr. Beck." Amster cited a violation of appellant's rights under the Sixth, Eighth and Fourteenth Amendments. (31RT:5584.)

Later, at a sidebar conference during LaMarsh's testimony, Magana

informed the court of his intent to establish that appellant, Beck and Vieira were a close-knit group, "one the enforcer, one the leader, one the slave." (32RT:5601.) He argued that the three were secretive in their dealings, had a separate agenda, and were "very capable of having planned other events not telling other individuals and manipulating them to do their bidding so they can't get caught in an awkward position." (32RT:5601.) He argued that LaMarsh was wary of them, and did not want to associate with them, "but because of Mr. Cruz's manipulative and deceptive personality, [appellant] basically hooked him into being associated with them. . . ." (32RT:5601-5602.)

Amster argued that if the trial court felt that this was material to LaMarsh's defense, the trial court should declare a mistrial and not allow a joint trial to continue, due to the prejudice to appellant. He described the evidence as "being brought in for character evidence to show disposition for Mr. Cruz to commit the crime. I feel that it's now cumulative, tremendously." (32RT:5603.) He further argued that "the Court is now faced with two competing Constitutional rights on two defendants. And I feel at this point that the Court has no choice but to mistry it and to have separate trials as the case law that I presented to the Court indicated." (32RT:5604.)

Miller responded by stating that "I feel it is absolutely necessary to the defense of Mr. Willey for me to be able to bring out and show to the jury the absolute domination of Mr. Cruz over Mr. Beck and Mr. Vieira. If that includes the fact that -- the jury concludes that Mr. Cruz is an evil man, I don't see a way of avoiding that." (*Ibid.*)

Amster noted that Miller and Magana were speaking of appellant, Beck and Vieira as a unit, and were trying to present character evidence to

show a propensity or disposition of doing a crime. (32RT:5606.) Amster and Kent Faulkner, Beck's attorney, noted that there was no evidence that there was a separate conspiracy not including LaMarsh and Willey, and that Magana and Miller were "trying to bootstrap some perception of a loose organization with these alleged Machiavellian goals and what actually happened on the evening of the 20th." (32RT:5606-5608.)

Magana argued that he intended to show that LaMarsh was not part of the conspiracy, but was present "because these guys are quite intimidating." (32RT:5610.) Faulkner argued that in order to give LaMarsh all that he deserved in putting on a defense, it would prejudice appellant's and Beck's defenses and bring in evidence in violation of the Constitution. (32RT:5611.) Miller agreed. (*Ibid.*)

The trial court ruled that Magana could inquire of LaMarsh whether he thought appellant, Beck and Vieira constituted a group, why he thought that, why he did not join it. (32RT:5612.) However, the trial court excluded any mention of religious philosophy, occultism, or Nazism. (32RT:5612-5614.)

Faulkner and Amster asked for a ruling on whether Magana would be allowed to elicit specific bad acts of Beck and appellant. The court ruled that bad acts could be pursued "[i]f they relate to Mr. LaMarsh, Mr. Willey, Mr. Vieira, Mr. Beck or Mr. Cruz. . . ." (32RT:5615.) Amster reiterated his objection, including reliance on the Sixth, Eighth and Fourteenth Amendments. (32RT:5650.)

LaMarsh took the witness stand in his own defense and testified, inter alia, that appellant said "it would be a lot easier if they had just went in the trailer and did him [Raper] than going through all this hassle" (32RT:5629); that appellant brought a baton and a knife to Elm Street

(32RT:5641, 5703), but not a cane (33RT:5765); that appellant repeatedly beat Raper in the head with a baton (32RT:5656-5657; 33RT:5747-5751, 5850, 5861, 5865, 5870-5871); that appellant had blood on his hands after the incident (32RT:5662); that appellant was "pissed off" because "one got away" (32RT:5663); that appellant told Vieira to bring "the gun" into Willey's house (32RT:5666-5667); that he was afraid that appellant and Beck would "kill me" after the incident (32RT:5669); that he heard appellant say that he wanted to "do" Raper (33RT:5714); that when they arrived at Willey's house after the incident, appellant had blood on his knees and shoes and told Vieira to clean off his shoes (33RT:5721); that appellant said to Beck "We're going to have to get an alibi" (33RT:5723); that on a prior occasion he saw Beck hit Vieira in the stomach at appellant's command, Vieira fell down, got up crying, and Beck hit him in the stomach again (33RT:5862); and that appellant did not tell the truth in his testimony about what happened that night, including appellant testifying that he entered the house and told everybody to leave (33RT:5863-5864).

Prior to Willey's testimony, Amster noted his objection to any evidence that appellant was a spiritual leader, or involved in the occult, unless Willey first testified that he entered into the conspiracy under duress or manipulation. (34RT:5951.) When Miller indicated that Willey's interest in the occult ended in 1989, the trial court ruled that Miller could not ask about the occult. (34RT:5952-5954.) The trial court also reiterated its ruling limiting evidence of observations to interactions between appellant, Beck, Vieira, and LaMarsh. (34RT:5954.)

Miller then asked for a mistrial and severance, describing the excluded evidence as highly probative of Willey's "state of mind when he reached Salida, California on May 20, 1990." (34RT:5954.) The trial court

denied the motion. (34RT:5954-5955.) After Magana joined in Miller's request for mistrial and severance, the trial court reiterated its denial. (34RT:5955.)

Willey then took the stand in his own defense and testified, inter alia, that appellant would "inflict pain" on Vieira if he was not acting the way appellant wanted him to, or tell Beck to do so (34RT:5961-5962); that appellant initiated him and LaMarsh by having them cut their fingers and put their fingerprints on paper in blood (34RT:5965-5967, 6030, 6037-6039, 6138); that appellant had a baton on the night in question (34RT:5991, 6083, 6143-6144), and a knife (34RT:6083), but not his cane (34RT:5986, 6073); that appellant said "Fuck man, fuck. One of them got away." (34RT:6005, 6105-6106); that appellant said "we got to get an alibi" (34RT:6005-6006); that appellant told Vieira to wash the blood off his shoes and out of the car (34RT:6009); and that, in his testimony, appellant told the jury things that weren't true (34RT:6146).

Prior to closing arguments, Amster, who had been ordered by the trial court to argue first of the four codefendants, requested the opportunity to deliver a rebuttal argument after the other three codefendants had argued. The motion was based on Penal Code sections 1093[22] and 1094,[23] *People v.*

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[22] Penal Code section 1093, in relevant part, states:

> (e) When the evidence is concluded, unless the case is submitted on either side, or on both sides, without argument, the district attorney, or other counsel for the people, and counsel for the defendant, may argue the case to the court and jury; the district attorney, or other counsel for the people, opening the argument and having the right to close.

[23] Penal Code section 1094 states: "When the state of the pleadings requires it, or in any other case, for good reasons, and in the (continued...)

Owen (1901) 132 Cal. 469, *People v. Strong* (1873) 46 Cal. 302, and the Sixth, Eighth and Fourteenth Amendments. Amster argued that without an opportunity to rebut the expected argument from codefendants that appellant, Beck and Vieira separately conspired, then the jury will have heard a "Prosecution-like" argument against appellant without appellant having had an opportunity to rebut it. (36RT:6454-6457.) LaMarsh and Willey objected. The prosecutor argued that appellant could cover the issue in his argument, stating, "it's rather obvious that it's a tag team here, two vs. two, and that can go on forever. I don't think it's proper." (36RT:6457.) Without comment or analysis, the trial court denied the request. (*Ibid.*)

d. Closing Arguments

In his closing argument to the jury, the prosecutor argued: "Now, this is seemed [*sic*] kind of like a World Wrestling Federation tag team match. As one of the attorneys pointed out, it's pretty obvious that it's two against two over here. And Mr. Beck and Mr. Cruz took the stand and both pointed the finger over in this direction towards Mr. LaMarsh and Mr. Willey. Mr. Cruz, of course threw in Michelle Evans and Ricky Vieira who aren't here on trial, at least in this case. And then when Mr. LaMarsh and Mr. Willey took the stand, they threw it back the other way against Mr. Beck and Mr. Cruz." (37RT:6719-6720.)

The prosecutor again referred to "the tag team" in arguing that Willey identified Beck rather than Cruz as having cut Ritchey's throat

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[23] (...continued)
sound discretion of the Court, the order prescribed in the last section may be departed from.

because "[h]e's got to back up Mr. LaMarsh. If he puts Mr. Cruz out there cutting his throat, then Mr. Cruz couldn't be in there playing hard-ball with Mr. Raper's head. So Mr. Beck is taking the fall for cutting Mr. Ritchey's throat when, in fact, I would submit to you that it was Gerald Cruz that cut Mr. Ritchey's throat after Mr. Willey had stabbed him a bunch of times." (37RT:6739.)

The prosecutor adopted the codefendants' prejudicial characterizations of Mr. Cruz, referring to him as "the Master" (37RT:6723-6724), and as "the mastermind of this conspiracy" (37RT:6728), and also relied upon the characterization of the defendants as "the militaristic organization" in attempting to support the credibility of William Duval's (otherwise quite dubious) testimony that he saw four people double-timing single file in a military-type formation at port arms. (37RT:6736.)

Through a large part of his closing argument on behalf of codefendant LaMarsh, Magana repeatedly misrepresented to the jury the meaning of "malice aforethought," equating it with ill will or hostility. He argued that LaMarsh had no malice aforethought as to Darlene Paris because "they were friends." (37RT:6624.) Similarly, he argued that LaMarsh had no malice aforethought as to Dennis Colwell since he "didn't really know Mr. Colwell." (*Ibid.*) While admitting various hostile acts by LaMarsh towards Raper, Magana argued that they were "nothing more than acts of stupidity that don't amount to malice aforethought. As a matter of fact, it shows that Jason is quite controlled." (37RT:6626.) He claimed that the dispute over the gun stolen from LaMarsh "was a simple dispute that was resolved." (37RT:6631.) On the other hand, he argued that Mike Wierzbicki showed that appellant "wanted to get his hands on Franklin

Raper, again to show you the hostility, the malice, and intent. But [Wierzbicki] didn't say anything about Jason [in a statement to Detective Deckard]." (37RT:6631.)

Another large part of Magana's argument centered on LaMarsh's character. He first argued that Richard Ciccarelli's belief of LaMarsh's statement that Raper came at him with a knife and LaMarsh broke his arm showed LaMarsh's reputation in the community for truthfulness. (37RT:6628-6629.) He argued that Brasuell thought highly of LaMarsh and considered him like a little brother, which was "a pretty high regard for somebody." (27RT:6629.) He argued that Brasuell testified that he did not think LaMarsh was "the kind of guy to get involved in this," which should tell the jury that LaMarsh is "a good man." (37RT:6630.) Magana referred to Brasuell's testimony that LaMarsh gave him money for medicine for his baby, showing "a facet of Mr. LaMarsh's character. It's a sense of humanity that does not turn on and off to the point of going the other direction and doing those kinds of acts that occurred inside 5223 Elm Street." (37RT:6629-6630.) Magana further argued as follows:

> I told you before that there was a savagery that took place inside 5223 Elm Street. And what you have seen through these witnesses, Mr. Ciccarelli and Mr. Brasuell, is a sense of humanity in Mr. LaMarsh, a humanity that's not consistent with the savage, brutal killings that took place.

(37RT:6630.) Magana argued that the crime "doesn't fit in with [LaMarsh's] character, his sense of humanity." (37RT:6631.)

Referring to Evans's testimony that LaMarsh "was the best boyfriend I've ever had. He gave me all the trust and all the respect I could ask for," Magana argued that this showed that LaMarsh "found a sense of humanity in her, and he treated her with dignity. Does that sound like the savage

brutality that occurred at 5223 Elm Street? No. No, it doesn't." (37RT:6632-6633.)

Magana closed his argument stating: "And you've learned something about Mr. LaMarsh. You know he's credible. You've learned something about him. He's not the kind of person who would do something like this. He's not the kind of person that's going to plan to go over and kill people." (37RT:6646-6647.)

Magana did not restrict his argument regarding character to his glowing praises of LaMarsh. Rather, immediately after discussing LaMarsh's character, Magana told the jury, by stark contrast:

> In any event, we know there are three individuals that have been together for a number of years. They're very tight. And we know what kind of behavior they engaged in. One of them, Ricky Vieira, is the subject of abuse, the subject of degradation. Those three individuals, I submit to you their character fits well with what took place at 5223 Elm Street. [¶] And why do I mention that? Because, you see, they acted independently of each -- of Jason. They acted independently of Michelle Evans. If they had a separate agenda, Jason didn't know about it. If they had a separate agenda, Jason didn't agree to it. I want you to consider that. Because Jason didn't kill those four people. And we know that somebody did. And the prosecution hadn't [*sic*] proven beyond a reasonable doubt the connection between Jason and those three individuals that I'm talking to you about.

(37RT:6633-6634.)

Following this argument contrasting the character of the defendants, Magana addressed the evidence relating to the question of who killed Raper. His primary argument that LaMarsh had not killed Raper was comprised in large part of the argument that appellant had done so, with a baton, while LaMarsh only broke Raper's arm with a baseball bat in

response to Raper's attack on LaMarsh with a knife. (37RT:6636-6642.)

In his closing argument on behalf of codefendant Willey, Miller argued that appellant had decided something was going to happen, he was going to settle a score, but Willey didn't know about it. He described appellant as a "master manipulator, . . . a man with the innate sense of the human psychology. It's fascinating, fascinating where the bird stares at the snake. It's scary too." (37RT:6654-6655.) He mocked appellant, Beck and Vieira as people "who want to dress up and play soldier." (37RT:6657-6658.)

2. The Trial Court Abused Its Discretion in Denying Appellant's Severance Motions

Given all of the foregoing, there can be no debate about the antagonistic nature of Willey's and LaMarsh's defenses vis-a-vis appellant's defense, both in theory and in practice, not to mention the rising personal hostility of the defense attorneys during trial (see Argument II. B.2, *post*). Under these circumstances, the trial court abused its discretion in dismissing appellant's repeated requests to sever. (*People v. Ervin* (2000) 22 Cal.4th 48, 68.)

The abuse of the court's discretion was evident even in its refusal to sever prior to the start of the prosecution's case. Without engaging in any inquiry or applying the "heightened scrutiny" appropriate to a capital case (*People v. Keenan, supra,* 46 Cal.3d at p. 500), the trial court denied the motion, stating only:

> So far as inconsistent defenses are concerned, the Court is aware of no rule of law or case decision that says simply because two defendants' defenses don't match, they're entitled to separate trials. [¶] The Court feels that – that if evidence which is admissible is presented and the defendants have a full and fair opportunity to confront and cross-examine

that evidence, they're entitled – they're receiving a fair trial. There's no due process violation.

(4RT:827.)

The trial court's statements betray a misapprehension about the principles governing the determination of whether or not separate trials are necessary. While it is true that "simply because two defendants' defenses don't match" is not adequate grounds to require severance, neither does it compel joint trials. Rather, the trial court must weigh the potentials for prejudice to the defendants which might arise from the presentation at trial of antagonistic or inconsistent defenses. Because of a misunderstanding of the relevant law, however, the trial court failed to weigh the heightened dangers of prejudice inherent in the antagonistic defenses at issue. As will be shown, the potential forms of prejudice identified in *United States v. Tootick, supra*, and in the precedents of this Court and the Court of Appeal, were actualized at appellant's trial.

A court's exercise of legal discretion "must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the . . . matter at issue." (*People v. Russel* (1968) 69 Cal.2d 187, 195, superseded by statute on another ground as noted in *People v. Anderson* (2001) 25 Cal.4th 543, 575.) If a trial court's discretionary decision is influenced by an erroneous understanding of the applicable law or reflects that the court is unaware of the full extent of its discretion, it cannot be said that the court properly exercised its discretion under the law. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) Here, the trial court's statement demonstrates an erroneous understanding of the applicable law, and demonstrates that the denial of the motion was not based upon a proper exercise of discretion upon which this Court may rely.

Furthermore, an exercise of discretion must be based upon all the evidence relevant to the issue. The failure to consider all of the evidence relevant to an exercise of discretion constitutes an abuse of that discretion: "'To exercise the power of judicial discretion all the material facts . . . must be both known and considered.'" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86, citing and quoting *People v. Surplice* (1962) 203 Cal.App.2d 784, 791.) "Judicial discretion must be informed, so that its exercise does not amount to a shot in the dark." (*Estate of Herrera* (1992) 10 Cal.App.4th 630, 637; see also *Schlumpf v. Superior Court* (1978) 79 Cal.App.3d 892, 901 ["A failure of the trial court to consider all the evidence is a failure to exercise discretion and requires reversal of the determination."].) Here, the trial court ignored information relevant to the issue and crucial to an informed evaluation of the potentials for undue prejudice from a joint trial. Mr. Magana, codefendant LaMarsh's attorney, offered to provide the trial court with specific information about documents and evidence regarding prior acts of LaMarsh's codefendants which he intended to introduce, and about which he expected that counsel for codefendants would object vigorously. (4RT:813-814.) Despite Magana's offer regarding specific evidence, rather than conjecture, and his representation that the specific evidence would raise objections from counsel for codefendants, indicating the probability, even inevitability, of substantial conflicts between the codefendants on the admissibility, the probative value or the prejudicial effect of evidence sought to be introduced, the trial court failed to hold the requested in camera hearing, without comment.

As a result, the trial court denied the motion for severance without knowledge of facts which were not only relevant, but crucial, to an informed evaluation of the risks of unwarranted prejudice in a joint trial in

this case. Such a refusal to obtain information available and relevant to the trial court's exercise of discretion amounts to an abuse of discretion. (See, e.g., *In re Cortez, supra*, 6 Cal.3d at pp. 85-86.)

The trial court further, and even more clearly, abused its discretion when it denied appellant's motions to sever during the presentation of evidence, when it knew, in no uncertain terms, that the defenses of Willey and LaMarsh were extremely antagonistic to appellant's.

No one but Michelle Evans, an original defendant in this case, gave direct testimony inculpating appellant in a conspiracy with LaMarsh, Willey, Vieira, Beck and Evans, and Evans's testimony was subject to extensive impeachment as well as the distrust due an accomplice testifying for the prosecution. Appellant, Beck, LaMarsh and Willey all testified that no such meeting as Evans described took place and no such conspiracy was entered into. Given the contradictory state of the evidence on this point, and the lack of any corroboration of Evans's story of the map and the meeting in the trailer, it was reasonably probable, in the absence of the antagonistic tactics of LaMarsh and Willey, that at least one juror would have found that the prosecution had not carried its burden of establishing appellant's guilt beyond a reasonable doubt.

The purported fact that appellant, Beck and Vieira were a close-knit group and secretive did not have probative value, in *appellant's* case, on the issue of whether they actually conspired secretly and without the knowledge of LaMarsh and Willey. There was no evidence that appellant, Beck and Vieira entered into a secret conspiracy without the knowledge of Evans, LaMarsh or Willey. The only evidence of conspiracy was Evans's tale of a discussion and agreement among all six codefendants – appellant, Beck, Vieira, LaMarsh, Willey and Evans. By the jurors' inability to reach a

verdict as to LaMarsh and Willey on either the conspiracy count or any of the homicides, it is clear that the jurors did not unanimously accept Evans's story as true. Yet the jury convicted appellant and Beck not only of the murders, but also of the conspiracy. That verdict, coupled with the jury's inability to reach a verdict as to LaMarsh and Willey, tracks LaMarsh's and Willey's use of the prejudicial and inflammatory character evidence to exonerate themselves, including its improper use to convince the jury that, because of how they acted in the past, appellant, Beck and Vieira must have entered into a separate, secret conspiracy to kill everyone at 5223 Elm, without letting LaMarsh, Evans and Willey know. The trial court abused its discretion, and denied appellant due process, in failing to grant appellant's motions to sever given the inevitable prejudice caused to appellant from joinder with codefendants Willey and LaMarsh.

Moreover, as argued by Amster, Willey and LaMarsh sought to tie appellant to Beck, seeking to attribute Beck's actions, as well as his statements, to appellant. (32RT:5606.) A basic principle underlying the concept of a fundamentally fair trial is that the culpability of every criminal defendant on each charge will be determined solely on the basis of evidence regarding him individually. (See, e.g., *People v. Mitchell* (1969) 1 Cal.App.3d 35, 39.) The trial court's erroneous denial of severance undercut this basic principle, denying appellant a fundamentally fair trial.

The extremely prejudicial testimony of LaMarsh and Willey, as well as that of the witnesses they presented and the testimony elicited by them on cross-examination of other witnesses (see subsection B.1.c, *ante*, and Argument II, *post*, fully incorporated herein by this reference), obviously would not have been introduced at a separate trial. LaMarsh's accusation that appellant, rather than he, had committed the fatal assault on Raper,

would not have been presented, for it conflicted with the prosecution's theory that LaMarsh killed Raper. Nor would have Dr. Rogers's opinion that a baton, rather than a bat, had caused those fatal wounds. Rosemary McLaughlin, the source of much of the worst of the prejudicial character evidence against appellant (see Argument II, *post*), would not have testified – and in a prejudicially emotional manner throughout her testimony (see 31RT:5585). The prejudice to appellant from the character evidence, acknowledged by the trial court, would have been avoided, since there would have been no probative value on behalf of LaMarsh and Willey to balance it against.

3. The Trial Court Abused Its Discretion in Denying Appellant's Request for Rebuttal Jury Argument

The court denied appellant's request for rebuttal argument without comment, without any acknowledgment of its discretion to grant the request.

The explicit language of Penal Code section 1094 establishes that the trial court had discretion to alter the order of argument "for good reasons, and in the sound discretion of the court." Such alteration of the order of the argument, to allow rebuttal argument after a second and third prosecutor had argued, would have been a reasonable means of attempting to protect appellant's right to a fair trial. (See *United States v. Mayfield, supra,* 189 F.3d at p. 900, fn. 1 [in camera admission by one defendant's counsel that her defense would be the prosecution of the codefendant required severance or alternative protective measures].) The requirement of Penal Code section 1093 that the prosecution "open[] the argument and hav[e] the right to close" was not affected by appellant's request. Nor would a rebuttal argument, limited to responding to antagonistic argument from

codefendants' counsel Magana and Miller, have unfairly affected LaMarsh or Willey, whose counsel had the opportunity to hear Amster's argument to the jury before they presented theirs.

The trial court's denial of the request without explanation leaves it unclear whether the denial was an actual exercise of discretion or whether, instead, the trial court did not realize that it had the discretion to grant the request. In either case, the denial of the request was an abuse of discretion, and a failure of the trial court in its duty to protect appellant's right to a fair trial.

4. Appellant Was Denied a Fair Trial and Due Process of Law by the Trial Court's Failure to Sever

Time and again the trial court was explicitly informed of, and even acknowledged, the conflict between the evidence Willey and LaMarsh sought to introduce in their defense and the prejudice to appellant which would result from that evidence. Miller even acknowledged to the trial court that the evidence which he claimed was critical to the defense of Willey and LaMarsh would lead the jury to conclude that appellant was "an evil man." Yet the trial court denied appellant's repeated motions to sever, treating the matter as resolved by balancing the probative value to Willey and LaMarsh against the prejudice to appellant and Beck. As shown above, the trial court's repeated denials of appellant's motions were an abuse of discretion. The joint trial which resulted deprived appellant of specific trial rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article 1, section 15 of the California Constitution. The joint trial further prevented a reliable determination of guilt and penalty, and resulted in gross unfairness at both phases of the trial. The joinder of codefendants' cases to appellant's resulted in a trial so unfair

to appellant that he was denied due process of law and deprived of the heightened reliability required in capital cases. (U.S. Const., 6th, 8th and 14th Amends.)

The evidence, from the prosecution and the defense, demonstrated that all four codefendants were present at 5223 Elm at the time of the homicides. However, there were conflicts in the evidence as to the responsibility for each of the four homicides. Appellant denied killing anybody. In the prosecution's case, appellant was linked only with the homicide of Ritchey, and only by the testimony of Earl Creekmore and Kathy Moyers, whose identifications of the person who cut Ritchey's throat were subject to serious question. The prosecution's case was that LaMarsh was solely responsible for the killing of Raper, and either Beck or Vieira was responsible for the deaths of Colwell and Paris.

Willey, otherwise hostile to appellant, clarified the questionable identifications by Creekmore and Moyers by identifying Beck as the person who cut Ritchey's throat. While LaMarsh testified that appellant delivered the fatal blows to Raper's skull, the conflicting testimony of Doctors Ernoehazy and Rogers left that question open, subject to the jury's evaluation of the evidence.

No one testified that appellant committed either the Colwell or Paris killings.

Thus, it strongly appears that in order for the jury to have found appellant guilty on all four counts of murder, as well as the conspiracy, the verdict would have to have been based upon a jury determination that appellant was guilty by virtue of his involvement in a conspiracy. The only real evidence of the charged conspiracy was Evans's story, which was not corroborated as to the supposed agreement constituting the conspiracy. The

jurors' inability to agree similarly as to LaMarsh's and Willey's involvement in the conspiracy demonstrates that at least some of the jurors rejected the story told by Evans of a meeting at which all six original codefendants entered into a conspiracy. Given that logical conclusion, the conspiracy verdict on appellant appears to be based upon the theory of LaMarsh and Willey as to a separate and secret conspiracy by appellant, Beck and Vieira – a theory supported by evidence, argument and innuendo which would have been absent in a severed trial of appellant.

Furthermore, as shown in detail in Argument II, *post*, this theory of appellant's culpability for the charged crimes was supported only by the inadmissible and substantially prejudicial character/disposition/propensity evidence which was presented or elicited by LaMarsh and Willey, and successfully exploited in their attorneys' closing arguments. Such evidence included all of the firearms and other weapons evidence, and evidence regarding appellant's relationship with and treatment of Beck and Vieira, as described in Argument II, *post* (fully incorporated herein by this reference).

5. The Erroneous Denial of Appellant's Severance Motions Constituted Reversible Error

Throughout the trial appellant "faced an extra prosecutor in the guise of [codefendant's] counsel." (*United States v. Romanello, supra,* 726 F.2d at p. 179.) More accurately, and even worse, he faced *two* extra prosecutors. Indeed, it is no exaggeration to say that codefendants LaMarsh and Willey were appellant's "most forceful adversar[ies]." (*Zafiro v. United States, supra*, 506 U.S. at p. 544 (conc. opn. of Stevens, J.).) Their testimony, and the evidence they presented through other witnesses, clearly constituted far more evidence of appellant's guilt than anything the prosecution presented or would have been able to present at a separate trial.

Thus, joinder manifestly "operate[d] to reduce the burden on the prosecutor" (*ibid.*) to prove his case against appellant beyond a reasonable doubt. As shown above, and in Argument II, *post*, the antagonistic defenses of codefendants Willey and LaMarsh produced a trial that was so grossly unfair to appellant that the joinder of their cases to appellant's case denied appellant due process of law and deprived him of the heightened reliability required in capital cases. (U.S. Const., 6th, 8th & 14th Amends.; *People v. Mendoza, supra*, 24 Cal.4th at p. 162; *People v. Arias, supra*, 13 Cal.4th at p. 127; *People v. Keenan, supra*, 46 Cal.3d at p. 500; see *Zafiro v. United States, supra*, 506 U.S. 534; *Mills v. Maryland, supra*, 486 U.S. at p. 376.) The denial of a separate trial denied appellant a fair determination of both guilt and penalty.

Under either the *Chapman*[24] or *Watson*[25] standard, the effect of the joint trial and the antagonistic second- and third-prosecution tactics of the codefendants on the jury's guilt verdicts was undoubtedly prejudicial, whether considered alone or in conjunction with the other errors in this case. (See, e.g., *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [errors that might not be so prejudicial as to amount to a deprivation of due process, when considered alone, may cumulatively produce a trial that is fundamentally unfair].)

It is reasonably likely that in the absence of the prejudice from the joint trial, a result more favorable to appellant at the guilt trial would have resulted. Reversal is therefore required even under the *Watson* standard. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) However, since the

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24 *Chapman v. California* (1967) 386 U.S. 18, 24

25 *People v. Watson* (1956) 46 Cal.2d 818, 836.

prejudicial nature of the evidence and innuendo, as well as the disparaging remarks and arguments, introduced into the trial by the codefendants, and the instruction which directed the jury to the erroneous consideration of this evidence (see Argument II, *post*), deprived appellant of his federal constitutional rights to due process, a fair trial and a reliable jury determination of guilt, the error must be assessed under the *Chapman* standard. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; U.S. Const. 6th, 8th & 14th Amends.) Respondent cannot conceivably demonstrate that the verdicts were not attributable, at least in part, to the prejudice introduced by the joint trial. Moreover, since appellant's death sentence rests on an unreliable guilt verdict, and the death verdict was not surely unattributable to this error (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279), the death verdict is itself unreliable, obtained in violation of appellant's Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment (*Caldwell v. Mississippi* (1985) 472 U.S. 320).

For all of the foregoing reasons, appellant's Sixth, Eighth and Fourteenth Amendments rights to fundamental fairness, a fair and reliable guilt determination, and a reliable, fair and individualized sentence, as well as his corresponding rights under California law, were violated as a result of the trial court's erroneous denial of appellant's severance motions. Appellant's convictions and death judgment must be reversed.

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II

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND COMMITTED REVERSIBLE ERROR BY ADMITTING EVIDENCE RELEVANT PRIMARILY OR SOLELY TO APPELLANT'S CHARACTER

Extensive irrelevant and prejudicial evidence was introduced at the guilt phase, over appellant's objections, concerning appellant's ownership of a number of firearms, described as assault weapons, as well as gas masks, grenades and knives. In addition, the trial court allowed the introduction, over appellant's objections, of evidence of alleged mistreatment of Ricky Vieira by appellant and James Beck, the characterization that Vieira was a "slave" and appellant the "master," that Beck acted as appellant's "enforcer," and that Beck and Vieira would do anything appellant told them to do. Moreover, counsel for codefendants LaMarsh and Willey persisted in asking questions of witnesses which suggested further evidence of appellant's interest in the occult, whether he and Beck had discussed killing anyone before, and whether appellant was Beck's spiritual leader. The trial court compounded the error and the prejudice to appellant by giving an erroneous instruction concerning the use to which the jury could put this evidence.

This evidence was legally irrelevant to the charges against appellant, and constituted inadmissible, inflammatory and prejudicial character evidence. The trial court's rulings allowing the evidence, the examination of witnesses concerning the evidence, and the instruction given by the trial court were erroneous as a matter of state law and deprived appellant of his constitutional rights to due process, and to a fair and reliable adjudication at all stages of a death-penalty case. (Evid. Code, §§ 350, 352, 1101; U.S.

Const., 6th, 8th, & 14th Amends.; Cal. Const. art. 1, §§ 1, 7 & 15; See *Estelle v. McGuire, supra*, 502 U.S. at p. 67; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *In re Winship* (1970) 397 U.S. 358, 364; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

A. Applicable Law

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.) Evidence is relevant only if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Trial court rulings on the admission or exclusion of evidence under section 352 are reviewed for abuse of discretion. (*People v. Ashmus* (1991) 54 Cal.3d 932, 973.)

Under Evidence Code section 352, evidence should be excluded if it tends to evoke an emotional bias against the defendant as an individual, and yet has little effect on the actual issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046.) Evidence is substantially more prejudicial than probative if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14).

While section 352 contemplates balancing the prejudicial effect on a defendant against the probative value to the prosecution or to a codefendant (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553), where the prejudicial effect of evidence introduced by a codefendant threatens the defendant's

right to due process and a fair trial, the trial court has a remedy other than simply balancing the prejudicial effect versus the probative value, i.e., to order a mistrial and separate trials (*id.*, at pp. 553-555).

Evidence Code section 1101,[26] subdivision (a) addresses a specific type of evidence likely to cause undue prejudice, i.e., character evidence. Section 1101, subdivision (a) prohibits the admission of evidence of a person's character to prove the conduct of that person on a specific occasion. The prohibition specifically includes evidence of specific instances of conduct. Subdivision (b) provides an exception to subdivision (a)'s prohibition against specific instances of conduct when such evidence is relevant to establish some fact other than the person's character or

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[26] Evidence Code section 1101 states:

> (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
>
> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.
>
> (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

disposition. (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146; *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.)

The rule excluding evidence of criminal propensity derives from early English law and is currently in force in all American jurisdictions. (See *People v. Ewoldt, supra*, 7 Cal.4th at p. 392; *People v. Alcala* (1984) 36 Cal.3d 604, 630-631.)

> The use of "other acts" evidence as character evidence is not only impermissible under the theory of evidence codified in the California rules of evidence (Cal.Evid.Code § 1101 (West Supp.1993) and the Federal Rules of Evidence (Fed.R.Evid. 404(b)), but is contrary to firmly established principles of Anglo-American jurisprudence.

(*McKinney v. Rees*, *supra*, 993 F.2d at p. 1380.) Such evidence is impermissible to "establish a probability of guilt." As the United States Supreme Court stated in *Michelson v. United States* (1948) 335 U.S. 469:

> The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

(*Id.* at pp. 475-476, fns. omitted.)

Similarly, this Court has warned:

> Evidence of uncharged offenses "is so prejudicial that its admission requires extremely careful analysis. [Citations.]" (*People v. Smallwood* (1986) 42 Cal.3d 415, 428; see also *People v. Thompson* (1988) 45 Cal.3d 86, 109.) "Since

> 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have *substantial* probative value." (*People v. Thompson* (1980) 27 Cal.3d 303, 318, italics in original, fn. and alternate citations omitted.)

(*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

"Section 1101 is concerned with evidence of a person's character (i.e., his propensity or disposition to engage in a certain type of conduct) that is offered as a basis for an inference that he behaved in conformity with that character on a particular occasion." (Law Revision Commission Comment to § 1101.) Referring to the principle of exclusion as it applies to prior criminal conduct, this Court has declared that the rule has three purposes: "(1) to avoid placing the accused in a position in which he must defend against uncharged offenses, (2) to guard against the probability that evidence of such uncharged acts would prejudice defendant in the minds of the jurors, and (3) to promote judicial efficiency by restricting proof of extraneous crimes." (*People v. Thomas* (1978) 20 Cal.3d 457, 464.)

Section 1101, subdivision (a) makes no distinction between criminal and noncriminal conduct. "The same policy considerations appear to apply where the prior conduct, though not criminal, would be considered reprehensible by the jury." (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 462.)

When evidence of other acts is offered under section 1101, subdivision (b), to prove a material fact rather than character, the court must employ a case-by-case balancing test of the probative value of the evidence compared with its prejudicial effect in order to determine the admissibility of the evidence. (*People v. Stanley* (1967) 67 Cal.2d 812, 816-819.) There must be a strong foundational showing that the evidence is sufficiently

relevant and probative of the legitimate issue for which it is offered to outweigh the potential, inherent prejudice of such evidence. (See *People v. Poulin* (1972) 27 Cal.App.3d 54, 65.) Evidence of other acts "should be scrutinized with great care . . . in light of its inherently prejudicial effect, and should be received only when its connection with the charged crime is clearly perceived." (*People v. Elder* (1969) 274 Cal.App.2d 381, 393-394, quoting *People v. Durham* (1969) 70 Cal.2d 171, 186-187.) As noted above, "uncharged offenses are admissible only if they have *substantial* probative value." (*People v. Thompson, supra*, 27 Cal.3d at p. 318, original emphasis, fn. omitted.) Similarly, the exercise of discretion to admit or exclude evidence pursuant to Evidence Code section 352 should favor the defendant in cases of doubt because in comparing prejudicial impact with probative value the balance "is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744; *People v. Murphy* (1963) 59 Cal.2d 818, 829.)

A defendant's uncharged offense is admissible under Evidence Code section 1101 on the issue of identity only if the offense is "highly similar" to the charged crimes. (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation omitted.] 'The pattern and characteristics of the crimes must be *so unusual and distinctive as to be like a signature*.'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403 [citing 1 McCormick on Evidence (4th ed. 1992) § 190, pp. 801-803 (italics added)].) Thus, to prove identity, the uncharged misconduct and the

charged offense must be "mirror images."[27] "The strength of the inference in any case depends upon two factors: (1) the *degree of distinctiveness* of individual shared marks, and (2) the *number* of minimally distinctive shared marks." (*People v. Thornton* (1974) 11 Cal.3d 738, 756 [italics in original].) Moreover, "the presence of marked *dissimilarities* between the charged and uncharged offenses is a factor to be considered by the trial court" in determining whether to admit the other crimes evidence. (*People v. Haston* (1968) 69 Cal.2d 233, 249, fn. 18 [italics added].)

Where there is no separate relevance of an uncharged crime or "other act," such as motive, identity, or common scheme or plan, evidence of uncharged crimes is inadmissible due to the undue risk that it will serve, unfairly and unconstitutionally, as evidence of criminal propensity. (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1384 [inadmissible "other acts" evidence deprived defendant of fair trial and amounted to denial of due process]; see also *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404 [admission of evidence of uncharged offenses should not contradict other policies limiting admission, such as the policies underlying Evidence Code section 352]; *People v. Guizar* (1986) 180 Cal.App.3d 487, 491-492 [prejudicial error

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[27] See, e.g., *People v. Balcom* (1994) 7 Cal.4th 414, 425 ["The highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense"]; *People v. Huber* (1986) 181 Cal.App.3d 601, 622; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1066 ["highly distinctive marks of similarity" between the prior offense and the charged crime are required for admissibility to prove the defendant's identity]; *People v. Wein* (1977) 69 Cal.App.3d 79, 90 [prior offense was "unique and peculiar" to the extent that it constituted defendant's "trademark"]; *People v. Rodriguez* (1977) 68 Cal.App.3d 874, 883-884 [uncharged and charged offenses must have "highly distinctive marks of similarity"].

requiring reversal where transcript of taped statement of witness containing reference to defendant having "committed some murders before" submitted to jury, where no evidence of such offense presented]; *United States v. Bradley* (9th Cir. 1993) 5 F.3d 1317, 1322 [evidence of prior homicide with minimal probative value not harmless error]; *United States v. Brown* (9th Cir. 1989) 880 F.2d 1012, 1016 [evidence of prior offenses involving firearms not relevant to motive held not harmless in murder trial].)

> ["]Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, 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 rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence. It has persisted since at least 1684 to the present, and is now established not only in the California and federal evidence rules, but in the evidence rules of thirty-seven other states and in the common-law precedents of the remaining twelve states and the District of Columbia.

(*McKinney v. Rees*, *supra*, 993 F.2d at p. 1381 [fn. omitted], quoting *Brinegar v. United States* (1949) 338 U.S. 160, 174.) The question to be resolved by the trial court before admitting such evidence

> is whether the admitted evidence of "other acts" of the defendant was relevant to a fact of consequence, or was only evidence of character offered to show propensity. Under the historic rule against character evidence, such evidence is not relevant to any fact of consequence. We summarize the contested evidence and then subject it to close scrutiny to determine whether any inferences relevant to a fact of consequence may be drawn from each piece of the evidence,

or whether they lead only to impermissible inferences about the defendant's character.

(*McKinney v. Rees*, *supra*, 993 F.2d at p. 1381.)

Nor is such evidence admissible to show a trait of character to attack the defendant's credibility. Evidence Code section 787 provides that "[s]ubject to Section 788[28], evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness." (*People v. St. Andrew*, *supra*, 101 Cal.App.3d at p. 461; *People v. Thompson* (1979) 98 Cal.App.3d 467, 477.)

B. Proceedings Below

1. Firearms Evidence

The evidence introduced at trial indicated, inter alia, that numerous firearms, some knives, and gas masks were found in appellant's residence by the police (15RT:2763-2764; Exhs. 6, 7); that one of the guns found in appellant's residence might have been reported stolen previously in Texas, although the police could not confirm this (15RT:2767); that appellant and Beck purchased a lot of guns (21RT:3694); and that guns found in appellant's house included, inter alia, an M-1 carbine, a Mini-14, 3 AR-15's, an HK .308 and an Ivor Johnson Universal, all described as assault rifles (21RT:3699-3700; Exh. 7). A witness described appellant and Beck as having "enough [weapons, including grenades[29]] to have their own little war." (24RT:4314, 4359; see also 20RT:3398; 29RT:5162, 5166-5167;

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[28] Evidence Code section 788 provides for impeachment of a witness by proof of a prior felony conviction.

[29] No evidence that the grenades were armed or operational was introduced.

31RT:5552; 32RT:5616, 5704.) Over appellant's objection, Miller was allowed to examine witnesses, including appellant, about the feasibility of converting appellant's semi-automatic weapons to full automatic operation. (21RT:3700-3701; 30RT:5193-5197.) Magana also questioned LaMarsh as to whether there was a "LAWS rocket." Although appellant's relevance objection was sustained, LaMarsh described, in answer to his counsel's question, that appellant had "a plastic tube and a smaller tube with balsa wood fins on it, a thing on the head . . . a rocket on the back."[30] (32RT:5616-5617.)

Appellant objected to this evidence on numerous occasions, arguing that the evidence was irrelevant and more prejudicial than probative. (15RT:2761; 21RT:3695, 3699; 30RT:5193-5194, 5384; 32RT:5616-5617.) In overruling appellant's objections, the trial court allowed into evidence photos of numerous firearms, gas masks and other small items that were removed from a gun safe at appellant's residence during the execution of a search warrant (15RT:2762-2764; Exhs. 6, 7), and allowed extensive questioning of witnesses, including appellant, concerning the weapons, including whether they could be converted to full automatic fire.

When LaMarsh first sought to introduce evidence of the weapons found in appellant's residence, appellant objected that the evidence was irrelevant and more prejudicial than probative under Evidence Code section 352. (15RT:2761.) The only basis for relevance argued by Willey and

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[30] In his opening statement on behalf of LaMarsh, Magana told the jury that appellant, Beck and Vieira "had all types of weapons. They had semiautomatic weapons. They had rifles, shotguns, knives. And he [LaMarsh] believes that they have a LAW's rocket or a LAW's rocket launcher. . . ." (31RT:5481.)

LaMarsh was that, with all those weapons available, it was unlikely that the six codefendants would have armed themselves only with knives, bats and a baton if they had agreed to go to the Elm Street house to kill the occupants. (15RT:2762.) However, as pointed out by counsel for appellant, that point would have been adequately made by evidence that guns were found, without showing the entire "arsenal." Attorney Miller responded that he "intend[ed] to tie them up by another witness later on as to their uses." (15RT:2762.) The trial court overruled appellant's objection without explaining its reasoning. (15RT:2763.)

In examining Steve Miller of Gun Country, who testified that he had sold a baton similar to Exhibit 19 and a handgun similar to Exhibit 87 to appellant and Beck, the prosecutor asked witness Miller whether the weapons shown in Exhibit 6 were the sort sold at Gun Country. Appellant's relevance objection was sustained. (21RT:3695-3696.) On cross-examination, however, Willey's counsel questioned witness Miller about the firearms shown in Exhibit 7, and the witness identified some of the weapons. (21RT:3699.) Appellant objected on relevance grounds. (*Ibid.*) In response to the trial court's inquiry as to the relevance, Willey's counsel responded, "I've already explained the relevance once to the court, that I would bring in a witness to tie up why I wanted those pictures at the time when I first introduced them. I intend to use this witness since I have him here."[31] The trial court responded "Go ahead." (*Ibid.*) No witness was ever presented by Willey's counsel who "tied up" the relevance or probative value of these items.

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[31] The only "explanation" of relevance of the firearms previously given by Willey's counsel was that given when appellant first objected to evidence of the firearms, described above.

Steve Miller then continued to identify the weapons and described them as semiautomatic "assault rifles." He described the difference between semiautomatic and automatic weapons, and discussed the difficulty in converting a semiautomatic weapon to a fully automatic one. (21RT:3699-3701.)

In cross-examining appellant, Willey's counsel began questioning appellant about his interest in guns, whether he had worked on the weapons in Exhibits 6 and 7, and whether he knew that some of the weapons could be converted into full automatic weapons. Initially, the trial court sustained appellant's objection to the question of whether appellant was a "gun nut" (30RT:5193) and whether appellant was aware that "some of the weapons could probably be converted into full automatic weapons." (30RT:5194.) However, at a bench conference, Willey's counsel reiterated the argument that the relevance was that "If people had weapons that could be converted to automatic weapons or had been converted to automatic weapons, it is totally illogical to go over there and kill people with bats and knives." The prosecutor noted that under that theory, it doesn't matter if the weapons were automatic or semiautomatic. Willey's counsel responded, "It's just a nice touch." The trial court then reversed its ruling, and overruled appellant's objection, again without explaining its reasoning. (30RT:5193-5194.) Appellant was then questioned extensively about the conversion of semiautomatic weapons to full automatic operation. (30RT:5195-5198.)

In cross-examination of Beck, LaMarsh's counsel attempted to question Beck about what he would do with all his guns, his practices regarding guns and whether he would purchase automatic weapons or illegal weapons. The trial court sustained objections to the bulk of the cross-examination. (30RT:5381-5384.)

In closing arguments to the jury, neither LaMarsh's nor Willey's counsel argued that the availability of these weapons was evidence that the six codefendants had not gone to Elm Street intending to kill anyone.

2. Evidence Regarding Appellant, Beck and Vieira

Counsel for LaMarsh and Willey regularly and continually asked questions of witnesses designed to elicit (or to suggest by the questions themselves) evidence that appellant, Beck and Vieira were a close-knit group, a cult, a survivalist group, involved in occult or satanic practices, acting secretively and manipulating others; that appellant was the leader of the group, the "Master," the "spiritual leader"; that Beck was the "enforcer" or the "muscle"; that Beck and Vieira would do anything appellant told them to do; that appellant and Beck took all the money made by others who lived with them; and that appellant, through Beck, enforced discipline on Vieira (and possibly others) by physical abuse and treated Vieira as a slave. The evidence also included testimony from Michelle Evans, Richard Cicarelli, LaMarsh, and Willey about an incident earlier in May, 1990, in which LaMarsh cut his hand and made a print in blood on a piece of paper as a sign of joining the group. The stated purpose of these questions and this evidence, according to Magana and Miller, was to differentiate their clients from that group, to establish that LaMarsh and Willey did not conspire with appellant, Beck and Vieira, but that appellant, Beck and Vieira had a separate, secret conspiracy to kill the occupants of 5223 Elm. (See 31RT:5464-5468; 32RT:5601-5602.)

This latter theory, the separate, secret conspiracy, was not based on any direct evidence of such a secret conspiracy, and contradicted the prosecution evidence from Evans's testimony that the agreement made to kill the occupants of 5223 Elm was made in a single meeting of all six

original codefendants, including LaMarsh and Willey. It also contradicted the testimony of each of the codefendants that no such plan was ever discussed or agreed to. Instead, Magana and Miller sought to establish the "secret conspiracy" through inadmissible, prejudicial and inflammatory evidence of past acts intended to establish appellant's and Beck's violent, murderous or "evil" character or disposition, and that appellant and Beck acted in accordance with that character and disposition by secretly conspiring to kill the occupants of 5223 Elm. The evidence and questioning also tended to attribute violence by Beck and Vieira to appellant, and to associate appellant with extrajudicial admissions attributed to Beck.

Appellant regularly objected to this evidence and questioning, arguing that it was irrelevant, inadmissible character evidence, more prejudicial than probative, and violated his rights under the Sixth, Eighth and Fourteenth Amendments. The trial court sustained some of appellant's objections, and erroneously overruled others, admitting substantial evidence, including evidence of specific acts, relevant only to appellant's character or disposition. Even where the objections were sustained, however, Miller and Magana repeatedly asked questions about matters which the trial court had ruled were inadmissible, or which were clearly inadmissible, suggesting to the jurors through their questions that substantial prejudicial and inflammatory evidence concerning appellant, Beck and Vieira was being withheld from the jury.

In response to questioning by Magana, and over objection by appellant, Evans testified that Vieira was treated like a slave, and "if he did something wrong, he was slapped around or, you know -- I mean, they'd beat on him pretty bad." (24RT:4312-4313.) Miller had Evans read from a letter she had written while in jail after her arrest on this case in which she

said, "Personally, I hate the fuckers [appellant and Beck] and the things they done [*sic*] to Ricky. No wonder Ricky turned." (25RT:4382.)

During cross-examination of Philip Wallace, who had testified that Beck had told him that "we" or "I" "had to slit their throats," Magana asked if it was unusual for Beck to be alone. After Beck's objection was sustained, Magana asked if it was unusual that appellant was not with Beck because Beck always came with appellant. Again, the trial court sustained the objection, and shortly thereafter admonished Magana, counsel for LaMarsh, not to ask Wallace questions intending to associate Beck with appellant. (22RT:3809-3810.)

On recross-examination of Wallace, Magana asked who, of Beck, appellant and Vieira, was in control, or in command. An objection was sustained. Magana then asked if the Camp, with which Wallace was familiar, was "sort of set up as a military type household." Appellant's objection that this called for character evidence was overruled, but the trial court required that a foundation be laid as to what a "military type household" is. In response to Magana's question, Wallace said he had never seen anybody do guard duty at the Camp. (22RT:3824-3825.)

In cross-examining appellant, Miller asked appellant if Vieira called appellant "the Master," but the trial court sustained appellant's objection. (29RT:5137.) Miller then asked questions insinuating that appellant bought weapons for himself with Vieira's money, which appellant, after an objection was overruled, denied. (29RT:5137-5142.) At one point, after appellant's counsel had objected to Miller's line of questioning regarding appellant's incarceration in this case, Miller stated, in front of the jury: "If Mr. Amster didn't want his client questioned, he shouldn't put him on the stand." (30RT:5220.) In response, appellant moved for a mistrial. (*Ibid.*)

That motion was denied. (30RT:5221.) At a sidebar discussion shortly thereafter, Amster again moved unsuccessfully for a mistrial. (30RT:5224-5225.) Miller subsequently asked appellant, again over objection, if Vieira was his slave, and appellant denied it. (30RT:5226-5228.) Appellant was then asked, "so you had no call to punish him if he didn't obey your orders?" The trial court sustained appellant's objection to the question. (30RT:5228.) But Miller persisted by asking the following question: "Having viewed the pictures here in court of how the people on Elm Street were killed and the circumstances you heard described, did the killings ever strike you as a part of a satanic ritual?" The trial court then sustained appellant's objection to the entire line of questioning. (30RT:5228.) After asking appellant how he felt when he saw Vieira pull the knife, and whether he had testified [on cross-examination] that he believed in deadly force only in self-defense, Miller followed by asking, "well haven't you and Mr. Beck discussed killing people, committing murder before?" Again the trial court sustained appellant's objection to the line of questioning and struck the question, instructing the jury to disregard it. (30RT:5228-5230.) Magana, however, responded by asking that the record reflect that he was joining Miller in the line of questioning just stricken by the trial court. (30RT:5230.)

On recross-examination of appellant, Magana then asked appellant, "Well, if Ricky didn't do what he was supposed to do, you beat him up, didn't you?" The trial court sustained appellant's objection. (30RT:5393.)

The trial court eventually ruled that evidence of other acts by appellant were admissible under Evidence Code section 1101, subdivision (b), if it related to LaMarsh, Willey, Vieira or Beck. The court explained: "As to the prior relationship of various parties and the nature of that

relationship, it appears that under 1101(b) that would have some probative value as to the identity of the planners of this incident, so that will be admissible there. Obviously, that line of testimony would be prejudicial to Mr. Cruz and Mr. Beck, but the Court feels that the probative value outweighs that prejudicial value." (31RT:5470-5471.) At another point, the trial court ruled that Willey and LaMarsh could elicit evidence of specific bad acts of appellant and Beck if they related to LaMarsh, Willey, Vieira, Beck or appellant. (32RT:5650; see also 30RT:5404.)

Rosemary McLaughlin, called by LaMarsh, testified that she saw Vieira "treated as a subservient individual" by appellant and Beck. "They'd tell him what to do and he did it on command." She saw him get "smacked in the head." (31RT:5542-5543.) She agreed with Magana that appellant was the leader "in all things" and that only Beck and Jennifer Starn had a choice to object to his decisions. (31RT:5544-5545.) She testified that when appellant moved in with Beck and her in a previous residence, appellant gave the orders and Beck and McLaughlin obeyed him. The trial court sustained an objection to whether she saw appellant be abusive to people who did not obey him, but overruled the objection to the question of whether she saw appellant order Beck to be abusive to people who did not obey appellant. She replied that they did not physically hurt anybody, but would do "power plays," disciplining each person differently. (31RT:5560-5561.) When Miller asked about discipline of Steve Perkins, the trial court sustained appellant's objection. Appellant requested an admonition to counsel for asking questions about irrelevant matters. The trial court then ruled that only inquiry about the relationship of the four defendants, Vieira and Rosemary McLaughlin would be allowed. Miller then asked McLaughlin if they ever disciplined her, and the trial court sustained

appellant's objection. (31RT:5562.) McLaughlin then testified that Vieira never got disciplined because he always did what appellant said. (31RT:5563.)

McLaughlin also testified that appellant and Beck got all the money from Beck's, Vieira's, McLaughlin's and Steve Perkins's jobs. When asked if it was voluntary, she responded, "Yeah. They voluntarily took it." (31RT:5562.) Miller noted that McLaughlin was crying, and asked if she was nervous. The trial court sustained appellant's objection to the question. Miller immediately followed with the question, "are you afraid of these guys?" (31RT:5563.) The trial court sustained appellant's objection, but denied appellant's request for a mistrial. (31RT:5584-5585.)

McLaughlin further testified, over objection, that she saw Vieira stand at attention by appellant for long periods of time waiting for appellant to tell him what to do. (31RT:5564.) She testified that Beck never refused to do anything appellant wanted him to do. (*Ibid.*) Miller then asked whether appellant had a name or a title he went by as head of the household, but appellant's objection was sustained. (*Ibid.*) Miller asked what the nature of the relationship was between appellant and Beck, but appellant's objection was sustained. (31RT:5565.) He then asked if appellant ever preached to Beck, and again appellant's objection was sustained. (*Ibid.*) He then asked if appellant ever advised Beck on matters of the occult, and again the objection was sustained and the trial court admonished Miller to get to a different subject. (*Ibid.*) Instead of complying with the trial court's order, Miller asked if Beck ever indicated to McLaughlin that appellant was his spiritual leader. The trial court again sustained appellant's objection, denied appellant's renewed request for a sidebar conference, and reiterated its direction to Miller to move on. Miller stated that, in light of the court's

rulings, he had no further questions. (31RT:5566.)

McLaughlin also testified that she knew that appellant, Beck and Vieira were treating LaMarsh in a special fashion to get him in their group, and that she had seen that conduct in the past to get people to join. The trial court then sustained objections to questions of what happened once one became a member, and what the purpose of the group was. (31RT:5550-5552, 5567.)

Over appellant's objection that it was irrelevant, LaMarsh was allowed to testify that the first time he saw appellant, Beck and Vieira together was at the Camp. Vieira was standing at attention, with Beck standing at attention in front of him, and appellant at his side, yelling at Vieira that Vieira had to learn more responsibility. Then appellant said, "OK, Dave," and Beck hit Vieira with a great deal of force. Vieira doubled over and fell on the ground. Beck told him to get up, and Vieira stood at attention again, crying. He had had the wind knocked out of him. When LaMarsh was asked how he felt about the three as a result of this incident, appellant's attorney Mr. Amster objected again to the entire line of questioning. This time, the trial court sustained the objection. (32RT:5599-5601.)

During a sidebar conference which followed, while glibly denying that the evidence he sought was inadmissible character evidence, the truth was clearly stated by Miller: ". . . I feel it is absolutely necessary to the defense of Mr. Willey to be able to bring out and show to the jury the absolute domination of Mr. Cruz over Mr. Beck and Mr. Vieira. If that includes the fact that -- the jury concludes that Mr. Cruz is an evil man, I don't see a way of avoiding that." (32RT:5604.)

After the sidebar conference, the trial court ruled that LaMarsh could

testify as to whether or not he felt the three constituted a group, why he felt they were a group, whether he joined it, and why he did not join it. The trial court also ruled that it would allow testimony of specific bad acts of appellant and Beck if they related to LaMarsh, Willey, or Vieira. Appellant reiterated his objections that this was inadmissible character evidence, more prejudicial than probative, and violated appellant's rights under the Sixth, Eighth and Fourteenth Amendments. (32RT:5613-5615.)

LaMarsh then testified that he perceived Beck, appellant and Vieira as a "survivalist" group, and described various weapons appellant showed him the first time LaMarsh sat down and had a conversation with appellant. (32RT:5660.) He also testified that Beck, Vieira and appellant would talk about their group and the benefits of joining. LaMarsh described the incident in which he cut himself and left a blood print on the paper. He testified that he did not want to join the group, but went along to get it over with. (32RT:5618-5619.)

LaMarsh also testified that, at Willey's residence after the homicides, after Beck, appellant and Vieira had left, he was scared, frightened that Beck and appellant would kill him. The trial court sustained appellant's objection that this was speculation, but LaMarsh then testified that he thought harm could come to him. (32RT:5669.)

Later during LaMarsh's testimony, after Amster had apologized for making a factual mistake in asking a question, Magana, in front of the jury, stated: "Your Honor, I'm going to request that the Court sanction Mr. Amster because he's doing this intentionally. It's inappropriate. He knows better. We spent a lot of time going to sidebar --" (33RT:5816.) The trial court denied the request, stating "Counsel, if I was going to sanction someone, I might sanction more than one. I have not sanctioned anybody.

Conduct has not come to the point where anybody needs to be sanctioned." (*Ibid.*)

Willey testified that appellant told Vieira what to do, how to act, when he could go to bed, what he could do when he was up. (34RT:5960-5961.) Beck used to tell Vieira what to do, but not as much as appellant did. If Vieira was acting up, or not acting the way either Beck or appellant wanted him to act, Beck would slap him on the back of his head, or punch him in the stomach. (34RT:5961.) According to Willey, Beck always did whatever appellant said. Appellant always told him what to do, and Beck did it, including inflicting pain on Vieira. (34RT:5961-5962.)

Willey also testified concerning the incident in which LaMarsh cut his hand and put a fingerprint in blood on the paper. (34RT:5965, 5967, 6037-6039.) Willey testified that he had signed a paper and put his thumb print on it in 1985, and told LaMarsh so that night. (34RT:5965-5966, 6030-6031, 6138.)

3. Instructions

Both the prosecutor and appellant requested that the trial court instruct the jury according to CALJIC No. 2.50. The trial court determined that it would give CALJIC No. 2.50, but modified it differently than either the prosecutor or appellant had proposed:

> THE COURT: All right. I'm going to give 2.50 as submitted by Mr. Brazelton with one change, and that's suggested by the notes. What I plan on doing is striking the words "a crime or crimes" on line 4 and inserting the words "acts similar to those constituting crimes other." So it would read, "evidence has been introduced for the purpose of showing that one or more of the defendants committed acts similar to those constituting crimes other than that for which he is on trial."
>
> And the notes suggest doing that, because as to – Mr.

LaMarsh suggested that he did some malicious mischief and maybe he did some batteries, evidence that arson was committed, but there was no prosecution for any of those offenses.

MR. MAGANA: Selling dope.

THE COURT: Right.

MR. AMSTER: Urinating in the back seat.

THE COURT: All right. With that one change, I'll give 2.50 as requested by the District Attorney.

(35RT:6172-6173.)

The instruction read to the jury stated:

> Evidence has been introduced for the purpose of showing that one or more of the defendants committed acts similar to those constituting crimes other than that for which he is on trial. [¶] Such evidence, if believed, was not received and may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. Such evidence is received and may be considered by you only for the limited purpose of determining if it tends to show:
>
> The existence of the intent which is a necessary element of the crime charged.
>
> The identity of the person who committed the crime, if any, for which the defendant is accused.
>
> A motive for the commission of the crime charged.
>
> The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged.
>
> The crime charged is a part of a larger continuing plan, scheme, or conspiracy.
>
> The existence of a conspiracy.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

You are not permitted to consider such evidence for any other purpose.

(36RT:6480-6481.)[32] Nowhere in the instructions to the jury were the "acts similar to those constituting crimes" identified or described.

C. The Trial Court Erred in Admitting Irrelevant and Prejudicial Character Evidence

1. Firearms and Other Weapons Evidence Was Erroneously Admitted

a. Firearms and Other Weapons Evidence was Irrelevant

Descriptions of the firearms and other weapons, the number of weapons, whether or not they were semiautomatic, or could be converted to

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[32] The trial court also instructed the jury according to CALJIC Nos. 2.50.1 (as it read in the Fifth Edition of CALJIC) and 2.50.2, as follows:

Within the meaning of the preceding instruction, such other acts purportedly committed by a defendant must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose unless you are satisfied that a defendant committed such other acts. While the prosecution has the burden of proving the defendants' guilt beyond a reasonable doubt and to a moral certainty, the prosecution has the burden of proving these acts by a preponderance of the evidence.

Preponderance of the evidence means evidence that has more convincing force and the greater probability of truth than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

(36RT:6481-6482.)

full automatic operation, whether they were generically categorized as assault weapons, whether or not they were legal or illegal or whether one had been previously stolen, whether the weapons included grenades or rockets, and whether appellant possessed a gas mask, were all irrelevant to the issues in this case. None of the evidence regarding the firearms and other weapons added anything of relevance to the question of who was involved in the events of May 20, 1992, what their intent was in going over to 5223 Elm, or what actions they took there or elsewhere after the homicides. The only firearm used during the incident at 5223 Elm was a handgun possessed by LaMarsh, but which no one but LaMarsh knew he had, and which was never fired, although wounds to Franklin Raper's forehead were consistent with having been caused by that handgun in a pistol-whipping. (31RT:5525.)

There was no legitimate inference from the firearm evidence which could be drawn under Evidence Code section 1101, subdivision (b). There was no similarity between appellant's possession of firearms, gas masks, grenades or rockets and the crimes with which he was accused in this case – homicides committed by means of knives and baseball bats. (See *People v. Balcom*, *supra*, 7 Cal.4th at p. 423; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) There were no distinctive features of appellant's possession of firearms, gas masks, grenades or rockets which shed light upon appellant's motives in going over to 5223 Elm, or which could provide any legitimate guidance to a jury on the question of whether there was a conspiracy, whether appellant was a part of it, or whether he planned an assault on 5223 Elm.

Therefore, the firearms and other weapons evidence introduced by LaMarsh and Willey had no legitimate probative value in this case. To the

extent, arguendo, that evidence that firearms were available was legitimately admissible on behalf of LaMarsh or Willey to counter the prosecution's theory that the codefendants went to 5223 Elm intending to kill the occupants with knives and bats, the evidence introduced by LaMarsh and Willey went well beyond that necessary to establish any legitimate point, and was therefore overwhelmingly cumulative.

Neither was the evidence admissible as impeachment of appellant. Evidence Code section 787 prohibits the use of evidence of specific instances of a witness's conduct to attack or support the credibility of a witness where that conduct is relevant only as tending to prove a trait of the witness's character. (*People v. Wagner* (1975) 13 Cal.3d 612, 618.) The evidence introduced by LaMarsh and Willey amounted to "evidence of specific instances of conduct," and, as character evidence, was not relevant, as explained below. It was thus not admissible as impeachment of appellant as a witness. (*Ibid.*)

Nor was the evidence admissible as a response to appellant's testimony. In his direct testimony, appellant did not place his character in issue (other than as any witness's character is thereby placed in issue). (See *People v. Wagner, supra*, 13 Cal.3d at p. 617; Evid. Code, §§ 785-790.) His entire direct testimony consisted solely of a denial of committing the homicides or entering into any conspiracy. (29RT:5008-5009.)

To the extent that appellant's character came up in his answers on cross-examination, he was not subject to impeachment by character evidence. A party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be thereafter contradicted. (*People v. Lavergne, supra*, 4 Cal.3d at p. 744; *People v. St. Andrew, supra,* 101 Cal.App.3d at p. 461.)

> This is especially so where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the party's questions. (*People v. Lavergne*, *supra*, at p. 744. See also *People v. Benjamin* (1974) 40 Cal.App.3d 1035, 1042.

(*People v. St. Andrew*, *supra*, 101 Cal.App.3d at p. 461 [alternate citations omitted].)

b. Firearms and Other Weapons Evidence Was Inadmissible Character Evidence

The effect of the evidence of firearms and other weapons here was similar to that in *McKinney v. Rees*, *supra*. In that case, irrelevant evidence concerning that defendant's "fascination with knives," his ownership of knives and activity relating to knives was admitted in a prosecution for murder committed with a knife. The Ninth Circuit found that the evidence was irrelevant to the issues in the case, and its admission was so prejudicial as to amount to a violation of due process:

> [T]he [wrongfully admitted] evidence in this case is emotionally charged. The prosecution used evidence of the Gerber knife, *which could not possibly have been used to commit the murder*, to help paint a picture of a young man with a fascination with knives and with a commando lifestyle. The prosecutor raised the issue on cross-examination of why McKinney had purchased a knife with a black blade, asking him whether it was because such knives are favored by commandos because they do not reflect light. The jury was offered the image of a man with a knife collection, who sat in his dormitory room sharpening knives, scratching morbid inscriptions on the wall, and occasionally venturing forth in camouflage with a knife strapped to his body. This evidence, as discussed above, was not relevant to the questions before the jury. It served only to prey on the emotions of the jury, to lead them to mistrust McKinney, and to believe more easily that he was the type of son who would kill his mother in her sleep without much apparent motive.

(993 F.2d at p. 1385 (emphasis added).)

Similarly, the firearms, grenades, rockets, or gas masks attributed to appellant "could not possibly have been used to commit the murder." The evidence was introduced and reiterated in order to portray appellant as a "gun nut," a survivalist with a pseudo-military lifestyle who possessed "enough weapons to start a war," and therefore was more likely to have intended to kill Raper and his cronies at 5223 Elm than was either LaMarsh or Willey.

This Court has long stated the rule that:

> When the prosecution relies . . . on a specific type of weapon, it is error to admit evidence that other weapons were found in his [the appellant's] possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons [citations omitted].

(*People v. Riser* (1956) 47 Cal.2d 566, 577, overruled o.g., *People v. Morse* (1964) 60 Cal. 2d 631 (error to admit evidence that defendant possessed a particular gun that could not have been the murder weapon; the only purpose of admitting the evidence would be to demonstrate that the defendant is "the sort of person who carries deadly weapons.")[33])

The only probative value identified by anyone was under the theory

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[33] See also *People v. Henderson* (1976) 58 Cal.App.3d 349, 360:

> Neither logic, experience, precedent nor common sense supports the proposition that, from the possession in one's home of two loaded guns, a reasonable inference may be drawn that the possessor has an intent to commit the crime of an assault with a deadly weapon. Evidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons - a fact of no relevant consequence to determination of the guilt or innocence of the defendant.

that it was unlikely that the defendants went to 5223 Elm with an intent to kill if they took only knives and bats rather than these firearms. This was not a theory espoused by appellant, but was put forward only by LaMarsh's and Willey's counsel, Mr. Magana and Mr. Miller, and appellant objected to the evidence.

To the extent, arguendo, that such a theory justified any evidence about the availability of firearms, the evidence which the trial court allowed went substantially further than was necessary to make that point. As the prosecution noted, and even Miller implicitly conceded, whether the weapons were semiautomatic or automatic was irrelevant to that theory of defense. (30RT:5193-5194.) Instead, the real point of this evidence was, as Miller cynically put it, "a nice touch," calculated to characterize appellant to the jurors as violent and dangerous. That Miller and Magana were disingenuous in proposing this theory of admissibility is shown by the fact that neither of them addressed the theory in argument to the jury. Magana did, however, focus on character in his argument to the jury. (See Argument I.B.1.d., *ante*.)

The firearms and other weapons evidence did not tend to identify appellant as one of those who personally killed, as one who entered into a conspiracy to kill, or as the one who planned the supposed conspiracy. There was no connection between appellant's possession of the firearms and the events at 5223 Elm. Nothing about the firearms evidence cast any light on appellant's state of mind or intent on the night of the homicides.

The firearms and other weapons evidence had no relevance to the charge against appellant other than as evidence of character – specific conduct by appellant as evidence that he had a criminal or violent disposition or propensity, and was thus more likely to have committed the

crimes with which he was charged. As such, admission of the evidence violated Evidence Code sections 352 and 1101, and deprived appellant of due process, a fair trial and a reliable jury determination at all stages of his capital trial. (U.S. Const., 6th, 8th & 14th Amends.)

c. The Firearms and Other Weapons Evidence Was More Prejudicial Than Probative

As noted above, to the extent (arguendo) that evidence that firearms were available was legitimately admissible to counter the prosecution's theory that the codefendants went to 5223 Elm intending to kill the occupants with knives and bats, the evidence presented by LaMarsh and Willey was overwhelmingly cumulative, and presented in a manner which suggested to the jury that appellant was a "gun nut," or a survivalist, with an intent to alter legal semi-automatic weapons to illegal automatic weapons. This evidence, although not establishing any illegality by appellant, was presented in a manner to suggest that appellant was a violent or dangerous man.

Assuming arguendo that the evidence was probative of issues relevant to the defense of LaMarsh and Willey, the prejudice to appellant, required exclusion of the evidence under section 352 or, in the alternative, the granting of a mistrial and separate trials thereafter. (*See People v. Reeder, supra*, 82 Cal.App.3d at pp.554-555; see Arg. I, *ante*.) The trial court erred in admitting the evidence and in denying appellant's motions for mistrial. The result was a trial which was fundamentally unfair, denying appellant due process and a reliable jury determination at all stages of his capital trial. (U.S. Const., 6th, 8th & 14th Amends.)

d. The Firearms and Other Weapons Evidence Prejudicially Violated Appellant's Constitutional Rights

The strongest import of the firearms evidence as used at appellant's trial was an improper and prejudicial suggestion of criminal or violent propensity. The trial court erred in the assessment of the probative value of the firearms evidence and in finding that the evidence was not character evidence within the meaning of Evidence Code section 1101, subdivision (a). Consequently, the trial court erroneously and unreasonably concluded that the evidence was relevant and that the probative value outweighed the substantial prejudice which admission of this evidence would entail. The trial court thus prejudicially abused its discretion in admitting the evidence, and rendered appellant's trial fundamentally unfair and unreliable, denying appellant due process. (Evid. Code, §§ 350, 352, 1101; U.S. Const., 6th, 8th & 14th Amends.; Cal. Const. art. 1, §§ 1, 7 & 15; see *Estelle v. McGuire, supra*, 502 U.S. at p. 67; *Beck v. Alabama, supra*, 447 U.S. at p. 638; *In re Winship, supra*, 397 U.S. at p. 364; *McKinney v. Rees, supra*, 993 F.2d 1378.)

2. Evidence Relating to Appellant's Relationship with and Treatment of Beck and Vieira

a. The Evidence Was Irrelevant

None of the evidence regarding appellant's relationship with Beck or Vieira, or the treatment of Vieira by Beck and/or appellant had any tendency to prove that appellant personally killed anyone at 5223 Elm, or that the killings were premeditated or deliberate, or that appellant conspired with anyone to commit murder that night.

LaMarsh and Willey argued that the evidence of the relationship of Cruz, Beck and Vieira showed that those three were a close-knit group and

secretive, and that appellant was manipulative of others. This in turn, so the theory went, supported LaMarsh's and Willey's defenses that they were not members of the group, nor parties to any conspiracy. Rather, they argued, this evidence established that appellant, Beck and Vieira conspired separately and secretly, without the knowledge of LaMarsh and Willey. (See 31RT:5464-5468; 32RT:5601-5602.)

However, the fact that appellant, Beck and Vieira may have been a close-knit group and secretive did not have any legally-proper relevance to the issue of whether they *did* conspire secretly and without the knowledge of LaMarsh and Willey. There was no evidence that they did so conspire. The only evidence of conspiracy presented at trial was Evans's tale of a discussion and agreement among all six original codefendants – appellant, Beck, Vieira, LaMarsh, Willey and Evans. All four defendants in this trial denied that any such discussion or agreement took place. Yet the jury found Beck and appellant guilty of conspiracy and four murders while being unable to reach a verdict on either the conspiracy count or any of the homicides as to LaMarsh and Willey.

The only relevance this evidence could have had in establishing a separate, secret conspiracy was through its use as character evidence, to establish that because appellant, Beck and Vieira were a close-knit group, secretive and manipulative, they acted in conformity with that character in conspiring secretly and separately from LaMarsh and Willey. That use of the evidence violated Evidence Code section 1101.

Nor was the evidence admissible under section 1101, subdivision (b), as the trial court ruled, as having "some probative value as to the identity of the planner of this incident. . . ." (31RT:5470.) As previously noted, to be admissible under subdivision (b) to establish identity, "other

acts" must be "highly similar" to the charged crimes. (*People v. Kipp, supra*, 18 Cal 4th at p. 369.) "For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation omitted.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.' (1 McCormick [on Evidence (4th ed. 1992)], § 190, pp. 801-803.)" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403.)

There are *no* similarities between the conduct described by this evidence and the charged offenses in this case. None of the evidence established a prior instance of conspiring to kill, or killing, as was charged in this case. Instead, the evidence concerned conduct of appellant, Beck and Vieira which supposedly took place in their day-to-day lives, with the violent conduct involving slaps to the head or punches to the stomach. Moreover, the conduct was limited to interactions of appellant, Beck and Vieira. There was no evidence that such conduct was directed at, or affected anyone other than those three, or perhaps others living with them. None of the evidence suggests violent action against people outside their immediate circle. Yet the charged crimes involved murder, not just dope-slaps and punches, and involved activity directed at persons outside that circle. The lack of similarity between the evidence and the charged crimes, as well as the "marked dissimilarities" (*People v. Haston, supra*, 69 Cal.2d at p. 249, fn. 18), rendered this evidence inadmissible as evidence of identity under section 1101, subdivision (b). The trial court's ruling to the contrary was error.

As with the firearms and other weapons evidence, this evidence was not admissible as impeachment of appellant. Appellant did not put his

character in issue. The evidence was therefore inadmissible under Evidence Code section 787. Nor did the elicitation of answers on cross-examination by Magana and Miller, which answers may have been contradicted by this evidence, make the evidence admissible as impeachment. (See *People v. Lavergne*, *supra*, 4 Cal.3d at p. 744; *People v. St. Andrew*, *supra*, 101 Cal.App.3d at p. 461.)

b. The Evidence Was Inadmissible Character Evidence

Willey and LaMarsh did not confine their efforts to seeking evidence that appellant, Beck and Vieira were close friends, or a close-knit group. Instead, they focused on the nature of the supposed group, attempting to establish that the group was a cult, and connecting the group, and appellant, to occult or satanic practices and beliefs, and to a willingness to do violence.

As explained above, the evidence concerning the relationships of appellant, Beck and Vieira, and the treatment of Vieira, was not probative of any legitimate issue presented by the charges against appellant. The evidence consisted of testimony regarding "specific instances of [appellant's] conduct," the probative value of which related solely to the attempts of Willey and LaMarsh "to prove [appellant's] conduct on a specified occasion." As such, the evidence constituted character evidence made inadmissible by Evidence Code section 1101. In arguing for admission of evidence relating to appellant's supposed domination of Beck and Vieira, Miller admitted as much: "If that includes the fact that -- the jury concludes that Mr. Cruz is an evil man, I don't see a way of avoiding that. . . ." (32RT:5604.)

Moreover, in arguing unsuccessfully for the opportunity to cross-

examine appellant about whether appellant thought that Rosemary McLaughlin had betrayed him, and if that was why he allegedly threatened to kill her, Miller revealingly argued that the evidence was relevant because "it shows a propensity towards violent acts on those he feels are disloyal." (30RT:5207.)

These arguments made to the trial court demonstrate that the purpose of Miller, at least, in pursuing evidence of specific acts by appellant was to produce exactly the prejudicial effect of which appellant now complains, i.e., to lead the jury to the conclusion "that Cruz is an evil man," with "a propensity towards violent acts." In other words, the purpose of this evidence was to put appellant's character in issue, even when appellant had not done so.

c. The Evidence Was More Prejudicial Than Probative

The evidence of appellant treating Vieira as a slave or having him beaten by Beck was evidence of misconduct which was likely to be "considered reprehensible by the jury." (*People v. St. Andrew*, *supra*, 101 Cal.App.3d at p. 462.) So, too, was McLaughlin's testimony that appellant and Beck took the earnings of herself, Vieira and Steve Perkins when they lived together.

Even where objections to the questions were sustained, the questions asked were themselves prejudicial. Questions seeking inadmissible character evidence will themselves cause prejudice, despite negative responses, where the questions suggest to the jurors that the questioner has a source unknown to the jurors "which corroborate[s] the truth of the matters in question." (*People v. Wagner*, *supra*, 13 Cal.3d at pp. 619-620 [and cases cited therein].)

The questions suggesting that appellant was the leader of a cult, interested in the occult and satanic practices, or had previously discussed committing murder with Beck, were clearly designed precisely to suggest to the jurors that there was evidence that corroborated the accusations which the questions contained. Moreover, the questions were asked after the trial court's rulings made it clear that objections to the questions would be sustained. There could have been no good-faith belief that the questions would lead to admissible evidence.

d. The Evidence Relating to Appellant's Relationship with and Treatment of Beck and Vieira Prejudicially Violated Appellant's Constitutional Rights

The strongest import of the "relationship" evidence as used at appellant's trial was an improper and prejudicial suggestion of criminal or violent propensity. The trial court erred in the assessment of the probative value of this evidence and in finding that it was admissible to identify the planner of the homicides under Evidence Code section 1101, subdivision (b). Consequently, the trial court erroneously and unreasonably concluded that the evidence was relevant and that the probative value outweighed the substantial prejudice which admission of this evidence would entail. The trial court thus prejudicially abused its discretion in admitting the evidence, and rendered appellant's trial fundamentally unfair and unreliable, denying appellant due process. (Evid. Code, §§ 350, 352, 1101; U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const. art. 1, §§ 1, 7 & 15; see *Estelle v. McGuire, supra,* 502 U.S. at p. 67; *Beck v. Alabama, supra*, 447 U.S. at p. 638; *In re Winship, supra*, 397 U.S. at p. 364; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

D. The Trial Court Erred in Denying Appellant's Motions for Mistrial

As argued elsewhere (see Argument I, *ante*), the conflict between the prejudice from the evidence to appellant and the interests of Willey and LaMarsh should properly have been resolved by the trial court ordering a mistrial and separate trials for the codefendants thereafter. (*People v. Reeder, supra*, 82 Cal.App.3d at p. 553.) Appellant raised this point on a number of occasions, but on each occasion, the trial court denied appellant's request.

"'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 565 [quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854.]) Denial of a motion for mistrial is reviewed for abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 953.)

"The term ['judicial discretion['] implies absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. To exercise the power of judicial discretion, all the material facts must be known and considered, together also with the legal principles essential to an informed, intelligent and just decision.' [Citation.]" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86.)

Appellant submits that the prejudice from the admission of the challenged character evidence, as described above, was manifestly incurable. Moreover, whether or not the prejudice to appellant resulting from the firearms and other weapons evidence could have been cured or prevented by an appropriate admonition or instruction is moot on this record, for no admonition was given the jury at the time the evidence came

in, and the instruction given the jurors was itself so flawed as to compound the prejudicial effect of the evidence, inviting the jury to use the evidence improperly. (See section E, *post.*)

E. The Instruction Given Was Erroneous and Compounded the Prejudice from the Erroneous Admission of the Evidence

The prejudice arising from this evidence was not limited to its erroneous presentation to the jury. Rather, it was compounded by an instruction which told the jury, improperly, how to use the evidence to convict appellant. An inadequate or erroneous instruction can not only fail to cure evidentiary error, but may, as did the instruction here, mislead and confuse the jury concerning such evidence. (See *People v. Simon* (1986) 184 Cal.App.3d 125, 131.) In this case, the instruction given concerning "other act" evidence heightened the prejudicial effect of this improper evidence, rather than limiting or preventing it.

The instruction given by the trial court directed the jurors' attention to acts committed by any of the defendants "similar to those constituting crimes other than that for which he is on trial." (36RT:6480.) While there was no evidence that appellant's possession of various weapons violated any laws, given the nature of the evidence and the questioning it is reasonably likely, if not probable, that the jurors considered the weapons evidence as "acts similar to those constituting crimes." Similarly, although nothing specifically identified any aspects of the relationship of appellant, Beck and Vieira as constituting crimes, given the evidence and attitude of the questioning the jurors were reasonably likely to consider such evidence as Vieira being hit at the order of appellant and being treated as a slave, and McLaughlin's story of Beck and appellant taking the earnings of herself,

Vieira and Perkins as "acts similar to those constituting crimes."[34]

While the instruction directed the jury not to consider the evidence as evidence of bad character or disposition to commit crimes, it directed them to use of the evidence which amounted to the same thing. The jurors were allowed, if they believed the facts true by a preponderance of the evidence, to use the evidence as tending to show: (1) intent, either for murder or conspiracy; (2) identity; (3) motive; (4) knowledge which might have been useful or necessary for the commission of the crime; (5) possession of the means useful or necessary for the commission of the crime; (6) the existence of a conspiracy; or (7) that the crime was part of a larger continuing plan, scheme or conspiracy.

Of these, only the fifth, possession of the means useful to the homicides, was arguably a legitimate inference from any of the challenged evidence, but even that related only to appellant's possession of some knives and the baton. Of the seven uses identified, only the second, identity, was a use for which the "relationship" evidence regarding appellant, Beck and

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[34] The modification of CALJIC No. 2.50 to address "acts similar to those constituting crimes" was based, according to the trial court, upon CALJIC's Use Note to 2.50, which stated:

> Where it is sought to show common scheme, plan or design by a non-criminal act or criminal act not resulting in a conviction, it is suggested that the first paragraph be revised by striking "a crime" and "crimes" and inserting in lieu thereof "an act similar to those constituting a crime." (*People v. Enos*, 34 Cal.App.3d 25, 42 [109 Cal.Rptr. 876, 888].)

However, review of *People v. Enos* demonstrates that that case did *not* suggest the "acts similar to those constituting crime" language. Nor has appellant found any California case which analyzes and approves that language.

Vieira was originally admitted by the trial court. (31RT:5470.)

Just as LaMarsh and Willey intended, the evidence was reasonably likely to have been considered by the jury as supporting an inference of identity, i.e., that appellant, Beck and Vieira were the ones who conspired and who killed. The trial court itself adopted this reasoning in admitting the evidence. (31RT:5470.) However, nothing about appellant's relationship with Beck or Vieira, or his or Beck's treatment of Vieira, was probative of identity of any particular killer, the identity of the members of a conspiracy, or the identity of who, if anybody, planned the homicides. Rather, the prejudicial effect of the evidence, the inadmissible inference of identity from a determination of character or propensity based upon unrelated "similar to criminal" acts, was the only way in which this evidence could in any way be used to establish identity. By differentiating an inference of identity from mere bad character or criminal disposition, the instruction created a false distinction, reasonably likely to lead the jurors to consider the evidence as supporting identity without understanding that its use for that purpose would violate the direction not to consider it as character or disposition evidence.

The instruction would reasonably be understood to direct the jurors not to convict merely because appellant was a bad character, "an evil man," or had a criminal disposition; i.e., such character or disposition standing alone was insufficient to convict. However, if the jurors considered that such character or disposition suggested identity, motive, intent, means, knowledge, a conspiracy, or a larger conspiracy, then according to the trial court's instruction it *could* be used to support the guilt verdict. But such use of the evidence violated section 1101 as well as appellant's rights to a fair trial and due process. (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1381;

U.S. Const., 6th, 8th & 14th Amends.)

F. The Admission of the Challenged Character Evidence Constituted Reversible Error As to the Entire Judgment

The evidence, from the prosecution and the defense, demonstrated that all four codefendants were present at 5223 Elm at the time of the homicides. However, there were conflicts in the evidence as to the responsibility for each of the four homicides. Appellant denied killing anybody. In the prosecution's case, appellant was linked only with the homicide of Richard Ritchey, and only by the testimony of Earl Creekmore and Kathy Moyers, whose identifications of the person who cut Ritchey's throat were subject to serious question. The prosecution's theory was that LaMarsh was solely responsible for the killing of Franklin Raper, and that either Beck or Vieira was responsible for the deaths of Dennis Colwell and Darlene Paris.

Willey, otherwise hostile to appellant, clarified the questionable identifications of Creekmore and Moyers by identifying Beck as the person who cut Ritchey's throat. While LaMarsh testified that appellant delivered the fatal blows to Raper's skull, the conflicting testimony of Doctors Ernoehazy and Rogers left that question open, subject to the jury's evaluation of the evidence. No one testified that appellant committed either the Colwell or Paris killings.

Thus, it strongly appears that in order for the jury to have found appellant guilty on all four counts of murder, as well as the conspiracy, the verdict would have to have been based upon a jury determination that appellant was guilty by virtue of his involvement in a conspiracy. The only real evidence of the charged conspiracy was Evans's story, which was not

corroborated as to the particulars of the conspiracy. The jurors' inability to agree similarly as to LaMarsh's and Willey's involvement in the charged conspiracy demonstrates that at least some of the jurors rejected the story told by Evans of a meeting at which all six original codefendants entered into a conspiracy. Given that logical conclusion, the conspiracy verdict on appellant appears to have been based upon the theory of LaMarsh and Willey as to a separate and secret conspiracy by appellant, Beck and Vieira. Yet that theory was supported by no substantial evidence; rather, it was supported only by the inadmissible and substantially prejudicial character/disposition/ propensity evidence which was erroneously admitted against appellant.

The prosecutor did not directly rely on the character evidence in his argument to the jury. However, Magana based a large part of his argument to the jury on the question of character. Magana had presented evidence which, he argued to the jury, demonstrated that LaMarsh's character was inconsistent with planning to kill or killing. In his argument to the jury, Magana then specifically contrasted LaMarsh's character to appellant's. Miller likewise disparaged appellant's character in his closing argument. (See Argument I. B.1.d, *ante*.)

The character evidence played a substantial part in this trial. It was introduced through a number of witnesses, and was the subject of numerous objections, sidebars and argument where the jury was excluded from the courtroom. Again, by the jurors' inability to reach a verdict as to LaMarsh and Willey on either the conspiracy count or any of the homicides, it is clear that the jurors did not unanimously rely upon Evans's story as true. Yet they convicted appellant and Beck not only of the murders, but of the conspiracy. That verdict, coupled with the inability to reach a verdict as to

LaMarsh and Willey, tracks LaMarsh's and Willey's use of the evidence, including its improper use to establish a separate, secret conspiracy.

The trial court's rulings admitting this evidence, and allowing the continued questioning on these subjects, compounded by a hopelessly-flawed instruction on the use of the evidence, violated Evidence Code section 1101, lightened the prosecution's burden of proof, improperly bolstered the credibility of witnesses, and permitted the jury to find appellant guilty in large part because of a perceived criminal or violent propensity. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) Moreover, for the reasons stated above, this evidence and the instruction, as well as the improper tactics of Magana and Miller, so infected the trial as to render appellant's convictions fundamentally unfair (*Estelle v. McGuire, supra*, 502 U.S. at p. 67; see also *McKinney v. Rees, supra*, 993 F.2d at p. 1384) and deprived appellant of his right to a reliable adjudication at all stages of this death-penalty case (see *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; *Beck v. Alabama, supra*, 447 U.S. at p. 638; *Penry v. Lynaugh* (1989) 492 U.S. 302, 328, abrogated on other grounds in *Atkins v. Virginia* (2002) 536 U.S. 304.)

Under either the *Chapman* or *Watson* standard, the effect of this evidence on the jury's guilt verdicts was undoubtedly prejudicial, whether considered alone or in conjunction with the other errors in this case. (See, e.g., *Mak v. Blodgett, supra*, 970 F.2d at p. 622 [errors that might not be so prejudicial as to amount to a deprivation of due process, when considered alone, may cumulatively produce a trial that is fundamentally unfair.].)

It is reasonably likely that in the absence of the prejudice introduced into this trial by this evidence, a result more favorable to appellant at the guilt trial would have resulted. Reversal is therefore required even under

the *Watson* standard. (*People v. Watson, supra*, 46 Cal.2d at p. 836.) However, since the prejudicial nature of this evidence, and the instruction which directed the jury to the erroneous consideration of this evidence, deprived appellant of due process, a fair trial and a reliable jury determination of guilt, the error must be assessed under the *Chapman* standard. (*Chapman v. California, supra*, 386 U.S. at p. 24; U.S. Const., 6th, 8th & 14th Amends.) Respondent cannot demonstrate that this evidence or the instruction was harmless. Moreover, since appellant's death sentence rests on an unreliable guilt verdict, and the death verdict was not surely unattributable to this error (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279), the death verdict is itself unreliable, obtained in violation of appellant's Eighth and Fourteenth Amendment right to be free from cruel and unusual punishment (*Caldwell v. Mississippi, supra*, 472 U.S. 320).[35/] Accordingly, appellant's convictions and judgment of death must be reversed.

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[35] Nor, with the possible exception of the striking of Vieira by Beck, would any of the evidence in question been admissible at the penalty phase as factor (b) evidence. (See, e.g., *People v. Phillips* (1985) 41 Cal.3d 29, 72 [section 190.3, subd. (b) evidence "must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute"]; see also Arg. XIII, *post.*)

III

THE TRIAL COURT'S ERRONEOUS EXCLUSION FOR CAUSE OF A PROSPECTIVE JUROR BECAUSE OF HER DEATH PENALTY VIEWS REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

The trial court conducted non-sequestered jury voir dire pursuant to Code of Civil Procedure section 223 (as it read at the time of trial), rather than sequestered voir dire pursuant to *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 69-81 (*Hovey*), allowed no questioning of potential jurors by attorneys for the parties and excused several prospective jurors for cause due to their purportedly impaired ability to return a death verdict. (See *Wainwright v. Witt* (1985) 469 U.S. 412 (*Witt*); *Witherspoon v. Illinois* (1968) 391 U.S. 510 (*Witherspoon*).) The record does not, however, support the trial court's finding of impairment as to at least one of these prospective jurors. The excusal of this prospective juror violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I, sections 1, 7, 15 and 16 of the California Constitution. Reversal of appellant's death judgment is therefore required. (*Gray v. Mississippi* (1987) 481 U.S. 648, 658, 668 (*Gray*).) Reversal is also required by the inadequacy of the record, and denial of appellant's right to meaningful and reliable appellate review. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15 & 17; Argument V, *post*, incorporated herein by reference.)

A. The Applicable Legal Principles

The exclusion of "all jurors who express conscientious objections to capital punishment . . . violates the defendant's Sixth Amendment-based right to an impartial jury and subjects the defendant to trial by a jury

'uncommonly willing to condemn a man to die.'" (*People v. Hayes* (2000) 21 Cal.4th 1211, 1285, quoting *Witherspoon*, *supra*, 391 U.S. at p. 521.)

The United States Supreme Court has held that "*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment "on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." (*Adams v. Texas* (1980) 448 U.S. 38, 48.)

In *Witt, supra*, the United States Supreme Court held that under the federal Constitution "the proper standard for determining when a prospective juror may be excluded for cause because of his or her 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.'" (469 U.S. at p. 424, quoting *Adams v. Texas, supra*, 448 U.S. at p. 45 (fn. omitted).) The same standard is applicable to a defendant's claims under the California Constitution. (See, e.g., *People v. Guzman* (1988) 45 Cal.3d 915, 955; *People v. Ghent* (1987) 43 Cal.3d 739, 767.) Thus, all the state may demand is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Adams v. Texas*, *supra*, 448 U.S. at p. 45.)

It is reversible error to exclude for cause a juror who says that he or she can follow the instructions and oath in regard to the death penalty. (See *Gray, supra*, 481 U.S. at pp. 667-668.) Thus, the relevant inquiry is whether the juror can perform his or her duties in accordance with the court's instructions and the juror's oath. (*Id.* at p. 658.) The mere fact that a prospective juror expresses "scruples about the death penalty" does not by itself establish the juror's inability to conscientiously perform the duties of a

juror in a capital case; rather, such scruples may "merely heighten the [prospective] jurors' sense of responsibility." (See *Gray, supra*, 481 U.S. at p. 653, fn. 3; *Witherspoon, supra*, 391 U.S. 510.)

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those 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.

(*Lockhart v. McCree* (1986) 476 U.S. 162, 176; see also *Witherspoon, supra*, 391 U.S. at p. 514, fn. 7 [recognizing that a juror with religious or conscientious scruples against capital punishment "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State"]; *People v. Kaurish* (1990) 52 Cal.3d 648, 699 [neither *Witherspoon* nor *Witt* "nor any of our cases, requires that jurors be automatically excused if they merely express personal opposition to the death penalty"].)

As decisions of this Court and the United States Supreme Court make clear, "a prospective juror's personal conscientious objection to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case. . . ." (*People v. Stewart* (2004) 33 Cal.4th 425, 446 (*Stewart*).) The focus of any inquiry is and must be on the juror's ability to honor his or her oath as a juror.

The prosecution, as the moving party, bears the burden of proof in demonstrating that a juror's views would "prevent or substantially impair" the performance of his or her duties. (*Stewart, supra*, 33 Cal.4th at p. 445.) "As with any other trial situation where an adversary wishes to exclude a juror because of bias, . . . it is the adversary seeking exclusion who must

demonstrate, through questioning, that the potential juror lacks impartiality. . . . It is then the trial judge's duty to determine whether the challenge is proper." (*Witt*, *supra*, 469 U.S. at p. 423; see also *Stewart*, *supra*, 33 Cal.4th at p. 445.) "A motion to excuse a venire member for cause of course must be supported by specified causes or reasons that demonstrate that, as a matter of law, the venire member is not qualified to serve." (*Gray, supra*, 481 U.S. at p. 652, fn. 3.)

"'The ability of a defendant, either personally, through counsel, or by the court, to examine the prospective jurors during voir dire is thus significant in protecting the defendant's right to an impartial jury.' (*In re Hitchings* (1993) 6 Cal.4th 97, 110, 24 Cal.Rptr.2d 74, 860 P.2d 466.)" (*People v. Roldan* (2005) 35 Cal.4th 646, 689-690.) "*Voir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188.) Without an adequate voir dire, the trial judge's responsibility to determine challenges for cause is substantially impaired. (*Ibid.*)

The trial court's ruling must be founded on an inquiry sufficiently searching to permit it to reliably determine a *Witt* impairment:

> Before granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would "prevent or substantially impair" the performance of his or her duties (as defined by the court's instructions and the juror's oath). . . .

(*Stewart*, *supra*, 33 Cal.4th at p. 445, quoting *Witt*, *supra*, 469 U.S. at p. 424.)

This Court has not yet addressed "the question of the circumstances under which defense counsel has a right to rehabilitate a prospective juror." (*People v. Stewart*, *supra*, 33 Cal.4th at p. 450.) However, a fair reading of this Court's jurisprudence reveals that the trial court is possessed of the discretion to limit rehabilitation voir dire within reason (see, e.g., *People v. Mattson*, *supra*, 50 Cal.3d at p. 845 ["When a bias that may form a basis of a challenge for cause appears during such voir dire, opposing counsel may seek to rehabilitate the prospective juror, but this further voir dire, like that directed to uncovering bias, is subject to reasonable limitation at the discretion of the trial judge"]), but such voir dire may only be foreclosed when a prospective juror has given unequivocally disqualifying answers. (See, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 824.)

The guiding principle is that while the trial court is vested with broad discretion as to questions to be asked during voir dire, that discretion is subject to the essential demands of fairness. (*Morgan v. Illinois* (1992) 504 U.S. 719, 730; *Aldridge v. United States* (1931) 283 U.S. 308, 310.) Thus, where the prospective juror has not given unequivocally disqualifying answers, the trial court must allow counsel a reasonable opportunity to have the juror questioned further (see *People v. Samayoa*, *supra*, 15 Cal.4th at p. 824), or be deemed to have abused that discretion. "[W]ith the heightened authority of the trial court in the conduct of voir dire, mandated under [Code of Civil Procedures section 223], goes an increased responsibility to assure that the process is meaningful and sufficient to its purpose of ferreting out bias and prejudice on the part of prospective jurors." (*People v. Taylor* (1992) 5 Cal.App.4th 1299, 1314; see also *People v. Wilborn* (1999) 70 Cal.App.4th 339, 348 [reversible error when trial court abused discretion by failing to allow voir dire for implied or actual bias on account

of racial prejudice]; *People v. Chapman* (1993) 15 Cal.App.4th 136, 141-142 [trial court abused discretion in foreclosing voir dire on issue of defendant's status as a felon; error required reversal]).

The trial court's decision whether to excuse a prospective juror for cause under *Witherspoon/Witt* must be based on the record of the voir dire "as a whole." (*Witt, supra*, 469 U.S. at p. 435; *People v. Cox* (1991) 53 Cal.3d 618, 646-647.) Accordingly, when the trial court's decision is based on a few individual answers in isolation and not on the voir dire "in its entirety" (*People v. Cox, supra*, 53 Cal.3d at p. 647), it is not fairly supported by the record and is not worthy of deference from this Court. The trial court must follow the process this Court has laid down for itself in assessing jury voir dire: "In short, in our probing of the juror's state of mind, we cannot fasten our attention upon a particular word or phrase to the exclusion of the entire context of the examination and the full setting in which it was conducted." (*People v. Varnum* (1969) 70 Cal.2d 480, 493.)

Although the trial court's "determinations of demeanor and credibility" are entitled to deference by the reviewing court *(Wainwright v. Witt, supra*, 469 U.S. at p. 428), the Sixth Amendment requires that a trial court's resolution of the issue of juror bias be examined in "the context surrounding [the juror's] exclusion" in order to determine whether it is "fairly supported by the record." (*Darden v. Wainwright* (1986) 477 U.S. 168, 176; *Witt, supra*, 469 U.S. at p. 434) Excusal of a prospective juror cannot be upheld unless there is substantial evidence in the record supporting the trial court's ruling. (*People v. Ashmus, supra*, 54 Cal.3d at p. 962.) This Court therefore must independently assess the jurors' responses on the record "as a whole," in the correct factual context, and in light of the proper legal standards. (See *Darden v. Wainwright, supra*, 477

U.S. at p. 176.)

Moreover, this Court can accord no deference to the trial court's decision to discharge a prospective juror where the trial court has applied an erroneous legal standard in making its determination. (See *Gray, supra*, 481 U.S. at p. 661, fn. 10 [deference to the trial court's factual findings "is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law"]; cf. *Witt, supra*, 469 U.S. at p. 427, fn. 7.)

Finally, the exclusion of even a single prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal of a death sentence. (See *Gray, supra*, 481 U.S. at pp. 659-667; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *Stewart, supra*, 33 Cal.4th at p. 445.)

Analyzed in light of these constitutional standards, it is clear that the trial court here committed reversible error in granting the prosecution's challenges for cause as to one prospective juror. The record of voir dire and a portion of the questionnaire answers of this prospective juror which were read into the record[36] demonstrates that the prosecution failed to carry its burden of demonstrating the juror's disqualification. The judgment of death must therefore be reversed. (*Gray, supra*, 481 U.S. at 667-668.)

B. Challenged Prospective Juror Danielle M. Dobel

1. The Questionnaire

Danielle M. Dobel's questionnaire is not available, having been lost

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[36] The questionnaires of two of the prospective jurors at issue, Danielle M. Dobel and Carol Flores, were lost or discarded by the Superior Court Clerk, and could not be made part of the record. (See 19CT:4462, 4570, 4595; See Arg. V, *post*.)

or discarded by the superior court clerk.[37] Certain of her questionnaire answers relating to the death penalty were read into the record by the trial court, while others were described, apparently not verbatim. Those answers, including an answer to a follow-up question by the trial court during voir dire, were as follows:

> THE COURT: . . . Miss Dobel in her questionnaire has stated that – the Question No. 75,[38] she felt she could be fair to both parties, she was an unbiased person. This obviously – this questionnaire was obviously answered after Miss Dobel knew the nature of this case.
>
> She has set forth in the questionnaire, Question 127,[39] a situation where the death penalty could be appropriate, multiple murders, if no remorse or promise of rehabilitation. She has set forth in there she could follow the law, although it would not be easy for her to sentence someone to death.
>
> Those answers would suggest that she is not challengeable for cause.

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[37] See fn. 36, *ante*.

[38] Question No. 75 on the questionnaire asks:

> If you were in the position of the defendants or the prosecutor, would you be satisfied to have your case tried with 12 jurors of your present frame of mind?
>
> _____Yes _____No
>
> Explain:_____

(See, e.g., 29CT:7366.)

[39] Question No. 127 on the questionnaire asks, "Under what circumstances, if any, do you believe that the death penalty is appropriate?" (See, e.g., 29CT:7385.)

She has further answered that, in Question No. 108[40/] -- that she does not believe in the death penalty except in extreme Dahmer-type cases, where a death penalty should not be entirely ruled out.

115[41/] she strongly opposes the death penalty.

And 116[42/] you answer that the death penalty as a punishment -- the purpose of the death penalty punishment, but it hurts more than it helps. What did you mean by that, "it hurts more than it helps"?

[DOBEL]: Well, I believe in rehabilitation. I think that it's possible for individuals to be rehabilitated. I think that's the purpose of prison. I think some good things come of going to prison. People deserve to go to jail. But taking away someone's life is not

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[40] Question No. 108 on the questionnaire asks, "What are your GENERAL FEELINGS regarding the death penalty?" (See, e.g., 29CT:7380.)

[41] Question No. 115 on the questionnaire reads as follows:

> Check the entry which best describes your feeling about the death penalty:
> Would impose whenever had the opportunity _____
> Strongly support_____
> Support____
> Will consider____
> Oppose_____
> Strongly oppose_____
> Will never under any circumstance impose death penalty_____
> Please explain or expand on your answer if you wish:
> _____

(See, e.g., 29CT:7382.)

[42] Question No. 116 on the questionnaire asks, "What purpose do you believe the death penalty serves?" (See, e.g., 29CT:7382.)

rehabilitative. You know, it's shutting off all possibilities for the person saying "there's no reason for you to be here," serve -- I don't believe that that is a positive thing.

And I also believe the death penalty has shown in various examples in different states in this country that it is not a deterrent, which is why I did not say -- I don't think it's a deterrent.

THE COURT: Okay. Even further, Miss Dobel has answered Question No. 118,[43/]a death penalty should only rarely be imposed when there is absolutely no help of rehabilitation -- no hope of rehabilitation, she would vote against the death penalty were it on a ballot. Those answers don't particularly suggest whether she should or should not be excused for cause.

Question No. 88,[44/] Dobel has answered that she does not believe in the death penalty.

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[43] Question No. 118 on the questionnaire asks:

Do you feel the death sentence is imposed:

Too often _____ Too seldom_____ Randomly _____

Please explain: _____

(See, e.g., 29CT:7383.)

[44] Question No. 88 on the questionnaire asks:

Do you have any beliefs about the guilt or innocence of the defendants or the penalty, if any, they should receive if found guilty?

_____Yes _____No

If yes, what are those beliefs?

(See, e.g., 29CT:7370.)

Question No. 114,[45/] she has answered that life without possibility of parole is okay for the most heinous crimes imaginable.

123,[46/] Miss Dobel acknowledges that the death penalty may be appropriate for only repeat offenders.

128,[47/] the death penalty is never appropriate for first time offender.

(14RT:2428-2430.)

. . . No. 130, "Is there anything about your present state of mind that you feel any of the attorneys would like to know? If so, please explain."

The answer: "I doubt seriously that I would impose a death penalty. My verdict would be affected if I was asked to vote guilty with a punishment of death as opposed to guilty with life imprisonment."

(14RT:2430.)

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[45] Question No. 114 on the questionnaire asks, "What are your feelings about the punishment of life imprisonment without the possibility of parole?" (See, e.g., 29CT:7382.)

[46] Question No. 123 on the questionnaire reads as follows:

Do you believe the state should impose the death penalty on everyone who, for whatever reason, murders another human being?

_____Yes _____No

Please explain: _____

(See, e.g., 29CT:7384.)

[47] Question No. 128 on the questionnaire asks, "Under what circumstances, if any, do you believe that the death penalty is not appropriate?" (See, e.g., 29CT:7386.)

2. Voir Dire

Prospective juror Dobel's voir dire relating to the death penalty, conducted solely by the trial court, which denied defense requests for additional follow-up questioning of her, was as follows:

> Q. THE COURT: What are your feelings about the death penalty?
>
> A. I am against the death penalty.
>
> Q. If called upon as a juror in this case or if you are selected as a juror in this case and the jury got to the place where the penalty was to be decided, and that if after hearing all the law and the evidence you felt that the death penalty was the appropriate disposition, would you be able to vote for it?
>
> A. If I felt it was appropriate, yes. I guess the thing is whether or not I would believe it was appropriate.
>
> Q. Do you believe there are any circumstances, any types of murders, where the death penalty could be appropriate?
>
> A. Yes.
>
> Q. Can you explain those, please?
>
> A. Well, I -- I'm not sure if I wrote it in the questionnaire. I think that somebody such as someone like Jeffrey Dahmer, if the death penalty had been appropriate in his case, I may be able to go with the death penalty.
>
> Severe human crimes, mass murders of numbers, lots of different people, and other, I guess, heinous circumstances involved would lead me to impose the death penalty; but it would have to be something very extreme and very severe.
>
> Otherwise, I really am not -- I do not believe that the death penalty serves any purpose.
>
> Q. Are your feelings about the death penalty so strong that

you would never vote for first degree murder?

A. No.

Q. Are your feelings about the death penalty so strong that you would never find a special circumstance to be true?

A. Possibly.

Q. Are your feelings about the death penalty so strong that you would never impose a death penalty in any case whatsoever?

A. No.

Q. Are your feelings about the death penalty so strong that you would impose it in every case in which you had the opportunity to do so?

A. No.

Q. Do you believe your feelings about the death penalty are so strong that they would substantially interfere with your ability to function as a juror in this case?

A. Yes.

Q. Do you believe that a person who was convicted of successfully planning the murder of or murdering multiple victims should automatically receive the death penalty?

A. No.

Q. When you say you feel that your beliefs are so strong that it would substantially interfere with your ability to function as a juror in this case, can you explain that further to me?

A. Yes, I would be fine during the guilt phase of the proceeding; but once we got to the penalty phase, I'm sure that it would -- it would take a lot -- it would take really a serious leap of some sort -- and I'm not sure I'd be able to make it -- to impose the

death penalty.

Q. Did you understand what I said about the factors of mitigation and the factors of aggravation and the situation where -- the only situation where a jury can only consider imposing the death penalty?

A. Yes.

Q. Do you understand that if you got to the penalty phase and you heard aggravating and mitigating factors and you decided that the mitigating factors outweighed the aggravating factors, you would have to impose the death penalty, you would have to impose life?

Obviously, I assume would you agree with that.

A. Um-hmm.

Q. And you further understand that if they were essentially equal, you would still then again have to impose a life sentence?

A. Um-hmm.

Q. Do you understand that if the aggravating factors were so bad in comparison with the mitigating factors, that death was warranted, that you could impose the death penalty?

A. I understand.

Q. If you sat as a juror in this case where you were called upon to determine a penalty of life or death and the only evidence presented in the penalty phase were aggravating factors, bad things about the defendants, and they were very bad, would you be able to vote for the death penalty?

A. Well, when you say very bad, it would have to be very bad. I mean, it's a qualitative statement. What is very bad? You know, what's very bad to me is probably different from what's very bad to someone else, and we may have the same feelings about what is very bad, but I would still believe it was not to right to have a part

in the death of someone else in this manner.

Q. In your last part of your answer that you don't believe that you have a right to take part in -- let me see if I understood your last answer.

Is your belief such that you do not believe that you have the right to take part in a decision which would deprive a person of his life?

A. Yes.

Q. Do you believe that you could ever participate in a decision that would result in the taking of a person's life?

A. In a courtroom or –

Q. In a courtroom, yes.

A. Possibly, the case I mentioned before. It would have to be something very bad.

(14RT:2420-2424.)

3. Argument and Ruling Below

The prosecution challenged prospective juror Dobel, stating:

> Your Honor, in light of case law on the subject and Miss Dobel's answers to Question Nos. 88, 108, 114, 116, 118, 122, 123, 127, 128, 129 and 130, the People would challenge Miss Dobel as a juror in this case. She's indicated both orally and in writing in her questionnaire in response to Question No. 130 that her verdict would be affected if she was asked to vote on the death penalty. She's indicated that her views would substantially interfere with her ability to function as a juror in this case.
>
> And I cite the Court to the case of *Wainwright versus Witt*, and it's prodigy [sic]. The People would exercise – or, I'm sorry, would excuse Miss Dobel.

(14RT:2424-2425.)

All four defense counsel objected, arguing that Dobel passed the threshold required to prevent a challenge for cause. (14RT:2425-2427.) Appellant's counsel requested either *Hovey* voir dire or that the attorneys be allowed to ask Dobel further questions. He noted that she had given an example of a situation in which she could vote for the death penalty, that she had stated that it might be a tough decision for her, but that she would weigh it. He argued that a denial of follow-up questions or *Hovey* voir dire would violate appellant's rights under the Sixth, Eighth and Fourteenth Amendments. (14RT:2425; see also Argument IV, *post.*) He also submitted follow-up questions for the trial court to ask Dobel. (14RT:2426, 2427-2428.)

Co-defendant LaMarsh's attorney argued that "of all the questionnaires, I believe this individual has given a great deal of thought and depth to her responses," and that "this individual stands out in the type of answers that are given, and No. 129[48] clearly indicates that she passes the *Witherspoon/Witt* questions." (14RT:2426-2427.) He also objected to the denial of *Hovey* voir dire. (14RT:2427.)

Co-defendant Beck's attorney also submitted follow-up questions for

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[48] Question No. No. 129 on the questionnaire asks:

> Could you set aside your own personal feelings regarding what you think the law should be regarding the death penalty, and follow the law as the Court instructs you?
> ____Yes ____No
> Please Comment:

(See, e.g., 29CT:7386.)

the trial court to ask Dobel, in which all other defense counsel joined.[49] (14RT:2427, 2431.)

The trial court, without explanation,[50] denied the request to ask the submitted follow-up questions. (14RT:2427.) After reviewing Dobel's answers to certain questions on the questionnaires,[51] the trial court stated:

> Miss Dobel has answered questions in court. She does have some concern about the ability to perform as a juror because of her feelings about the death penalty. The Court feels that perhaps the most -- and that the Court most seriously going to take into consideration an answer that Miss Dobel put down without the Court or counsel suggesting anything to Miss Dobel, and that's to No. 130, "Is there anything about your present state of mind that you feel any of the attorneys would like to know? If so, please explain."
>
> The answer: "I doubt seriously that I would impose a death penalty. My verdict would be affected if I was asked to vote guilty with a punishment of death as opposed to guilty with life imprisonment."
>
> I would find that answer, coupled with the remaining answers that I have given -- the Court finds that Miss Dobel's current state of mind is such that her feelings against the death penalty would substantially interfere with her ability to

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[49] The trial court assured the defense attorneys that the follow-up questions, showing the requesting attorney and the relevant juror, would be preserved in the record. (14RT:2436.)

[50] In refusing follow-up questions on another prospective juror whom the trial court excused on a prosecution *Witherspoon/Witt* challenge, the trial court had reasoned that "when a juror makes it absolutely and unmistakenly clear that he or she impose and request -- never impose a death penalty, there is no requirement that there be an attempt to, quote, rehabilitate, unquote, that juror." (11RT:2077.)

[51] Set forth at section B.1.a of this argument, *ante*.

perform as a juror in a case in which the death penalty was a possible penalty.

(14RT:2430.)

Co-defendant LaMarsh's attorney again objected, arguing that *Hovey* voir dire was necessary and that there were not "sufficient answers to make a determination that [the court] indicate[s] upon reflection of [the court's] review of these questionnaires. If there is doubt as to each one of those answers that I asked, I ask that she be asked individually in camera as to those responses." (14RT:2430-2431.) Appellant's counsel joined LaMarsh's attorney's objection, based upon the Sixth, Eighth and Fourteenth Amendments. (14RT:2431.)

The trial court noted, in regard to the denial of *Hovey* voir dire, "We are following Proposition 115 --." (*Ibid.*)

4. The Record Does Not Support the Trial Court's Ruling That Prospective Juror Dobel Was Unqualified to Sit As a Juror in This Case

As stated above, in reviewing the trial court's ruling regarding prospective juror Dobel, this Court must independently assess her responses on the record "as a whole." (See *Darden v. Wainwright, supra*, 477 U.S. at p. 176.) In this case, however, the record on appeal is not "whole" – it does not contain Dobel's questionnaire. The record is sufficient, however, to show that Dobel was qualified to sit as a juror on this case, and that her dismissal for cause was erroneous, contrary to *Witherspoon* and *Witt*. The contrary conclusion, that she was properly dismissed, cannot be made on this record, because key portions of the record are missing.[52]

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[52] As argued below, the incomplete state of the record requires reversal. (See Arg. V, *post*.)

The record, insofar as it reflects certain of Dobel's questionnaire answers, as well as her answers on voir dire, demonstrates that she considered the death penalty appropriate in some cases, and, although she generally opposed the death penalty, that she would be able to impose it in an appropriate case. When asked if her feelings regarding the death penalty would prevent her from imposing a death verdict in any case, she replied, "no." Furthermore, based upon LaMarsh's counsel's description of her answer to Question No. 129, it is a reasonable inference that Dobel answered that question to reflect that she would be able to set aside her personal views regarding the death penalty and follow the trial court's instructions. On the basis of those answers, the record demonstrates that she was qualified to sit as a juror in this case under *Witherspoon* and *Witt*.

Dobel gave her answers on the questionnaire before she received any explanation of the procedures involved in a capital trial or a juror's role in determining penalty.[53] Her questionnaire answers, therefore, must be considered in that light. For example, her answer to question No. 130, which the prosecution cited in its challenge to her and upon which the trial court placed heavy reliance, stated that "I doubt seriously that I would impose a death penalty. My verdict would be affected if I was asked to vote guilty with a punishment of death as opposed to guilty with life imprisonment." (14RT:2430.) That answer suggests that she thought that penalty was determined through the jury's determination of guilt, rather

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[53] The instructions given by the trial court to prospective jurors prior to handing out the questionnaires did not explain the procedures involved in a penalty trial, but instead focused upon the prospective jurors' obligations during voir dire and upon filling out the questionnaire. (See, e.g., 7RT:1488-1493.)

than in a separate proceeding directed solely at deciding between death and life imprisonment without possibility of parole, and that such a situation might affect her guilt verdict. Such an uninformed response does not constitute a disqualifying state of mind, nor does it demonstrate an unwillingness or inability to abide by her oath to follow the trial court's instructions, which she had yet to hear.

Once the procedure of the penalty determination was clarified somewhat for Dobel during voir dire,[54] her answers made clear that she could consider the death penalty if the aggravation was very bad. (14RT:2423-2424.) This was consistent with her prior description, in the questionnaire and on voir dire, that the death penalty should not be ruled out in extreme, "Dahmer-type" cases, that it could be appropriate for "multiple murders, if there was no remorse or promise of rehabilitation," or "other, I guess, heinous circumstances involved." (14RT:2421, 2428-2429.) She never stated that she would not consider the death penalty in any other type of case. She was never asked that question. Moreover,

> [Veniremen] cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment.

(*Witherspoon*, *supra*, 391 U.S. at p. 522, fn. 21.)

Dobel's answers about the type of case in which she thought the death penalty was appropriate were entirely consistent with the possibility

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[54] During the voir dire of the prospective juror immediately before the voir dire of Dobel, the trial court introduced more of the concepts involved in a juror's role in a capital trial and the manner in which penalty would be determined, including the bifurcated nature of the guilt and penalty phases, as well as some minimal introduction of the concepts of aggravation and mitigation. (14RT:2413-2415.)

that she would consider this case as one of those cases. According to the trial court, Dobel wrote in her questionnaire that the death penalty might be appropriate for multiple murders, where there is no remorse or promise of rehabilitation. (14RT:2428.) Of course, in this case, appellant was charged with and convicted of multiple murders, and the trial court found, in its denial of modification of the death verdict, that appellant showed "a total lack of remorse." (45RT:8383.) Thus, Dobel not only indicated that she could return a death verdict in an appropriate case, but that, depending upon factual findings, this case might be an appropriate case.

The trial court, in reciting some of Dobel's questionnaire answers, found that her answers to Question Nos. 75 and 127 would suggest she was not challengeable for cause. (14RT:2428.) The court made no similar finding as to her answers to Question Numbers 108, 115 and 116, yet those answers did not support a challenge for cause either. The fact that Dobel thought that the death penalty should be limited to extreme cases (Question No. 108) in fact supports a finding that she was qualified, for it shows she did consider the death penalty an appropriate penalty in an appropriate case. As was the situation in *Gray*, the prospective juror "ultimately stated that she could consider the death penalty in an appropriate case" (*Gray*, *supra*, 481 U.S. at 653) and "'was clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria.'" (*Id.* at p. 659 (citation omitted).)

> [*People v.*] *Kaurish*, *supra*, 52 Cal.3d 648, 276 Cal.Rptr. 788, 802 P.2d 278, recognizes that a prospective juror may not be excluded for cause simply because his or her conscientious views relating to the death penalty would lead the juror to impose a higher threshold before concluding that the death penalty is appropriate or because such views would make it very difficult for the juror ever to impose the death penalty. Because the California death penalty sentencing process contemplates that jurors will take into account their own

> values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt*, *supra*, 469 U.S. 412, 105 S.Ct. 844. . . . A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law.

(*Stewart*, *supra*, 33 Cal.4th 425, 446-447.)

In sum, on the available record, Dobel's answers showed that she was not "so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its" death penalty scheme, the standard that *Witt* requires for exclusion. (*Adams v. Texas, supra*, 448 U.S. at p. 51;see *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 331 [notwithstanding the deference due to the trial court, the record did not support the juror's exclusion where the juror indicated he could and would follow the law as instructed].) Moreover, the trial court's process for resolving the challenge to Dobel was further flawed because it ignored the rule that "[t]he burden of proving bias rests on the party seeking to excuse the venire member for cause." (*United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1270, citing *Witt, supra*, 469 U.S. at p. 423; see also *Szuchon v. Leham* (3d Cir. 2001) 273 F.3d 299, 328.) At most, prospective juror Dobel's responses "appear[ed] ambiguous" and therefore "[did] not justify dismissal for cause." (*United States v. Chanthadara, supra*, 230

F.3d at p. 1271.)[55]

5. Assuming Arguendo This Court Rules That Prospective Juror Dobel's Answers Were Ambiguous, The Trial Court's Ruling Is Not Entitled to Deference As a Matter of Federal Constitutional Law

This Court has based its general rule of deference to the trial court's findings where the prospective juror has given conflicting, ambiguous or equivocal answers upon the trial court's ability to assess credibility or demeanor. Deference is given because the trial court has had the advantage of seeing and hearing the juror's demeanor on voir dire and is therefore able to "assess the juror's state of mind." (*People v. Cox*, *supra*, 53 Cal.3d at p. 646, quoting *People v. Coleman* (1988) 46 Cal.3d 749, 767, fn. 10.) "[A] finding as to state of mind depends in turn on a finding as to 'demeanor and credibility,' which 'are peculiarly within a trial judge's province.'" *(People v. Cox*, *supra*, 53 Cal.3d at p. 679, quoting *Witt*, *supra*, 469 U.S. at p. 428, fn. omitted; see also, e.g., *People v. McPeters* (1992) 2 Cal.4th 1148, 1175.)

However, consideration of a trial court's determination as binding where a juror's answers are equivocal, ambiguous or conflicting, without consideration of the adequacy of the voir dire to clarify those equivocations, ambiguities or conflicts affords the trial court's determination more substance than can be squared with a capital defendant's right to meaningful

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[55] To the extent that this Court continues to "accept[ ] as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous" (e.g., *People v. Bolden* (2002) 29 Cal.4th 515, 537), such a standard is more deferential than the *Witt* standard (see *Witt, supra*, 469 U.S. at p. 424; *Chanthadara, supra*, 230 F.3d at p. 1271) and is therefore erroneous as a matter of federal constitutional law.

and reliable appellate review of his capital sentence; the type of review that is required for a capital-sentencing scheme to be considered constitutionally acceptable. (See *Clemons v. Mississippi* (1990) 494 U.S. 738, 749; *Pulley v. Harris* (1984) 465 U.S. 37, 53; *Gregg v. Georgia* (1976) 428 U.S. 153, 194 (lead opn. of Stewart, Powell, and Stevens, JJ.).) Such an approach also deprives him of the right to meaningful review that this Court has recognized as his constitutional right. (See, e.g., *People v. Howard* (1992) 1 Cal.4th 1132, 1166.)

Thus, if this Court were to conclude, on the basis that her answers were conflicting or ambiguous, that the trial court's decision to remove Dobel for cause is binding, this Court would effectively deny appellant the right to appeal the trial court's order excusing Dobel for cause.

This Court is well aware that many prospective jurors make equivocal or conflicting answers at voir dire. As this Court has held:

> In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected.

(See *People v. Fudge*, *supra*, 7 Cal.4th at p. 1094].) Thus, deeming trial courts' decisions whether to remove equivocal prospective jurors for cause to be binding would insulate a large number of *Witherspoon/Witt* claims from appellate review. The Eighth and Fourteenth Amendments demand that this Court independently review whether the trial court violated appellant's Sixth and Fourteenth Amendment rights to an impartial jury by disqualifying prospective juror Dobel.

Granting total deference to the trial court's ruling would also undermine the purpose of voir dire. The primary purpose of a lengthy,

probing voir dire in a capital case is to delve into and flesh out prospective jurors' views on capital punishment. (See *Mu'Min v. Virginia* (1991) 500 U.S. 415, 431 ["*Voir dire* examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."].) "*Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188, quoted in *Morgan v. Illinois*, *supra*, 504 U.S. at p. 729.) Because many jurors are undecided or uncertain regarding their views on capital punishment or vacillate in their responses at voir dire, extended questioning is often needed to uncover prospective jurors' beliefs regarding the death penalty. (See Schnapper, *Taking Witherspoon Seriously: The Search for Death Qualified Jurors* (1984) 62 Tex. L.Rev. 977, 994-1032 [discussing phenomenon of undecided, uncertain, and vacillating jurors and need to question them extensively].) It is hardly rare for prospective jurors to initially state that they are unable to vote for a death sentence, only to ultimately change their positions. (*Id.* at pp. 1031-1032.) Rehabilitating, or attempting to rehabilitate, these prospective jurors is crucial for determining whether they would be substantially impaired from performing their duties as jurors. (See Carr, *At Witt's End: The Continuing Quandary of Jury Selection in Capital Cases* (1987) 39 Stan. L.Rev. 427, 444 [explaining importance of rehabilitation of prospective jurors].) According virtually absolute deference to a trial court's decision to remove a prospective juror who gives ambiguous or inconsistent answers at voir dire would undercut rehabilitation by giving trial courts carte blanche to consider a class of prospective jurors incapable of rehabilitation.

Although some deference is due to the trial judge, who can observe

the prospective juror's demeanor and listen to his or her answers (see *Witt*, *supra*, 469 U.S. at pp. 424-426), complete deference without prior review of the adequacy of the voir dire, without determination of whether the answers given by the prospective jurors actually state a disqualifying state of mind, or without determination of whether the reasons generally justifying deference were, in this case, a substantial and adequate basis for the trial court's ruling, would infringe appellant's constitutional right to meaningful and reliable appellate review.

The trial court's ruling did not refer to Dobel's demeanor or credibility. In fact, the trial court relied in large part on an answer in the questionnaire:

> The Court feels that perhaps the most -- and that the Court most seriously going to take into consideration an answer that Miss Dobel put down without the Court or counsel suggesting anything to Miss Dobel, and that's to No. 130, "Is there anything about your present state of mind that you feel any of the attorneys would like to know? If so, please explain."
>
> The answer: "I doubt seriously that I would impose a death penalty. My verdict would be affected if I was asked to vote guilty with a punishment of death as opposed to guilty with life imprisonment."

(14RT:2430.) Nothing in the record suggests her credibility was in question, nor does anything indicate her demeanor was suggestive of a state of mind in any way contrary to her actual answers in the questionnaire or on voir dire. Thus, there is no basis for a determination that the trial court relied upon either credibility or demeanor to any substantial degree in its ruling. As demonstrated above, based on the answers themselves, the trial court erred in finding that Dobel was not qualified to be seated as a juror. Moreover, given the explicit answers demonstrating her qualification as a juror, the trial

court's ruling to the contrary suggests that, rather than relying on demeanor or credibility, the trial court made its determination based upon an erroneous legal standard, excusing her on a "'broader basis' [for exclusion] than inability to follow the law or abide by their oaths." (*Adams v. Texas, supra*, 448 U.S. at p. 48.)

The Supreme Court's most recent opinion relating to death qualification of jurors, *Uttecht v. Brown* (2007) – U.S. –, 127 S.Ct. 2218, 2007 WL 1582998, addressed the issue of deference due to a trial court's determination of a *Witherspoon/Witt* challenge. In determining that deference was appropriate in that case, the Supreme Court relied upon circumstances which differ significantly from those presented here. Specifically, the Court relied upon the extensive voir dire conducted in that case,[56] including the fact that the trial court, before ruling on a challenge, allowed each side to recall the challenged juror for additional questioning by counsel (127 S.Ct. at p. —, 2007 WL 1582998 at p. 7), that the potential jurors received a description of the procedure of a penalty phase before completing questionnaires, as well as "handbooks that explained the trial process and the sentencing phase in greater depth" after completing the questionnaire and before death qualification voir dire. (127 S.Ct. at p. —, 2007 WL 1582998 at p. 8.) The Court also relied quite heavily upon defense

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[56] The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment. But where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire*, the trial court has broad discretion.

(127 S.Ct. at p. —, 2007 WL 1582998 at p. 12.)

counsel's "volunteered comment that there was no objection" to the prosecution's challenge (127 S.Ct. at p. —, 2007 WL 1582998 at p. 12), not as waiver of an issue but as evidence that there was agreement by defense counsel that the potential juror was not qualified under *Witherspoon* and *Witt*. (127 S.Ct. at p. —, 2007 WL 1582998 at pp. 11-12.)

As demonstrated above, and in Argument IV, *post*, rather than having been "extensive,"[57] the death qualification voir dire of Ms. Dobel was inadequate to sustain a finding of disqualification. In contrast to the situation in *Uttecht*, the entire voir dire in this case was conducted solely by the trial court. In further and more significant contrast, rather than allowing additional questioning of the juror after a challenge, the trial court here denied defense counsels' requests to have Ms. Dobel questioned further. Finally, rather than acquiescing in the prosecution's challenge as in *Uttecht*, defense counsel here strongly objected to the challenge, asked for further questioning and submitted further questions to be asked. Even upon the trial court's ruling that Ms. Dobel was unqualified to sit as a juror, defense counsel continued to object.

Rather than supporting deference to the trial court's ruling in this case, *Uttecht* highlights the failings of the trial court here, and demonstrates that no deference is due to the erroneous exclusion of Ms. Dobel.

Deference to the trial court's ruling, which is devoid of any clear reliance on credibility or demeanor, and is indicative of the application of an

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[57] The portion of Ms. Dobel's voir dire which involved qualification under *Witherspoon* and *Witt* covered less than five pages of transcript. (14RT:2420-2424.) The voir dire of the challenged juror in *Uttecht* covered about 18 pages of transcript. (127 S.Ct. at pp. —, 2007 WL 1582998 at pp. 14-21, Appendix)

erroneous legal standard, would be without any substantial justification, and deprive appellant of this Court's review of the record "as a whole" to which he is constitutionally entitled.

6. Conclusion

Clearly, the exclusion of prospective juror Dobel was on a "broader basis" than is constitutionally acceptable under *Witherspoon*, *Adams*, and *Witt*. Taking Dobel's voir dire and those questionnaire responses which appear on the record as a whole (*Witt, supra*, 469 U.S. at p. 435; *People v. Cox, supra*, 53 Cal.3d at pp. 646-647), the record demonstrates that she was qualified to serve under *Witherspoon*, *Adams*, and *Witt*. Because the prosecution failed to carry its burden to establish disqualification, and because the voir dire conducted by the trial court was inadequate to support the finding of disqualification, the excusal of prospective juror Dobel was error. Because it is unsupported by the record and based on an erroneous standard, no deference to such a finding is appropriate. (*Gray, supra*, 481 U.S. at p. 661, fn. 10.) The judgment of death must therefore be reversed. (*Gray, supra*, 481 U.S. at p. 668.)

C. Challenged Prospective Jurors Brad Davis and Carol Flores

Appellant argues elsewhere in this brief (see Arg. IV, *post*) that the trial court's voir dire of two other prospective jurors, Brad Davis and Carol Flores, as well as that of prospective juror Dobel, was constitutionally inadequate to reliably determine those prospective jurors' qualification to serve under *Whitherspoon/Witt*. Since the trial court's voir dire of those prospective jurors was not adequate to protect appellant's constitutional rights, resulting in a "'broader basis [for exclusion of prospective jurors] than inability to follow the law or abide by their oaths" (*Adams v. Texas,*

supra, 448 U.S. at pp. 47-48), the trial court likewise erred in excusing prospective jurors Davis and Flores under *Witherspoon/Witt* and reversal of the death judgment is required. In support of this argument, appellant fully incorporates by reference herein Argument IV.D., *post,* in its entirety.

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IV

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND COMMITTED REVERSIBLE ERROR IN DENYING SEVERAL DEFENSE MOTIONS AND REQUESTS RELATING TO THE CONDUCT OF THE JURY-SELECTION PROCEEDINGS AND BY FAILING TO CONDUCT VOIR DIRE ADEQUATE TO PROTECT APPELLANT'S CONSTITUTIONAL RIGHTS

A. Motion for Individualized and Sequestered Voir Dire

Appellant's co-defendant LaMarsh filed a pretrial motion requesting, inter alia, individual and sequestered death-qualification voir dire of all prospective jurors (15CT:3651-3652); appellant subsequently joined in that motion (6RT:1251). Following arguments by counsel, the court denied the motion. (6RT:1250-1262; 6CT:1613.) Appellant subsequently, and unsuccessfully, renewed his request for individual, sequestered voir dire on numerous occasions during jury selection. (E.g., 10RT:1845, 1861-1863, 11RT:2071, 2072, 2116, 12RT:2159, 2202, 2243-2244, 2250, 13RT:2281, 2299, 2340, 2379, 14RT:2417, 2425-2426, 2430-2431, 2503, 2529, 2602.) Even the prosecutor expressed his preference for such a procedure. (6RT:1260, 12RT:2204.)

The denial of appellant's request for individual and sequestered voir dire, which this Court had mandated in *Hovey v. Superior Court, supra*, 28 Cal.3d 1, was constitutionally erroneous. Although this Court has denied similar claims in previous cases (e.g., *People v. Waidla* (2000) 22 Cal.4th 690, 713-714), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 304 [articulating requirements for fair presentation of appellate claims].)

As explained in the defense motion, Proposition 115 did not bar *Hovey* voir dire. (15CT:3651; see *People v. San Nicolas* (2004) 34 Cal.4th 614, 633.) Referencing the particular peculiar facts of the instant case, the defense motion warned that "[d]eath-qualifying voir dire of a juror in the presence of all the other jurors will have an impact on the expectations, perceptions, attitudes and behavior at trial of the jurors exposed to the voir dire," resulting in jurors being "more likely to believe the accused is guilty as charged." (15CT:3651, citing *Hovey, supra*, 28 Cal.3d at p. 70.) Indeed, it has been demonstrated that group voir dire inhibits prospective jurors from being frank and results in conviction-prone and death-prone jurors. (Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death Qualification Process* (1984) 8 Law & Hum. Beh. 121; Broeder, *Voir Dire Examination: An Empirical Study* (1965) 38 S.Cal.L.Rev. 503.)

In further support of the defense motion, defense counsel cited the testimony of Professor Stephen Schoenthaler at the hearing on the defendants' motion for a change of venue, in particular his description of the so-called "Hawthorne Effect." (6RT:1251-1252; see also 10RT:1835, 11RT:1970-1971.) Dr. Schoenthaler had explained that the Hawthorne Effect "basically means that a person wants to please whoever they're working with" (3RT:441), i.e., people attempt to please whoever is "measuring" them (3RT:531). (See *People v. Vieira, supra*, 35 Cal.4th at p. 354 ["the Hawthorne effect [is] a phenomenon observed in social science research whereby the act of observation changes the behavior of the subjects observed, as when research subjects change their behavior to conform to what they perceive as the expectations of the researchers"].) Specifically with respect to attempting to select an impartial jury, "there's great danger" in allowing one person to be questioned while "having other potential people

observing that one person being questioned." (3RT:536.) As Dr. Schoenthaler explained, the others will be observing the person being questioned by the judge "to see if there is favorable response or unfavorable response through body language and things of that nature. . . . [S]ince there's a tendency to please, there will be an increased pressure subconscious[ly] to try to do . . . whatever pleases the others in the courtroom." Thus, there is an increased "risk of getting untruthful answers if subsequent subjects get to observe the first person going through questioning." (3RT:537.) According to Dr. Schoenhaler, the "magnitude of the Hawthorne Effect . . . is one of the areas in criminal justice that has been well, well studied for over 30 years." (3RT:594.) Citing the "hallowed ground" and substantial "symbolism" embodied by the courtroom setting (3RT:594-595), Dr. Schoenthaler opined that "[t]here are few areas I can perceive where Hawthorne Effect would be potentially greater than [that] unfolding in a courtroom" (3RT:595). In response to a juror being questioned with other jurors present, "[t]here are two possible outcomes, neither of which are desirable. . . .":

> Some people who should . . . be capable of serving on the jury that do not want to serve on a jury, for personal reasons, will listen to the previous person who has been excused [for prejudging the case] and then change their answers truthfully to get out of serving on the jury because they've learned that. And others will make up the decision that they want to please the Court, and therefore, answer accordingly.
>
> So you've got not one source of erroneous information, but two possible sources of erroneous information. Some people simply don't want to be on the jury, and others that would want to please the Court.

(3RT:596.)

As shown by the empirical studies cited and described above, the group voir dire was not an adequate vehicle for assuring appellant an impartial jury. Moreover, a jury-selection process that increases the risk of a death-prone jury undercuts the reliability of the death judgment. Accordingly, by denying appellant's motion for individual voir dire, the trial court prejudicially deprived appellant of his constitutional rights to an impartial jury and a fair and reliable capital sentencing determination. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

B. Request for Inquiry into the Prospective Jurors' Perception of the True Meaning of the Sentence of Life Imprisonment Without the Possibility of Parole

All of the defendants requested that the jury questionnaire include a question that would inquire into the prospective jurors' perception of the meaning of the term "life without the possibility of parole." (6RT:1175-1177.) Relying on numerous cited cases decided by this Court, the trial court denied the defense request, concluding that "this is a subject that the Court and counsel should not go into on its own," i.e., unless a juror expressed such a concern "without the Court or counsel putting that concern in the juror's mind"; "if a juror does, then the Court will have to deal with what to tell that juror or prospective jurors at that time." (6RT:1177.) Subsequently, defense counsel asked the trial court to reconsider its ruling because the questionnaires revealed "that there are a number of people that are skeptical of the meaning of life without parole"; as to those prospective jurors who "don't believe that it's life without parole, . . . that may push them over to the side of considering only death," so this situation "has to be rectified." (10RT:1914.) The judge responded that "I'm going to stand by the ruling I previously made." (10RT:1915.)

The denial of the defense request was constitutional error. Although this Court has denied similar claims in previous cases (e.g., *People v. Jones* (1997) 15 Cal.4th 119, 189-190), appellant urges this Court to reconsider those precedents. (See *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) Researchers have demonstrated that the overwhelming majority of California capital jurors erroneously believe that a life-without-parole sentence does not foreclose the possibility of parole. (Steiner et al., *Folk Knowledge As Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness* (1999) 33 Law & Soc'y Rev. 461, 499; see also *Simmons v. South Carolina* (1994) 512 U.S. 154, 169-170 & fn. 9.) Consequently, the requested question for the jury questionnaire was necessary to expose and correct such jurors' misconceptions. Appellant's inability to identify such jurors improperly and unconstitutionally precluded a voir dire examination sufficient to ferret out bias and reasonably ensure an impartial jury in a capital case. (See *Morgan v. Illinois*, *supra*, 504 U.S. at pp. 729-730, 733-734; *People v. Cash* (2002) 28 Cal.4th 703, 720-723.) As a result of the denial of the defense request, the death verdict was tainted by the misperception of the alternative sentence to death, thereby prejudicially violating appellant's constitutional rights to a fair and impartial jury and to a fair, accurate and reliable capital-sentencing determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

C. Request to Use Questioning for the Purpose of Exercising Peremptory Challenges

Appellant's counsel placed on the record certain areas of inquiry of prospective jurors about which the trial court had refused to ask his requested questions following up on jury-questionnaire questions; counsel expressed the belief that such follow-up questions were important in

determining whether to use peremptory challenges against particular prospective jurors. Specifically, counsel requested that the court ask his submitted follow-up questions of jurors regarding whether "they are a leader or a follower" in terms of how they would react if a group of jurors "took a different point of view from your own" during deliberations (11RT:1967); whether they "differentiate between . . . users of marijuana and other drugs," because "I believe there's going to be some evidence concerning marijuana use by the defendants and . . . harder drug use by the victims" (11RT:1967-1968); what discussions jurors have had with acquaintances who are in law enforcement or are attorneys in order to determine any prejudices toward people who have been arrested or toward the legal system they may have formed as a result of such discussions (11RT:1968); and the attitudes of those people who have skinned or cleaned animals and who therefore may not find the photographs in this case as offensive as others might (11RT:1967-1968).

Appellant's counsel expressed the belief that under *People v. Williams* (1981) 29 Cal.3d 392, and Code of Civil Procedure section 223, it was proper in voir dire to use questions for the purpose of exercising peremptory challenges. The trial court replied that "Prop 115 has changed the requirement that the Court allow *Williams*-type peremptory challenges." (11RT:1970.) Appellant's counsel then asserted that appellant's federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments were also being violated by the court's refusal to ask his requested follow-up questions, especially since this is a capital case. (*Ibid.*) In response, the court reiterated its belief that the enumerated follow-up questions "are of the type that might aid in exercising peremptory challenges, but not challenges for cause; and under Prop 115 those questions are not required."

(11RT:1973; see also 10RT:1923-1926.) The trial court subsequently refused to ask numerous other requested follow-up questions submitted by appellant's counsel. (See, e.g., 11RT:2071, 2075, 12RT:2158-2160, 13RT:2281-2282, 2299-2300; see also section D, *post.*)

The court's refusal to permit questioning of prospective jurors for the purpose of exercising peremptory challenges was constitutionally erroneous. The United States Supreme Court has emphasized that voir dire "plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored," and that the lack of adequate voir dire "impairs the defendant's right to exercise *peremptory challenges* where provided by statue or rule." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188, emphasis added; see *People v. Roldan, supra*, 35 Cal.4th at p. 689.) The Court cited *Swain v. Alabama* (1965) 380 U.S. 202, 218-219, in which "we noted the connection between *voir dire* and the exercise of peremptory challenges: 'The *voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of *peremptories*. . . .'" (451 U.S. at p. 188, fn. 6; emphasis added.) Similarly, in *Mu'Min v. Virginia, supra*, 500 U.S. 415, the high court reiterated that "[*v*]*oir dire* examination serves the dual purpose of enabling the court to select an impartial jury and *assisting counsel in exercising peremptory challenges*." (*Id.* at p. 431; emphasis added.)

Consistent with these precedents, the federal appellate courts have held that the Sixth and Fourteenth Amendment right to an impartial jury guarantees voir dire adequate to enable the defense to intelligently exercise peremptory challenges. (E.g., *Knox v. Collins* (5th Cir. 1991) 928 F.2d 657, 661; *Darbin v. Nourse* (9th Cir. 1981) 664 F.2d 1109, 1113.) Denial or impairment of a defendant's right to the effective use of the full complement

of peremptory challenges to which he is entitled is also a violation of the Due Process Clause of the Fourteenth Amendment and is reversible error per se. (*Knox v. Collins, supra,* 928 F.2d at p. 661, citing *Swain v. Alabama, supra*, 380 U.S. at p. 219.) "A voir dire procedure that effectively impairs the defendant's ability to exercise his challenges intelligently is ground for reversal, irrespective of prejudice." (928 F.2d at p. 661.)

In short, whether or not peremptory challenges themselves are constitutionally required, once a statute or rule creates the right to exercise peremptory challenges, this state-created right may not, consistent with the Due Process Clause of the Fourteenth Amendment, be arbitrarily denied or abridged (see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346), and a criminal defendant has a Sixth, Eighth and Fourteenth Amendment right to voir dire for the purpose of intelligently and effectively exercising such challenges. Neither the trial court here, nor this Court, can properly rely on Proposition 115 as having abridged this federal constitutional right. The trial court's ruling preventing appellant from using voir dire for the purpose of exercising peremptory challenges prejudicially violated appellant's Sixth, Eighth and Fourteenth Amendment rights to due process, an impartial jury, and fair and reliable guilt and penalty determinations, and its California constitutional counterparts (Cal. Const., art. I, §§ 7, 15, 16 & 17).

D. The Trial Court's Voir Dire of Three Prospective Jurors Excused for Cause over Defense Objection Was Inadequate to Reliably Determine Each Juror's Qualification Under *Witherspoon/Witt*

As set forth in Argument III, *ante*, the trial court erred in excusing prospective juror Danielle M. Dobel under *Witherspoon/Witt*. Assuming arguendo this Court rules that the record below does not support appellant's argument in that regard, then appellant claims herein that the manner in

which the trial court conducted death-qualification voir dire was inadequate to protect appellant's constitutional rights. Appellant further submits that the trial court's voir dire of two other jurors excused under *Witherspoon/Witt* over defense counsel's objection, Brad Davis and Carol Flores, was constitutionally inadequate in that it was superficial and improperly failed to ask follow-up questions submitted by defense counsel,[58] and because, in some instances, the trial court improperly refused to allow defense counsel even to submit follow-up questions. The trial court's often perfunctory voir dire was hardly done with the "special care and clarity" this Court called for in *People v. Heard* (2003) 31 Cal.4th 946, 966-977 (*Heard*), and resulted in a " 'broader basis' [for exclusion] than inability to follow the law or abide by their oaths." (*Adams v. Texas, supra*, 448 U.S. at p. 48.)

1. Prospective Juror Danielle M. Dobel

While Dobel gave answers on voir dire that appear ambiguous, the trial court failed to explore that ambiguity by questioning her in a manner sufficient to reliably determine that those answers reflected a disqualifying state of mind. Similarly, given that Dobel gave answers that clearly demonstrated that she *was* qualified (see Arg. III, *ante*), as well as answers that suggested she *might not* be qualified, the trial court's failure to explore that apparent conflict through further questioning, as well as its refusal to ask follow-up questions submitted by defense counsel, deprived appellant of an adequate voir dire, sufficient to reliably determine Dobel's qualifications.

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[58] To the extent that this Court might determine that the absence from the record of the specific follow-up questions submitted by defense counsel prevents a determination of whether the refusal to ask those questions was an abuse of discretion, that defect in the record on appeal is itself reversible error. (See Arg. V, *post*.)

While the trial court quoted Dobel's answer to Question No. 130, discussed above, in stating the basis for its ruling, at no time did the trial court ask Dobel directly about that answer, or ask how her answer might have changed in light of the trial court's explanation of the process by which a juror's decision is reached. Given that the original answer was apparently based upon a faulty premise, further inquiry was necessary before any conclusion could reasonably be made that her answer supported a finding of disqualification. Instead the trial court accepted an internally flawed answer as a basis for finding Dobel unqualified to serve.

The trial court simply failed in its responsibility to carefully question Dobel to determine whether or not she was qualified to sit as a juror in this case. While the trial court did some follow-up questioning, the questioning did little more than reiterate portions of the questionnaire, without exploring any ambiguity or apparent inconsistency.

The prosecution bears the burden of proof in demonstrating that a juror's views would "prevent or substantially impair" the performance of his or her duties. (*People v. Stewart, supra*, 33 Cal.4th at p. 445; *Wainwright v. Witt, supra*, 469 U.S. at p. 423.) With Dobel, despite clear statements establishing that she was qualified to sit as a juror in this case, the prosecution challenged her without asking for any follow-up questioning. As this Court stated in *Heard, supra*:

> In the wake of the trial court's inadequate questioning, one might have expected the prosecutor to more diligently follow up the court's examination of [the prospective juror] with questions that were more precisely directed toward identifying [her disqualifying views], if any, in order to better ensure the validity of the penalty phase judgment that ultimately was rendered.

(31 Cal.4th at p. 968, fn. 11.) Here, the prosecution requested no follow-up

questions, no clarification of Dobel's answers to more precisely determine whether she was qualified to be seated as a juror in this case.

Where the trial court conducts the voir dire, the prosecution seeks no clarification or follow-up, and the defense, as here, objects to the trial court's voir dire as inadequate and proposes follow-up questions which the trial court refuses to ask, automatic deference to the trial court's ruling is unwarranted. This Court should assess the adequacy of the voir dire conducted by the trial court in light of the clarity or lack thereof in the prospective juror's responses, and the extent to which the interests of the defendant in having only those jurors excused who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths" (*Witt,* 469 U.S. at 423; *Gray v. Mississippi, supra*, 481 U.S. at p. 658) are adequately represented and protected, before crediting the ruling of the trial court.

The trial court here controlled the entire process of determining the merits of the prosecution's challenge for cause, from development of the evidence regarding the prospective juror's qualifications through voir dire, to ruling on the sufficiency of that evidence to establish her disqualification. The prosecution failed to seek clarification of the evidence by requesting further questioning, thus abdicating its responsibility as the moving party to establish through questioning that the prospective juror is disqualified. The defense was denied any opportunity to clarify the record or establish the qualification of the prospective juror. It is fundamentally unfair, and a deprivation of due process, to defer to the trial court on a record which it alone developed without a reasonable effort to clarify or resolve ambiguities or conflicts in a prospective juror's answers. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15 & 17.)

In *Heard*, *supra*, 31 Cal.4th 946, this Court, after finding the excusal for cause of a juror error, decried the trial court's failure to question the juror more fully:

> Although such precedent clearly requires that we set aside the penalty, we note our dismay regarding the adequacy of the trial court's efforts to fulfill its responsibilities in selecting a jury in this case. Unlike other duties imposed by law upon a trial court that may call for the rendition of quick and difficult decisions under unexpected circumstances in the midst of trial, the conduct of voir dire in a death penalty case is an activity that is particularly susceptible to careful planning and successful completion. . . . In view of the extremely serious consequence – an automatic reversal of any ensuing death penalty judgment – that results from a trial court's error in improperly excluding a prospective juror for cause during the death-qualification stage of jury selection, we expect a trial court to make a special effort to be apprised of and to follow the well-established principles and protocols pertaining to the death-qualification of a capital jury. . . . The error that occurred in this case – introducing a fatal flaw that tainted the outcome of the penalty phase even before the jury was sworn – underscores the need for trial courts to proceed with special care and clarity in conducting voir dire in death penalty trials.

(31 Cal.4th at pp. 966-967.)

The need for "special care and clarity" in voir dire does not disappear because a particular response of the prospective juror appears to provide sufficient justification for a *Witherspoon/Witt* challenge to garner this Court's deference. In *Heard*, this Court stated:

> If the trial court remained uncertain as to whether H.'s views concerning the death penalty would impair his ability to follow the law or to otherwise perform his duties as a juror, *the court* was free, of course, to follow up with additional questions. *The prosecutor* similarly could have pursued the matter with further questions.

(31 Cal.4th at p. 966 [italics added].) In appellant's case, it was the four

attorneys for the defendants who seriously questioned whether prospective juror Dobel's views concerning the death penalty would impair her ability to follow the trial court's instructions, and who sought additional questioning – "special care and clarity"– to establish her qualification as a juror, but were denied. Again, as stated in *Heard*:

> Nor do we believe that additional follow-up questions or observations by the court would have been unduly burdensome: in a capital case that required more than three weeks, the trial court's expenditure of another minute or two in making thoughtful inquiries, followed by a somewhat more thorough explanation of its reasons for excusing or not excusing Prospective Juror H., would have made the difference between rendering a supportable ruling and a reversible one.

(31 Cal.4th at p. 968.)

In this case, additional follow-up questions sought by defense counsel would not have been unduly burdensome, and aside from protecting the judgment from reversal by reinforcing prospective juror Dobel's qualification to serve on the jury, would also have more fully protected appellant's right not to be tried by a jury "uncommonly willing to condemn a man to die." (*Witherspoon, supra* (1968) 391 U.S. 510, 521.)

In *People v. Stitely* (2005) 35 Cal.4th 514, this Court reiterated the necessity and "importance of meaningful death-qualifying voir dire . . . [and] of [the trial court's] duty to know and follow proper procedure, and to devote sufficient time and effort to the process." (35 Cal.4th at p. 539.) The Court cited *Heard* as demonstrating that where a juror is excused over defense objection, based upon the juror's ambiguous answers to inadequate oral examination, reversible error occurs. (*Ibid.*) The Court also noted the trial court's "broad discretion over the number and nature of questions about the death penalty" (*id.* at p. 540), and cited a number of cases in which

challenges to the adequacy of voir dire were rejected, including *People v. Navarette* (2003) 30 Cal.4th 458, 487-488, *People v. Hernandez* (2003) 30 Cal.4th 835, 855, *People v. Cunningham* (2001) 25 Cal.4th 926, 973-974, and *People v. Tuilaepa* (1992) 4 Cal.4th 569, 586. (*People v. Stitely, supra*, 35 Cal.4th at p. 540.) However, this Court explained that, "These cases found voir dire to be adequate *because the court and/or counsel asked additional questions to clarify ambiguous responses and to reliably expose disqualifying bias*." (*Ibid.* [emphasis added].)

This Court has not yet addressed "the question of the circumstances under which defense counsel has a right to rehabilitate a prospective juror." (*Stewart, supra*, 33 Cal.4th at p. 450.) However, a fair reading of this Court's jurisprudence reveals that the trial court is possessed of the discretion to limit rehabilitation voir dire within reason (see, e.g., *People v. Mattson* (1990) 50 Cal.3d 826, 845 ["When a bias that may form a basis of a challenge for cause appears during such voir dire, opposing counsel may seek to rehabilitate the prospective juror, but this further voir dire, like that directed to uncovering bias, is subject to reasonable limitation at the discretion of the trial judge"]), but such voir dire may only be foreclosed when a prospective juror has given unequivocally disqualifying answers (see, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 824).

The guiding principle is that while the trial court is vested with broad discretion as to questions to be asked during voir dire, that discretion is subject to the essential demands of fairness. (*Morgan v. Illinois, supra*, 504 U.S. at p. 730; *Aldridge v. United States* (1931) 283 U.S. 308, 310.) Thus, where, as here, the prospective juror has not given unequivocally disqualifying answers, the trial court must allow counsel a reasonable opportunity to have the juror questioned further (see *People v. Samayoa*,

supra, 15 Cal.4th at p. 824 ["A trial court . . . may subject to reasonable limitation further voir dire of a juror who has expressed disqualifying answers"]), or be deemed to have abused that discretion (see, e.g., *People v. Wilborn* (1999) 70 Cal.App 4th 339, 348 [reversible error when trial court abused discretion by failing to allow voir dire for implied or actual bias on account of racial prejudice]; *People v. Chapman* (1993) 15 Cal.App.4th 136, 141-142 [trial court abused discretion in foreclosing voir dire on issue of defendant's status as a felon; error required reversal]). The trial court's failure to allow additional questioning as requested by the defense constituted an abuse of discretion.

2. Prospective Juror Brad Davis

A review of Davis's answers relating to the death penalty in his questionnaire[59] reveals answers in conflict as well as a number of questions which Davis left blank.

On Question No. 108, Davis responded that he was "undecided" in his feelings about the death penalty. (29CT:7380.) On Question No. 109, Davis understood that if the case reached the penalty phase, the two punishments between which the jury would have to decide were life in prison without possibility of parole and death. (*Ibid.*) On Question No. 110, he responded that he felt that the death penalty should not be automatic for any particular type of crime. (29CT:7381.) On Question No. 111, he responded that he felt that life without possibility of parole should not be automatic for any particular type of crime. (*Ibid.*) On Question No. 112, he responded that he did not feel that a jury should determine the punishment in a criminal case. (*Ibid.*)

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[59] Mr. Davis's questionnaire is found at 29CT:7347-7388.

On Question No. 119, Davis responded that he believed in the adage, "an eye for an eye." He explained that to him it meant, "you take my eye. I take yours." He did not respond to the question of whether his belief in this adage was based on a religious conviction. (29CT:7383.)

On Question No. 121, he responded that he did not belong to any organization that advocates for either the death penalty or the abolition of the death penalty. (29CT:7384.) On Question No. 122, he responded that he was not sure how he would vote if the death penalty was on the ballot in the next election. (*Ibid.*) On Question No. 123, he responded that he did not believe that the death penalty should be imposed on everyone who murders another human being, and explained "not in self-defense." (*Ibid.*)

On Question No. 125, Davis responded that he did not recall any of the publicity surrounding the reconfirmation of former California Supreme Court Justices Rose Bird, Cruz Reynoso, and Joseph Grodin. (29CT:7385.)

On Question No. 127, Davis responded "none" to the question of under what circumstances he believed the death penalty was appropriate. (29CT:7386.) On Question No. 128, he responded that he believed the death penalty was not appropriate in all cases. (*Ibid.*) On Question No. 129, he responded that he could not set aside his personal feelings about the death penalty and follow the law as the court instructs, commenting, "I couldn't change my opp [*sic*] of the death penalty." (*Ibid.*)

On Question No. 133, Davis responded that he had no reason to think he might not be a completely fair and impartial juror in this case. (29CT:7387.)

Davis left Question Nos. 113,[60] 114,[61] 115[62], 116,[63] 117,[64] 118,[65]

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[60] Question No. 113 asks:

(continued...)

120,[66] 124,[67] and 126[68] blank. (29CT:7381-7386.)

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[60] (...continued)

Have your views about the death penalty changed substantially in either intensity or nature in the last few years?

_____ Yes _____No

Please explain: _____

[61] See footnote 42, *ante*.

[62] See footnote 37, *ante*.

[63] See footnote 38, *ante*.

[64] Question No. 117 asks:

If called upon to decide penalty, what information would you like to have to help you make that decision?

_____

[65] See footnote 39, *ante*.

[66] Question No. 120 asks:

California law has not adopted the "eye for an eye" principle. Will you be able to put the "eye for and [sic] eye" concept out of your mind and apply the principles the Court gives you?

_____ Yes _____No

[67] Question No. 124 asks:

There has been a great deal of publicity recently in regarding the death penalty. Please describe what, if anything, you have read; seen or heard:

_____

What are your feelings about what you've read, heard or seen?

_____

Has what you have read, heard or seen it affected your feelings about the death penalty?

_____ Yes _____No

Please explain:_____

[68] Question No. 126 asks:

(continued...)

On voir dire, the trial court asked about some of Davis's responses to the questionnaire, and asked him some of those questions he failed to answer. His responses on voir dire essentially mirrored the conflicting answers given in his questionnaire. The trial court made little effort to clarify the bases for the inconsistencies in the answers in the questionnaire or the responses on voir dire.

The relevant portion of Davis' voir dire is as follows:

> Q. Have your views about the death penalty changed substantially in the last few years?
>
> A. No.
>
> Q. What are your feelings about punishment of life in prison without the possibility of parole?
>
> A. I agree with it.
>
> Q. Question No. 115 asked you to check the box which most accurately described your feelings about the death penalty and you did not check any boxes. Let me read the different categories and ask you where you believe you would put yourself. Would impose the death penalty whenever you had the opportunity? Strongly support? Support? Will consider? Oppose? Strongly oppose? Will never under any circumstance oppose the death penalty?
>
> A. Oppose.
>
> Q. What purpose do you believe the death penalty serves?

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[68] (...continued)

> What effect, if any, do you think the change in the composition of the California Supreme Court has had on the imposition of the death penalty?

A. As a deterrent.

Q. I'm sorry?

A. As a deterrent.

Q. If you were selected as a juror and if you found the defendant Is guilty of an offense which allowed the imposition of the death penalty as one of the possible alternatives and you were called upon to make the decision whether the penalty was death or life without the possibility of parole, what information would you like to have in making that penalty decision?

A. All the facts.

Q. When you say "all the facts," what facts are you referring to?

A. Whatever both sides puts up.

Q. You would be satisfied, then, to decide life or death based solely on what was presented to you?

A. Yes.

Q. Regardless of what that was?

A. Yes.

Q. Do you feel the death penalty -- death sentence is imposed either too often, too seldom, or randomly?

A. Randomly.

Q. Are you familiar with any recent publicity regarding the death penalty?

A. No.

Q. You answered Question No. 127, "Under what circumstances, if any, do you believe the death penalty was

appropriate" -- you put down, "None." Could you go ahead and explain what you meant by that answer?

A. I don't believe in the death penalty. I don't believe it's my place to judge a man.

Q. On Question 108 you were asked what your general feelings about the death penalty were. You put down "undecided." Can you give any further explanation or elaboration on that answer?

A. At that point I just didn't really know.

Q. Have your feelings become more strong either for or against the death penalty since you put down undecided there?

A. About the same.

Q. Do you have feelings about the death penalty which are so strong that you would never vote for first degree murder?

A. No.

Q. Do you have feelings about the death penalty which are so strong that you would never find a special circumstance to be true?

A. No.

Q. Do you have feelings about the death penalty which are so strong that you would never impose the death penalty in any case whatsoever?

A. Yes.

Q. Do you have feelings about the death penalty which are so strong that you would always impose a death penalty in every case in which you had the opportunity to do so?

A. No.

Q. Do you have feelings about the death penalty which you believe would substantially interfere with your ability to function as a juror in this case?

A. Yes.

Q. Do you believe that a person who was convicted of successfully planning the murder of or murdering multiple victims should automatically receive the death penalty?

A. No.

(13RT:2278-2281.)

The prosecutor challenged Davis for cause, stating, "Based upon Davis's oral answers, and particularly his answers to Questions No. 127, 128, and 129 on the questionnaire, I would challenge Davis for cause." (13RT:2281.) Appellant's counsel responded, "I would oppose his challenge, and I would ask if I could have a *Hovey* voir dire; otherwise, I feel my client's 6th, 8th, and 14th Amendment rights underneath the Constitution are being violated." (*Ibid.*) The other three defense counsel joined. (*Ibid.*) After the trial court denied the request for *Hovey* voir dire, co-defendant LaMarsh's attorney asked "for an opportunity to present written questions, if the Court would give us a few moments?" Appellant's counsel joined in the request to submit written questions. The trial court denied the request. (13RT:2281-2282.)

The trial court then granted the prosecution's challenge, stating,

based on Mr. Davis's answers to questions in the questionnaire, Question No. 127, he believed the death penalty was appropriate in no circumstances and life with the possibility -- with no possibility of -- excuse me. Let me start that again. [¶] Question No. 127, he answered he believed the death penalty was appropriate in no circumstances. [¶] No. 128, he answered that he believed the death penalty was not appropriate in all cases. [¶] Question No. 129, he cannot

> change his opinion regarding the death penalty. [¶] His failure to answer a number of death penalty related questions, the Court feels that those answers indicate a very strong opinion, feeling against the death penalty, which far outweighs his undecided answer in Question No. 108. His general feelings about the death penalty -- his feelings I believe are confirmed by his answers orally in court, that he would never impose the death penalty under any circumstances whatsoever. [¶] Accordingly, the Court concludes that Mr. Davis has feelings about the death penalty that are so strong that he would -- his ability to serve as a juror in this case would be substantially impaired if he were to come to the point where he had to vote on which sentence were appropriate, death or life without the possibility of parole.

(13RT:2282-22832.)

The trial court's voir dire of Davis was inadequate to reliably determine his qualification under *Witt/Witherspoon*. Davis's answers regarding the death penalty, both in the questionnaire and on voir dire, were inconsistent and conflicting. He wrote on the questionnaire, and confirmed on voir dire, that he was "undecided" on the death penalty (13RT:2279, 29CT:7380), and did not think there is anything that would make him an unfair juror. (29CT:7387.) Davis had not answered Question No. 115 in the questionnaire. The trial court, on voir dire, asked him to choose which of the categories best described his views on the death penalty. Davis chose to describe himself as opposing the death penalty, rather than strongly opposing it, or never under any circumstances imposing it. (13RT:2278; 29CT:7382.) When the trial court asked Question No. 117, Davis said he would want "all the facts . . . whatever both sides puts up" if he was a juror called upon to decide penalty in this case, and assured the trial court that he "would be satisfied, then, to decide life or death based solely on what was presented to [him] . . . regardless of what that was." (13RT:2278-2279.) These answers do not support a finding of disqualification as a juror in a capital case under

Witherspoon and *Witt*.

Yet, in the questionnaire and on voir dire, Davis also said that he would never impose the death penalty, and could not set aside his own feelings and follow the trial court's instructions, commenting "I can't change my opp [*sic*] of the Death Penalty." He also answered "yes" to the question of whether he had feelings about the death penalty which would substantially interfere with his ability to function as a juror in this case. (13RT:2280; 29CT:7385-7386.)

The trial court did little to explore these obvious inconsistencies, even when they were repeated on voir dire. For example, after Davis stated on voir dire that he did not believe in the death penalty, the trial court asked about his answer to Question Number 108, that he was "undecided" about the death penalty. Davis explained that at the time he wrote that answer, he "just didn't really know." (13RT:2279-2280.) Yet, when the trial court asked if his feelings about the death penalty had changed since the time he wrote that, Davis replied, "About the same." (13RT:2280.) In other words, after stating that he did not believe in the death penalty, he reaffirmed his previous response that he was undecided about it. These two responses appear to be in conflict. The statement that he did not believe in the death penalty, while not disqualifying under *Witherspoon* and *Witt* on its own, raises the question of whether Davis's views on the death penalty *might* disqualify him. Yet the statement that he was undecided about the death penalty raises no such question, suggesting neutrality or equipoise in Davis's views on the merits of the death penalty, and suggesting that Davis would be unquestionably qualified under *Witherspoon* and *Witt*.

Instead of exploring, or attempting to clarify, this inconsistency, the trial court simply went on to the *Witherspoon* questions. At that point, Davis

answered two of the six questions in a manner that would support a finding of disqualification, i.e., that his feelings about the death penalty were so strong that he would never impose the death penalty, and that he thought his feelings about the death penalty would substantially interfere with his ability to function as a juror in this case.

Again, the inconsistency between confirming that he was undecided about the death penalty, while stating that those undecided feelings were so strong that he would never impose the death penalty, is stark. Yet the trial court ended the voir dire at that point without any attempt to obtain clarification or explanation of that inconsistency.

As argued above (see section III.B.5, *ante*, and section D.1 of this argument, *ante*), the trial court had an obligation to inquire into the inconsistencies in Davis' answers, to at least attempt to clarify their meaning and effect. (See *Heard, supra*, 31 Cal.App.4th [correct cite] at pp. 964, 966-967; see also *People v. Stitely, supra*, 35 Cal.4th at p. 540.) A trial court's reliance on a juror's conflicting answers as demonstrating qualification or disqualification under *Witherspoon* and *Witt,* without such clarification, during court-only voir dire, is improper. Deference by this Court to such a determination, without regard to the adequacy of the voir dire, where a juror has given conflicting answers, would deprive appellant of the meaningful and reliable appellate review to which he is constitutionally entitled. To the extent that this Court continues to "accept[ ] as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous" (e.g., *People v. Bolden, supra*, 29 Cal.4th at p. 537), such a standard is more deferential than the *Witt* standard (see *Witt, supra*, 469 U.S. at p. 424; *United States v. Chanthadara, supra*, 230 F.3d at p. 1271) and is therefore

erroneous as a matter of federal constitutional law.

Similarly, the trial court noted Davis's failure to answer a number of death penalty-related questions on the questionnaire, and concluded that the explanation was a strongly-held belief against the death penalty:

> His failure to answer a number of death penalty related questions, the Court feels that those answers indicate a very strong opinion, feeling against the death penalty, which far outweighs his undecided answer in Question No. 108.

(13RT:2282.)

A review of the trial court's voir dire of Davis demonstrates that the trial court asked him all but two of the questions which he had not answered on this issue in the questionnaire. (13RT:2278-2279.) None of the answers Davis gave on voir dire to those questions demonstrated "a very strong opinion, feeling against the death penalty." Rather, the answers showed that his views on the death penalty had not changed substantially in the last few years; that he agreed with life without parole; that he opposed the death penalty, but *not* strongly; that he thought the death penalty was imposed randomly; that he was unfamiliar with any recent publicity regarding the death penalty; that he thought the death penalty was a deterrent; that he would want all the facts before deciding penalty; and that he would be satisfied to make the penalty decision on whatever evidence the parties presented. (*Ibid.*) The trial court's transformation of the unanswered questions on the questionnaire into evidence of a "very strong opinion, feeling against the death penalty" was an unwarranted and unreasonable inference on its face; it cannot be reasonably or rationally reconciled with the answers Davis had just given to those questions on voir dire. The trial court's conclusion is not only unsupported by any substantial evidence, but is contrary to the evidence actually in the record.

Out of 21 questions about the death penalty in the questionnaire, Davis answered only 13. Of those 13, almost all were a matter of checking a blank. In only one, Question No. 129, concerning his ability to set aside his feelings and follow the court's instructions, did Davis elaborate in any substantial way, writing "I can't change my opp [*sic*] of the Death Penalty." (29CT:7380-7386.) Of course, his answer to Question No. 108 was that his general feeling about the death penalty was undecided. (29CT:7380.) The trial court's transformation of such conflicting and sparse information into "indicat[ions] of a very strong opinion, feeling against the death penalty" was not reasonable, and is not supported by the record.

Nor was the trial court's denial of follow-up questions a reasonable exercise of discretion. There were obvious areas of inquiry suggested by Davis's questionnaire answers, e.g., the inconsistencies in his answers noted above, which would have been properly explored solely for the purpose of determining challenges for cause rather than to aid in the exercise of peremptory challenges.

This state of the record and the trial court's failure to explore the inconsistencies in Davis's answers do not justify the trial court's ruling that Davis's ability to serve on this case would be substantially impaired by his feelings about the death penalty. The trial court's conclusion was based not on substantial evidence, reached after "special care and clarity" on voir dire, but upon a transformation of conflicting and limited answers into evidence of a very strong opinion. Moreover the trial court's refusal to allow defense counsel to even submit follow-up questions was unreasonable in this circumstance and itself an abuse of discretion which acted to undercut the trial court's ruling.

3. Prospective Juror Carol Flores

Flores's questionnaire is not available, having been lost or discarded by the superior court clerk.[69] The trial court referred to certain of Flores's answers, indicating that: on Question No. 108, concerning her feelings about the death penalty, she had mixed feelings; on Question No. 110,[70] she indicated she did not feel that the death penalty should be automatic for any particular crime; on Question No. 115, she selected "would consider the death penalty"; and on No. 123, responded "no" regarding any belief in the automatic imposition of the death penalty for murder. (13RT:2340-2341.)

Flores's answer to No. 129, regarding whether she could set aside her feelings and follow the court's instructions, was not read into the record, nor did the trial court ask her that question on voir dire.

Flores's voir dire relating to the death penalty, conducted solely by the trial court, which denied defense requests for additional follow-up questioning of Ms. Flores, was as follows:

> BY THE COURT: Q. Miss Flores, were you here last week when I asked the jurors as a whole some questions regarding the law that may apply to this case?
>
> A. Yes.
>
> Q. And do you believe you may have understood what I said about those particular laws?
>
> A. Yes.

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[69] See fn. 36, *ante*.

[70] Question No. 110 asks:
Do you feel that the death penalty should be automatic for any particular type of crime?
_____Yes _____No
Please explain: _____

Q. Anything about those particular laws which you disagree with?

A. No.

. . .

Q. You stated you had some very mixed feelings about the death penalty. Can you tell us what those mixed feelings are?

A. Pardon?

Q. In answering the questionnaire, you said that your feelings about the death penalty were very mixed. Will you tell us what those mixed feelings are?

A. I would have a hard time going for the death penalty.

Q. And what's the reasoning behind that thought or the reason -- yes, the reason behind that thought?

A. I don't really think it's the ultimate answer.

Q. Do you have any religious or other reasons that you feel that you could not sit in judgment on the conduct of a fellow human being?

A. No.

Q. What are your feelings about punishment of life in prison without the possibility of parole?
A. I could handle that.
. . .

THE COURT: Q. What purpose do you believe the death penalty serves?

A. I don't think it serves any purpose.

Q. If you were selected as a juror and the case came to the point where the jury had to decide whether the penalty should

be life or death, what information would you like to have to help you make that decision?

A. All the evidence.

Q. Anything in particular that you would want the attorneys to present to you?

A. All the facts.

Q. Can you tell us any circumstances where you think the death penalty is appropriate and not appropriate?

A. I don't think it's appropriate.

Q. Is there any situation in which you believe the death penalty is appropriate?

A. No.

Q. Do you have feelings about the death penalty which are so strong that you would never be able to vote for first degree murder?

A. Yes.

Q. Do you have feelings about the death penalty which are so strong that would you never find a special circumstance to be true?

A. Yes.

Q. Do you have feelings about the death penalty which are so strong that you would never impose the death penalty in any case whatsoever?

A. Yes.

Q. Do you have feelings about the death penalty which are so strong that you would always impose the death penalty in every case in which you had the opportunity to do so?

A. No.

Q. Do you have feelings about the death penalty which you believe would substantially interfere with your ability to function as a juror in this case?

A. Yes.

Q. Do you believe that a person who is convicted of successfully planning the murder of or murdering multiple victims should automatically receive the death penalty?

A. No.

(13RT:2333-2339.)

The prosecution challenged Flores for cause. (13RT:2340.) Appellant's counsel requested *Hovey* voir dire, arguing that denial would be a violation of the Sixth, Eighth and Fourteenth Amendments, and asked for the opportunity to submit follow-up questions. The remaining three defense counsel joined appellant's requests. (13RT:2340.)

Without allowing follow-up questions to be submitted, or explaining the reasons for not doing so, the trial court granted the challenge for cause:

> THE COURT: The Court feels that the answers given here in open court clearly reflect Mrs. Flores's state of mind and belief against the death penalty. She would never impose it. She feels it so strongly, she would never even vote for a first degree murder conviction. Her ability to perform her duties as a juror in this type of case would be substantially impaired. [¶] The Court finds in the written questionnaire, her answer to 108 she had mixed feelings, 110 she did not feel that the death penalty should be automatic for any particular type of crime, No. 123 she answered "no" to the question "do you believe the state should impose a death penalty on everyone" -- strike that. [¶] All of those answers clearly reflect her feeling, and the Court finds that those feelings and beliefs are not diminished by the one answer to 115 that she would consider the death penalty. [¶] So, thank you, ma'am. I'll find that because of

your beliefs, you would not be able to sit as a juror in this case. And thank you. You're free to leave.

(13RT:2340-2341.)

Flores indicated her disagreement with the death penalty generally on voir dire, stating that it serves no purpose, that it was not the ultimate answer, and that she "would have a hard time going for the death penalty." Those statements, however, did not establish her disqualification to serve as a juror. (See *Stewart*, *supra*, 33 Cal.4th at pp. 446-447; *People v. Kaurish, supra*, 52 Cal.3d at p. 699.) In answer to three of the *Witherspoon* questions asked on voir dire, Flores stated that she would not vote for first degree murder, for the special circumstances, or for the death penalty.

Both the statements indicating disagreement with the death penalty and the facially disqualifying answers to the *Witherspoon* questions are substantially inconsistent with the few answers available from Flores's questionnaire, in which she described her feelings on the death penalty as "mixed," and indicated that she would consider the death penalty as an option. Yet the trial court failed to question Flores about the apparent inconsistency between her answers to the *Witherspoon* questions and her answers on the questionnaire. The contrast between the questionnaire answer that she would consider the death penalty and her answers on voir dire that she would not vote for first degree murder or the special circumstances is stark, yet the trial court accepted the "yes/no" answers on voir dire without any attempt to clarify that those "yes/no" answers were not based upon some misunderstanding of the law, the role of a juror in a capital case, or the questions themselves.

Instead, the trial court, in its ruling, cited two of Flores's questionnaire answers – "her answer to 108 she had mixed feelings, 110 she did not feel that the death penalty should be automatic for any particular type

of crime" – as supporting the finding that Flores was not qualified under *Witherspoon* and *Witt*.[71] The trial court's reliance on those questionnaire answers as supporting disqualification was contrary to settled law on the subject. Having mixed feelings about the death penalty is in no way a disqualifying fact under *Witherspoon* and *Witt*. (See *Stewart*, *supra*, 33 Cal.4th at pp. 446-447; *People v. Kaurish*, *supra*, 52 Cal.3d at p. 699.) Moreover, not only is the belief that the death penalty *should not be automatic* for any particular crime not a basis for disqualification under *Witherspoon* and *Witt*, but a contrary answer, that the death penalty *should be automatic* for any particular crime, would itself be an arguable basis for a finding of disqualification under *Morgan v. Illinois, supra*, 504 U.S. 719.

The trial court's conclusion that "all those answers clearly reflect her feelings, and the Court finds that those feelings and beliefs are not diminished by the one answer to [No.] 115 that she would consider the death penalty" (13RT:2341) is difficult to understand. The questionnaire answers cited by the trial court do not reflect any strong feeling or belief against the death penalty. If those answers did "clearly reflect her feelings," then the trial court's conclusion that she was disqualified under *Witherspoon* and *Witt* is contrary to its own findings.

The trial court did not cite a single answer from Flores's questionnaire that actually supported its ruling. Perhaps most importantly, the trial court did not cite her answer to Question No. 129. That question addressed the fundamental issue upon which the trial court had to rule, i.e.,

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[71] The trial court also read the answer to No. 123 (see fn. 46, *ante*), which asked "Do you believe the state should impose the death penalty on everyone who, for whatever reason, murders another human being?" Ms. Flores's answer was "no." However, the trial court then struck his reference to that answer. (13RT:2340-2341.)

whether Flores could set aside her personal feelings about the death penalty and follow the court's instructions. One would assume that if Flores had indicated on the questionnaire that she could not do so, the trial court would have cited that answer in its ruling. It is, therefore, a reasonable inference that Flores indicated on the questionnaire that she could set aside her personal feelings and follow the court's instructions. In any case, the trial court failed to ask Flores that question during voir dire, either before or after her answers to the *Witherspoon* questions.

That the trial court did not cite in support of its ruling any questionnaire answers other than those to Questions No. 108 and No. 110 suggests that the other answers to the questionnaire, like the answers to Questions 108, 110, 115 and 123, support a finding that Flores was qualified, rather than disqualified, under *Witherspoon* and *Witt*. The absence of the questionnaire from the appellate record makes the resolution of that question impossible, and thus deprives appellant of meaningful and reliable appellate review of this issue. (See Arg. V, *post.*)

At most, Flores's "yes/no" answers to the *Witherspoon/Witt* questions on voir dire raise a question, given what may be characterized as either a conflict or ambiguity regarding Flores's ability to follow the law and consider the death penalty.

> Before granting a challenge for cause concerning a prospective juror, over the objection of another party, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would "prevent or substantially impair" the performance of his or her duties (as defined by the court's instructions and the juror's oath) (*Witt, supra*, 469 U.S. 412, 424, 105 S.Ct. 844) " ' " 'in the case before the juror' " ' " (*People v. Ochoa* (2001) 26 Cal.4th 398, 431, 110 Cal.Rptr.2d 324, 28 P.3d 78 (italics omitted)).

(*Stewart*, *supra*, 33 Cal.4th at p. 445.) Here, as with Dobel and Davis, the trial court failed to obtain sufficient information to permit a reliable determination of Flores's qualifications to serve.

In sum, the trial court abused its discretion in failing to conduct voir dire adequate to protect appellant's constitutional rights; this error resulted in a " 'broader basis' [for exclusion of prospective jurors] than inability to follow the law or abide by their oaths." (*Adams v. Texas, supra*, 448 U.S. at p. 48.) Appellant's death judgment must therefore be reversed. (*Ibid.*)

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V

THE JUDGMENT MUST BE REVERSED BECAUSE APPELLANT HAS BEEN DENIED A COMPLETE AND ACCURATE RECORD ADEQUATE TO PROVIDE HIM APPELLATE REVIEW OF HIS CLAIMS

Sometime after trial and before the appellate record was delivered to appellate counsel, the questionnaires completed by prospective jurors in this case, including those completed by the jurors who sat on appellant's jury, were lost by the Alameda County Superior Court Clerk. (19CT:4462,[72] 4570, 4595.) Because trial counsel for appellant had retained most of his copies of the questionnaires in his file, the record was settled to include those copies. (19CT:4516; 42CT:10710.) However, not all of the questionnaires were contained in trial counsel's file. Those missing included those for Danielle M. Dobel and Carol Flores, prospective jurors who were excused for cause on prosecution challenge under *Witherspoon* and *Witt*. (See Args. III and IV, *ante*.) In the trial court's voir dire of those jurors, in the prosecution's challenge to those jurors, in defense counsel's objection to the challenge and in the trial court's ruling granting the challenge, answers to questions in the questionnaire were referred to. Some answers were read into the record, some were described, characterized, or paraphrased, but not read verbatim into the record, and others were referred to only by question number in the questionnaire. Because the Dobel and Flores questionnaires

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[72] The Alameda County Superior Court Clerk's Certificate found at 19CT:4462 states that all jury questionnaires in the possession of that court are included in Clerk's Transcript at pages 2803-2874. Review of the questionnaires contained in those pages reveals that they were questionnaires from jurors in the retrial of codefendants LaMarsh and Willey, rather than questionnaires from appellant's trial.

are lost, and most of their contents could not be determined in settlement of the record, this Court is faced with a record inadequate to meaningfully and reliably review the trial court's rulings excusing those jurors. As a result, appellant is denied due process and the full, fair, meaningful and reliable appellate review of the trial proceedings to which he is entitled. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const. Art. 1, §§. 1, 7 & 15.)

Moreover, written "follow-up" questions submitted by trial counsel for appellant as well as counsel for codefendants Beck, LaMarsh and Willey, were also lost by the Alameda County Clerk. (19CT:4464, 4595.) These questions had been drafted during voir dire, then given to the trial court, with no copies kept by trial counsel. Such follow-up questions had been submitted, but not asked by the trial court, during the voir dire of prospective juror Dobel among others. The trial court had assured counsel for the defendants that the written questions would be preserved for the appellate record. (14RT:2431.) While settlement of the record was attempted, the trial court was unable to recreate or determine the contents of the written follow-up questions. (42CT:10710.)

A. Settled Record

The trial court settled the record relating to the missing questionnaires and follow-up questions as follows:

Juror Questionnaires

> Trial counsel, counsel on appeal and the court have made diligent efforts to obtain the jury questionnaires in this case. The record will be augmented to include all questionnaires which have been located. As to any missing questionnaires, no finding as to the content of those questionnaires is possible.

Follow-up questions:

> During court-conducted voir dire, the trial attorneys submitted written questions to the trial court, requesting follow-up questions to either the court's voir dire or the responses on juror questionnaires. After submission of the written question, the trial court sometimes asked prospective jurors additional questions, and other times denied the requested follow-up, either explicitly or by not asking the requested questions. The written questions which were submitted cannot be located. The content of the written questions was not read into the record, and cannot be reliably recreated. Where additional questions were asked by the court following submission of a written question, it cannot be determined whether or not the questions asked were the questions actually submitted.

(42CT:10710.)

B. Relevant Law

Both the United States Constitution, under the Fourteenth Amendment generally and under the Eighth Amendment specifically when a sentence of death is involved, and the California Constitution entitle a criminal defendant to a record on appeal sufficiently complete to permit meaningful appellate review. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15 & 17; *Dobbs v. Zant* (1993) 506 U.S. 357, 358; *Parker v. Dugger* (1991) 498 U.S. 308, 321; *Gardner v. Florida* (1977) 430 U.S. 349, 361; *Woodson v. North Carolina* (1976) 428 U.S. 280, 303; *Chessman v. Teets* (1957) 354 U.S. 156; *People v. Howard, supra*, 1 Cal.4th at p. 1165; *In re Steven B.* (1979) 25 Cal.3d 1, 7-9; *People v. Barton* (1978) 21 Cal.3d 513, 517-520; *March v. Municipal Court* (1972) 7 Cal.3d 422, 427-429; *In re Roderick S.* (1981) 125 Cal.App.3d 48, 53; *People v. Gloria* (1975) 47 Cal.App.3d 1, 6-7; see also *Hart v. Eyman* (9th Cir. 1972) 458 F.2d 334, 337-338 [inadequate appellate record violates federal due process rights]; Pen. Code, § 190.7; California Rules of Court, rule 8.610.) Anything short of a complete record interferes with effective appellate advocacy.

(*Hardy v. United States* (1964) 375 U.S. 277, 282.)

The record on appeal is inadequate only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal. (*People v. Howard, supra*, 1 Cal.4th at pp. 1165-1166.) It is the defendant's burden to show prejudice of this sort. (*Id.* at p. 1165.)

In recent years, this Court has addressed the issue of missing juror questionnaires in three cases: *People v. Ayala* (2000) 24 Cal.4th 243, 270; *People v. Alvarez, supra*, 14 Cal.4th at p. 196, footnote 8; and *People v. Haley* (2004) 34 Cal.4th 283, 304-308. In each, this Court held that lost juror questionnaires did not impede meaningful appellate review. In *Ayala* and *Alvarez*, the issue to be reviewed was a *Wheeler/Batson*[73] claim. In each, despite loss of the questionnaires, the record was deemed adequate for review by this Court. In *Alvarez*, "material from the now lost items survives in the reporter's and clerk's transcripts through quotation and paraphrase." (*Alvarez, supra*, 14 Cal.4th at p. 196, fn. 8.) In *Ayala*, it was determined that the missing questionnaires of jurors who were not the subjects of the *Wheeler/Batson* claim were irrelevant to the claim, while as to those jurors who were the subject of the claim the Court was able to determine from the existing record that those jurors were not challenged and excused on the basis of forbidden group bias. (*Ayala*, 24 Cal.4th at p. 270.)

In *Haley*, the issue to be reviewed, as here, concerned jurors excused for cause under *Witherspoon* and *Witt*. (34 Cal.4th at pp. 304-305.) The record was considered sufficient for appellate review:

> The complete transcript of the voir dire process is available for appellate review. The record reveals that during voir dire, the trial judge permitted both attorneys considerable

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[73] *People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.

> latitude in exploring each juror's views on the death penalty. The attorneys were free to read questions on a prospective juror's questionnaire and the prospective juror's written response, and then ask the prospective juror to further explain his or her written response. Thus, portions of the juror questionnaires have been preserved for appellate review through quotation and paraphrase.
>
> The voir dire transcript in the present case reveals that each of the challenged jurors gave equivocal or conflicting statements as to whether they could impose the death penalty. This alone is a sufficient basis to uphold the determination of the trial court as to these jurors' actual state of mind. *(People v. Carpenter* (1997) 15 Cal.4th 312, 357, 63 Cal.Rptr.2d 1, 935 P.2d 708 (*Carpenter*) ["if the juror's statements [regarding the death penalty] are equivocal or conflicting, the trial court's determination of the juror's state of mind is binding"].) Defendant fails to show prejudice because he does not explain how the missing juror questionnaires undermine this fact. We therefore conclude that the absence of the juror questionnaires does not impede meaningful appellate review in this case.

(34 Cal.4th at pp. 305-306.)

C. Argument

At appellant's trial, unlike in *People v. Haley*, *supra*, the trial court prohibited trial counsel from questioning the prospective jurors, asked some but not all of the questions which trial counsel submitted to the court to ask, denied follow-up questions as to all three of the prospective jurors whose excusal is challenged on this appeal,[74] and read into the record only some of the answers from the questionnaires of two of those jurors, not including some of the answers that dealt directly with the prospective jurors' views on

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[74] See 13RT:2280 (prospective juror Davis – denial of request to submit questions); 13RT:2340 (prospective juror Flores – denial of request to submit questions); 14RT:2427-2428 (prospective juror Dobel – questions submitted, but not asked by the trial court).

the death penalty. The questionnaires of those two prospective jurors, Dobel and Flores, are among those missing from the record, as are the follow-up questions submitted by defense counsel to be asked of Dobel. (See Args. III and IV, *ante*.) While the jurors in question did give answers which indicated views antagonistic to the death penalty, the voir dire conducted by the trial court was so perfunctory, and so failed to explore the jurors' ability to follow the court's instructions, that the record cannot be found sufficient to sustain the trial court's rulings as a "determination of the jurors' state of mind." (*People v. Carpenter* (1997) 15 Cal.4th 312, 357; see Args. III and IV, *ante*, incorporated herein by reference.) The absence of substantial portions of the normal record on appeal, i.e., the questionnaires of Dobel and Flores, and the follow-up questions submitted by defense counsel, have deprived appellant of his ability to fully present his claim of trial court error in excusing Dobel and Flores, and deprived this Court of substantial portions of the record necessary to a full review of the trial court rulings in question. In the event this Court determines that the record as it stands is insufficient to establish that the trial court erred, appellant has been deprived of a record on appeal which is adequate to provide a full, meaningful and reliable determination of his appellate claims.

1. Prospective Juror Dobel

As stated In Argument III, *ante*, in reviewing the trial court's ruling regarding Dobel, this Court must independently assess Dobel's responses on the record "as a whole." (See *Darden v. Wainwright* (1986) 477 U.S. 168, 176.) In this case, however, the record is not "whole" – the record on appeal does not contain Dobel's questionnaire. The record is therefore inadequate to allow meaningful and reliable appellate review, and requires reversal on that ground alone. Moreover, the follow-up questions submitted by counsel

for appellant and co-defendant Beck, which the trial court refused to ask, were not preserved despite the trial court's assurances to counsel that the questions submitted to the court by counsel would be preserved for the appellate record. (13RT:2346.) The absence of these follow-up questions from the record further makes the record inadequate to allow meaningful and reliable appellate review. Considered in conjunction with the missing questionnaires, or separately, the absence of a record of the requested follow-up questions requires reversal.

A clear demonstration of the deficiency of the record is seen in the conflict concerning Dobel's answer to Question No. 129, which asked, "Could you set aside your own personal feelings regarding what you think the law should be regarding the death penalty, and follow the law as the Court instructs you."

The prosecutor, in stating a basis for the challenge to Dobel, referred to a number of her answers in the questionnaire, referring to them only by number. One of the answers referred to was Dobel's answer to Question No. 129. (14RT:2424.) This would suggest that her answer was in the negative, which would support a challenge for cause. However, in opposing the challenge, co-defendant LaMarsh's counsel stated, "this individual stands out in the type of answers that are given [in the questionnaire], and No. 129 clearly indicates that she passes the *Witherspoon/Witt* questions." (14RT:2426.) Had Dobel indicated in the questionnaire that she could not follow the court's instructions, one could reasonably infer the trial court would have cited that response in its ruling.

Thus, on an answer directed at the ultimate question to be resolved by the trial court regarding Dobel's qualifications, both the prosecution and the defense claimed the answer supported their position. In its ruling granting

the challenge,[75] the trial court did not refer to, or otherwise describe, Dobel's answer to that question. (14RT:2428-2430.) Nor did the trial court ask Dobel on voir dire whether or not she could set aside her personal feelings regarding the death penalty and follow the court's instructions. Thus, there is some circumstantial conflict in the record regarding Dobel's answer to the question which most directly addresses the ultimate issue which the trial court was called upon to decide, and which this Court must review. The best evidence of her answer, essential to resolving the conflict, is in Dobel's questionnaire, which the trial court failed to preserve, and could not be made part of this record. This deficiency in the record deprives appellant of a crucial portion of the record, thereby depriving appellant of meaningful appellate review on this issue. Deprived of a portion of the record which likely strongly supports appellant's claim of error, the penalty judgment must be reversed. (See Arg. III, *ante*.)

The absence from the record of the follow-up questions submitted by defense counsel regarding Dobel further impacts appellant's claim that the trial court's voir dire of Dobel was insufficient to support the trial court's ruling that she was not qualified to sit as a juror in this case. (See Arg. IV.D.1, *ante*.)

In *People v. Roldan* (2005) 35 Cal.4th 646, an argument was made on appeal that the voir dire conducted by the trial court was inadequate. This Court rejected the argument on the merits because "defendant fails to explain what type of information was missing or how the detailed jury questionnaires and follow-up questions from the bench were inadequate." (35 Cal.4th at p. 692.) Similarly, while the defendant had asked that the trial court "ask additional questions" of a challenged juror, this Court noted that

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[75] The trial court's ruling is quoted at p. 144, *ante*.

defense counsel had not explained to the trial court "what additional questions he sought to have asked, what subjects needed additional exploration, or why the existing information . . . was insufficient. . . ." (*Id.*, at p. 693.)

In appellant's case, in contrast, counsel for appellant, as well as counsel for the co-defendants, submitted specific questions to be asked of Dobel, and objected to the inadequacy of the trial court's limited voir dire. (14RT:2427-2428.) Through no fault of appellant or appellant's counsel, those specific questions, demonstrating the inadequacy of the trial court's voir dire, are not available for review. Thus, appellant has been deprived of the opportunity to establish more specific bases for his claim of inadequate voir dire. Morever, as to Dobel and Flores, appellant has been deprived of the relevant juror questionnaires, so that appellant cannot specify further any answers from those questionnaires which should have resulted in additional questioning of those prospective jurors. Deprived of a portion of the record which likely strongly supports appellant's claim of error, the penalty judgment must be reversed. (See Arg. III, *ante*.)

2. Prospective Juror Flores

The trial court did not cite a single answer from Flores's questionnaire which actually supported its ruling.[76] Perhaps most importantly, the trial court did not cite her answer to Question No. 129. That question addressed the fundamental issue upon which the trial court had to rule, i.e., whether Flores could set aside her personal feelings about the death penalty and follow the court's instructions. It is reasonable to infer that if Flores had indicated on the questionnaire that she could not follow the court's instructions, the trial court would have cited that answer in its ruling.

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[76] The trial court's ruling is quoted at pp. 186-187, *ante*.

It is, therefore, a reasonable inference that Flores's answer to Question No. 129 did not support a finding of disqualification, but indicated on the questionnaire that she *could* set aside her personal feelings and follow the court's instructions. In any case, the trial court failed to ask Flores that question during voir dire, either before or after her answers to the *Witherspoon* questions.

The trial court cited only two of Flores' questionnaire answers in support of its ruling: Question No. 108, indicating mixed feelings about the death penalty, and Question No. 110, indicating she did not feel the death penalty should be automatic for any particular type of crime. (13RT:2340.) As shown in Argument IV.D.3, *ante*, those answers do not support a finding of disqualification under *Witherspoon* and *Witt*. The trial court cited, then struck the reference to Question No. 123, on which Flores had indicated she did not believe the death penalty should be automatic for any murder. (13RT:2340-2341; see fn 41, *ante*.) The trial court mentioned, but did not rely upon, Flores's answer to question No. 115 that she would consider the death penalty. (13RT:2341.) That the trial court did not cite any other answers from Flores's questionnaire suggests that the other answers to the questionnaire, like the answers to Questions 108, 110, 115 and 123, support a finding that Flores was qualified, rather than disqualified, under *Witherspoon* and *Witt*. To the extent that the absence of Ms. Flores's questionnaire from the appellate record prevents this Court from determining the qualifying nature of her answers or any specific answers which undercut the trial court's ruling, or from determining the adequacy of the trial court's voir dire to determine her qualifications,[77] the incompleteness of the record deprives appellant of meaningful and reliable appellate review of this issue.

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[77] See Arg. IV, *ante*.

It is reasonable to infer that there was substantial evidence supporting the conclusion that Flores was qualified to sit as a juror in the missing questionnaire. While the "yes/no" answers to the *Witherspoon* questions on voir dire[78] appear to conflict with that conclusion, the trial court's failure to conduct an adequate voir dire to clarify the import of that conflict renders the record an insufficient basis upon which to defer to the trial court's finding of disqualification or to uphold that ruling as based upon substantial evidence. The absence of the questionnaire from the record further undercuts any confidence this Court might have in the reliability of the trial court's ruling. Deprived of a crucial portion of the normal appellate record which likely supports his claim of error, appellant is deprived of meaningful appellate review of the trial court's ruling.

D. Conclusion

A review of the record as a whole, and of the proceedings by which appellant attempted to obtain a complete and adequate record of the trial proceedings in this case, demonstrates that an adequate record cannot be obtained, and that the record certified to this Court is inadequate to provide the full and fair review of the trial proceedings to which appellant is entitled, in violation of appellant's rights to due process and reliability at all stages of a capital prosecution. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15 & 17; *Dobbs v. Zant*, *supra*, 506 U.S. at p. 358; *Parker v. Dugger*, *supra*, 498 U.S. at p. 321; *Clemons v. Mississippi* (1990) 494 U.S. 738, 749; *Gardner v. Florida*, *supra*, 430 U.S. at p. 361; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 303; *Chessman v. Teets*, *supra*, 354 U.S. 156; *People v. Howard, supra*, 1 Cal.4th at p. 1165; *In re Steven B.*,

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[78] Relevant excerpts of Flores' voir dire are quoted at pages 174-177, *ante*.

supra, 25 Cal.3d at p. 7-9; *People v. Barton*, *supra*, 21 Cal.3d at pp. 517-520; *March v. Municipal Court*, *supra*, 7 Cal.3d at pp. 427-429; *In re Roderick S.*, *supra*, 125 Cal.App.3d at p. 53.)

The exclusion of even a single prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal of a death sentence. (See *Gray v. Mississippi, supra*, 481 U.S. at pp. 659-667; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *People v. Stewart, supra*, 33 Cal.4th at p. 445.) Because appellant has been denied a record on appeal sufficient to provide meaningful and reliable appellate review of the trial court's exclusion of two jurors under *Witherspoon/Witt*, the penalty judgment must be reversed.

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VI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED FROM 3510 FINNEY ROAD, APARTMENT 7

The trial court erred by denying appellant's motion pursuant to Penal Code section 1538.5 to suppress the evidence seized pursuant to a warrant executed on appellant's residence at 4510 Finney Road, No. 7. The affidavit submitted by Detective Gary Deckard failed to establish probable cause to search appellant's residence. Moreover, Deckard improperly withheld from the affidavit, and the issuing magistrate, material information necessary to a determination of probable cause, which information undercut the ostensible showing of probable cause in the affidavit. The trial court held that even though, after obtaining but prior to executing the warrant, Deckard had learned of additional information which undercut the probable cause determination underlying the warrant, he had reasonably relied upon the issuance of the warrant in conducting the search, and thus had acted in good faith under *United States v. Leon* (1984) 468 U.S. 897. The trial court's denial of the motion was erroneous and based in part upon findings not supported by substantial evidence. As a result, appellant was denied his rights guaranteed by the Fourth Amendment to the United States Constitution to suppression of the evidence obtained as a result of the unlawful search of his residence, and evidence unlawfully obtained was admitted at trial against him by both the prosecution and codefendants, to his prejudice. The judgment must therefore be reversed.

A. Relevant Facts

1. Search Warrant and Affidavit

The affidavit in support of the search warrant (42CT:10738-10741.[79]) informed the magistrate that Detective Deckard had learned of a quadruple homicide at 5233 Mason[80] Street in Salida in the early morning hours of May 21, 1990. At the scene, Deckard was informed by Donna Alvarez that she had come to that residence that evening with a friend she knew only as Garfield, in order to get some sleep. She was awakened several hours later by a woman with long blond hair who told her she had to leave the bedroom. Alvarez went into the living room, then into another bedroom. There was a man there, described as white, 20 to 25 years of age, 6'0", medium build, with brown afro type hair, not one of the people who was in the residence when she first arrived there. He pointed a handgun at Alvarez and Garfield and ordered them to the living room. Alvarez went to the living room, then hid behind some counters in the kitchen, then went into the garage, where she escaped, running to another residence where the Sheriff's Office was notified.

Deckard described the body of one deceased man in front of the residence, with wounds apparently caused by some type of blunt instrument and/or with a knife. Inside the residence, Deckard found three more victims:

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[79] Exhibit 1 at the section 1538.5 hearing, which included the affidavit for the search warrant (or a copy), has been lost. The copy of the affidavit in the Clerk's Transcript was settled into the record. (42CT:10733, 10738-20741, 10780.)

[80] In the affidavit, Detective Deckard gave the address as 5223 Mason Street. The residence at which the homicides took place was at the corner of Mason Street and Elm Street (see Exh. 2 (diagram of area around 5223 Elm Street)), and was identified as 5223 Elm Street throughout this trial.

a man sitting in a chair in the living room and a man and a woman on the kitchen floor. Deckard did not know what the cause of death was for those three.

Deckard was informed, by Kenneth Tumelson, of a person Tumelson knew "as Jason who is approximately 21 years of age, has brown afro type hair and does frequent the residence at 5233 Mason St." Tumelson said "that Jason is staying in a group of apartments located across the street from the laundromat on Finney Road."

Deckard was informed by Frank Raper, Jr., son of one of the deceased in the residence, Frank Raper, Sr., that his father had a problem with a guy named Jason, who, according to the father, was responsible for setting fire to the father's car about a month previously. Raper, Sr., had asked to borrow a gun because he feared for his life, but never told his son any details of the problem between Jason and himself. Raper, Jr. told Deckard "that Jason is supposed to be staying in a apartment across from the laundromat. . . [and] described the residence where Jason was staying as having a large amount of camo type material draped in front of the residence and is located in the back or the rear of those group of apartments."

Deckard, with other officers went to 4510 Finney Road, #7, in Salida. Deckard noted that "the residence has a large camo type of material in front of the residence as earlier described by Frank Raper, Jr." It appeared that no one was home. Deckard was informed by Kevin Brasuell, who lived next door, that "a guy by the name of Jerald [sic] resides at the residence of 4510 Finney Rd. #7. . . [and] that a white male with a brown afro type hair frequents that residence but he does not know his name." Brasuell also told Deckard that two described vehicles "either belonged to the manager of the apartments or people who associate with the manager at 4530 Finney Road

#7" and that several people come and go out of the manager's apartment. (42CT:10738-10741.)

The warrant was issued to search 4510 Finney Road, No. 7 in Salida, described as a single story structure with a carport on the side, over which camouflaged type netting was draped. The warrant included authorization to search "All rooms, attics, basements, closets, cupboards, cabinets, any luggage, trunks, valises, boxes and any containers therein, and any garages, storage rooms, outbuildings, trailers and trash containers of any kind located on the above described premises" as well as two described vehicles. The warrant authorized a search for

> Firearms, ammunition, expended bullets and bullet fragments, expended shell casings, receipts for the purchase of arms, ammunition, bullet holes to be photographed tested and excised if possible and articles of identification tending to establish the identification to the persons in control of the described premises including but not limited to rent receipts, utility receipts, mail and keys, and fingerprints, blood splatters, hair fibers, clothing, shoes or other articles of clothing which tend to establish the identity of the perpetrator, documents, letters, notes or videotapes of victim, the co-occupant or other persons which tend to show cause of motive for the killing, of firearms which may have fingerprints or otherwise connect a suspect in the murder weapon, containers and receipts for the above items and bandages which the perpetrator used to mend his own wounds.

(42CT10736-10737.[81])

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[81] This language is found in the Clerk's Transcript only in a copy of the affidavit for the search warrant. The original search warrant was destroyed, and Exhibit 1 at the section 1538.5 hearing, which included the search warrant (or a copy), has been lost. The copy of the affidavit in the Clerk's Transcript was settled into the record. (See fn. 79, *ante*.)

2. Penal Code Section 1538.5 Motion and Hearing

Appellant filed a motion pursuant to Penal Code section 1538.5 to suppress the evidence seized under the warrant, on the grounds that the search warrant was not supported by probable cause, that the warrant was vague and overbroad, that the warrant was not executed properly, and that a warrantless search had been conducted before the issuance of the warrant. (4CT:1064-1066.)

Beck and LaMarsh joined in the motion. (4CT:1143; 15CT:3551-3553; 2RT:138.) In opposition, the prosecution asserted, inter alia, that the warrant was supported by probable cause, and that the search should be upheld under *United States v. Leon*, *supra*, 468 U.S. 897, as having been conducted in good-faith reliance on the warrant. (5CT:1154-1177.)

The motion was heard and testimony taken on December 13 and 26th, 1991. (5CT:1212, 1217-1218.) Jennifer Starn, who was facing charges in a separate case as a result of the search conducted at No. 7, also joined the motion, and participated through counsel at the hearing.

a. Evidence at Section 1538.5 Hearing

Jennifer Starn testified that she, appellant and their two children lived at 4510 Finney Road, No. 7, a studio apartment, on May 21, 1990. There were a couple of trailers and a modular home nearby, which did not use the address of No. 7. LaMarsh lived in one of the trailers, and had sole, exclusive use of it. Beck and Vieira lived in the other trailer. (2RT:143-145, 165.) They might have been in and out of No. 7 a couple of times a week. Starn was in and out of the trailers much less than that. (2RT:145-146.) None of them had access to each others' residence without permission. (2RT:153, 165-166, 169.) The larger trailer had toilet facilities, but the small trailer did not. (2RT:165-166, 169.) LaMarsh used the

restroom facilities at the Brasuell's house, and sometimes at No. 7. (2RT:170.) Both trailers had extension cords running from No. 7 for electricity. (2RT:170.) On May 21, Starn and appellant had returned to No. 7 before the warrant arrived. Before it was executed, Starn told Deckard that Jason LaMarsh lived in the small trailer and that she, appellant and their children lived in No. 7. (2RT:184, 189, 191, 198.)

Detective Deckard testified that on the right hand side of the entry at 4510 Finney Road, there were three or four small studio apartments. On the left side was the main house where the Brasuells lived, and behind that was a free-standing one-bedroom studio apartment, with camouflage netting in front of it, No. 7. To the right of that apartment, there were two trailers, the smaller behind the larger. (2RT:179-180.) Deckard recalled one extension cord leading to the small trailer. (2RT:195-196.)

At about 5:00 - 5:30 a.m. on May 21st, Deckard arrived at 4510 Finney Road. When Deckard first arrived, he went to the Brasuell's house, a few feet from No. 7, waking Kevin Brasuell. Deckard talked to him for about three or four minutes. (2RT:219.) Brasuell testified that Deckard asked about a tall man with curly hair and Brasuell told them that he frequently stayed in the small trailer. (2RT:208, 211.) He told them that Gerald Cruz , Jennifer Starn and their two kids lived in the studio, and Beck and Vieira lived in the larger trailer. (2RT:209, 230.)

Deckard knocked on the door of the studio with the netting in front of it, No. 7, but no one answered. He tried the doorknob and found it locked. Another deputy forced open the door of the larger trailer to see if anyone was inside, and found no one. Deckard then had the entire area secured, with deputies posted at the rear of the studio. (2RT:180-182, 187, 189-190, 193-195, 265-266, 274, 276-277, 280, 289-294, 296-297, 314, 316.)

Deputies also looked into the small trailer and saw that no one was inside. (2RT:194.)

At about 6:30 a.m., Deckard left to prepare the search warrant. Other officers continued to secure the scene. Before leaving, the only person Deckard interviewed was Kevin Brasuell. (2RT:183, 188.) Brasuell told Deckard that a person with afro-type hair frequented No. 7, and that Gerald and his wife lived there. (2RT:191-192.) Based on that, Deckard did not believe that Jason lived at No. 7, but only "frequented" that location. (2RT:199-200.) Deckard did not ask Brasuell who lived in the larger trailer. (2RT:200.)

Deckard did not include in the search warrant affidavit a description of the trailers or their relationship to No. 7. (2RT:188.) Deckard did not know at the time he got the search warrant what the causes of death at 5223 Elm Street were. Ritchey appeared to have died from blunt trauma and possibly a knife. The only connection of firearms known to Deckard was that Alvarez had said the person with the afro type hair had a gun. (2RT:197.)

The search warrant was signed at 10:19 a.m. (2RT:183.) Deckard took the search warrant back to 4510 Finney Road. By that time, appellant and Starn had arrived at No. 7, and appellant had already been "taken away from the area" according to Deckard.[82] (2RT:184.) Deckard claimed that before he got the search warrant he had no opinion or belief that there were separate living accommodations in either one of the trailers. Deckard interviewed Starn upon his return to 4510 Finney Road, and asked if Jason LaMarsh lived in any of the buildings or trailers. Starn informed Deckard

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[82] No explanation about why, where, or by whom appellant was "taken away" was mentioned at this hearing.

that the trailers were separate living accommodations, that LaMarsh lived in the smaller trailer, and that she and appellant lived in No. 7. Deckard claimed that it was at that point that he ascertained that LaMarsh 's residence was the small trailer. (2RT:185-186, 189, 191, 197-199.)

Prior to the execution of a search warrant, Deckard had information that at least four persons were involved in the homicide as suspects. (2RT:202, 259, 304-305.)

Based upon the testimony presented, appellant argued, citing *Franks v. Delaware* (1978) 438 U.S. 154, that the warrant was invalid because Deckard had omitted material information from the affidavit which undercut any finding of probable cause. Appellant argued that although Deckard had testified that he knew from Brasuell that Jason LaMarsh did not live in No. 7, he had omitted that information from the affidavit. Deckard also omitted information about the trailers, misleading the magistrate to issue the search warrant based on where "Jason" lived, even though Deckard knew he didn't live there. (2RT:318-319.)

Starn argued that the additional information from Starn that Jason LaMarsh lived in the small trailer, which Deckard obtained after the warrant was signed, but before it was executed, required Deckard to present that additional information to the magistrate rather than Deckard making probable cause decisions on his own. (2RT:325-326.)

b. Trial Court's Ruling

The trial court found that appellant had standing to challenge only the search of apartment 7, since the trailers were separate from the apartment, and "there's been no evidence suggesting that [appellant and Starn] resided in or had control over the trailers." (2RT:327-328.) Beck was found to have standing only as to the search of the large trailer. LaMarsh was found to

have standing as to the search of the small trailer, since the evidence established that he lived in that trailer, and as to the search of apartment 7, since the search warrant was obtained based on the allegation that LaMarsh lived in that apartment. (2RT:327-328.)

The trial court suppressed the evidence seized from the larger trailer as to Beck only, ruling that by the time it was searched, Deckard knew that it was a separate residence, and had no information suggesting that Beck was involved in the crimes. (2RT:346-347.) Evidence seized from the smaller trailer was not suppressed, based only upon a theory of inevitable discovery, since by the time it was searched, Deckard knew that it was LaMarsh's residence. (2RT:346.)

In a preliminary ruling, the trial court had addressed the argument that Deckard had omitted material information from the warrant:

> With regard to the search warrant and the affidavit in support thereof, Court's of the opinion that the affidavit in support of the search warrant did give probable cause to search Apartment 7, and if Detective Deckard had all of this additional knowledge about where Mr. LaMarsh lived at the time he went to get the affidavit, as opposed to what he learned later during the morning and before the actual search took place, the Court feels that that would not have detracted or diminished from the probable cause to search Apartment 7, but simply would have given more probable cause to search one or both of the trailers. [¶] And I say that particularly because Mr. Deckard had some fairly specific information from Mr. Raper that Jason was staying in an apartment draped in camo or camouflage material, or at least where that was draped in front of it, and that certainly was Apartment 7.

(2RT:326-327.) After further argument, the trial court ultimately upheld the search of No. 7, not based upon probable cause, but solely upon the "good faith" doctrine of *United States v. Leon, supra*:

> Of the three pieces of property searched, the actual Apartment No. 7 has caused the Court the most difficulty. As I previously commented,

> Mr. Deckard, in the Court's opinion, had probable cause to obtain a search warrant for Apartment 7 and he properly did so. However, by the time he returned with the search warrant to search Apartment 7, he knew now or by then that it was a separate residential accommodation and he knew that Mr. LaMarsh actually lived in the small trailer. However, he also knew that Mr. LaMarsh frequented Apartment No. 7 and may in fact have stayed in it at times, and he did have a search warrant authorizing its search. Here the court did not say that Mr. Deckard was not acting in good faith and reasonably believing that if he had returned to the magistrate with the additional information that Mr. LaMarsh actually lived in the trailer right next to the apartment and connected to that apartment with an extension cord, that the magistrate would also have authorized a search of the trailer in addition to the apartment rather than just substituting the trailer for the apartment. Thus on the *Leon* good faith doctrine *and on that doctrine only*, the search of Apartment 7 is ruled valid and what is adequately described in the search warrant is not suppressed.

(2RT:347 (emphasis added).) The trial court did, however, suppress a number of items seized from No. 7 which were not described in the search warrant. (2RT:347-357.)[83]

3. Evidence introduced at trial

Among the items seized or obtained by means of the search conducted pursuant to this warrant which were admitted into evidence or were the subject of testimony at the guilt/innocence phase of the trial were:

- Exhibits 4(a) and 4(b) (receipts from Crescent

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[83] In argument by counsel and the trial court's rulings regarding suppression of specific items seized improperly under the warrant, the items were identified with reference not to the return on the warrant, but by reference to a log of items found describing where each was found, which log was Exhibit 4 at the section 1538.5 hearing. (2RT:268-271, 348; 42CT:10733, 10780.) Exhibit 4 was lost by either the Alameda County Superior Court or the Stanislaus County Superior Court. The trial court settled the record regarding the missing Exhibit 4 as follows: "No copy of the document admitted as Exhibit 4 at that hearing has been found to date." (42CT:10733, 10780.)

Supply Company for knives and camouflage masks) (2RT:355-356; 15RT:2756.) These receipts were identified by Sylvia Zavala as receipts from purchases made by appellant in February and March, 1990, at Crescent Supply, including purchases of camouflage masks such as Exhibit 23, a K-Bar knife such as Exhibit 20, and another knife. (15RT:3662-36645.)

- Exhibits 6 and 7 (photographs of various firearms and a gas mask[84]). (15RT:2763-2765.) The firearms shown in these photographs were the subject of testimony by Steve Miller of Gun Country in response to questioning from the prosecutor and counsel for Willey, and by appellant on cross-examination by counsel for LaMarsh and for Willey. (21RT:3695-3696, 3699-3701; 29RT:5137, 5143, 5162, 5166; 30RT:5193-5198.)

- Exhibit 5 (Two sais (marital arts weapons)) were admitted as corroboration of Evans's testimony that, after the meeting in the trailer, but before leaving for 5223 Elm on the night of the homicides, Willey was dancing around outside No. 7 with the sais. (15RT:2756-2757, 25RT:4496);

- Exhibits 188, 189, and 190 (3 bayonets). (36RT:6355, 6365.) In identifying Exhibits 188, 189 and 190 as having been found during the search of No. 7, Detective Darrell Freitas also testified that while he was serving the search

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[84] The gas mask was ordered suppressed by the trial court. (2RT:352.) The photographs were not listed on the return to the search warrant (42CT:10742-10745, 10780), but were taken during the search. (15RT:2763-2764.) It is unknown whether the photographs were itemized in the log of items found during the search which was Exhibit 4 at the section 1538.5 hearing. (See fn. 83, *ante*.)

> warrant, he was looking for camouflage masks, knives and bayonets, but found no masks. (36RT:3658-3659.) Deckard also testified that no masks or knives other than Exhibits 188, 189 and 190 were seized from No. 7 during the execution of the warrant. (36RT:6362.)

Additionally, Exhibit 192 (stun gun) was introduced into evidence at the penalty phase of the trial. (2RT:350- 351; 39RT:6978, 7020.)

B. Relevant Law

"The 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' [Citation.]" (*Payton v. New York* (1980) 445 U.S. 573, 585-586.) The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In *Illinois v. Gates* (1983) 462 U.S. 213, the Supreme Court adopted a "totality of the circumstances" approach to the determination of probable cause. Under this approach, "[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." (462 U.S. at p. 238; *People v. Camarella* (1991) 54 Cal.3d 592, 600-601.) The affidavit must establish a nexus between the criminal activities and the place to be searched and the items to be seized. (*People v. Hernandez* (1994) 30 Cal.App.4th 919, 924; *People v. Garcia* (2003) 111

Cal.App.4th 715, 721.)

"The opinions of an experienced officer may legitimately be considered by the magistrate in making the probable cause determination." (*People v. Deutsch* (1996) 44 Cal.App.4th 1224, 1232.) However, an affidavit based on mere suspicion or belief, or stating a conclusion with no supporting facts, is wholly insufficient. (*Illinois v. Gates, supra*, 462 U.S. at p. 239.)

On review, a search warrant affidavit is construed in a commonsense and realistic fashion. (*People v. Mesa* (1975) 14 Cal.3d 466, 469; *People v. Smith* (1994) 21 Cal.App.4th 942, 948-949; *People v. Hernandez, supra*, 30 Cal.App.4th at p. 923.)

In reviewing a trial court's denial of a motion to suppress evidence obtained pursuant to a warrant, an appellate court defers to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, the appellate court exercises its independent judgment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362; *People v. Weaver* (2001) 26 Cal.4th 876, 924.)

> [A]lthough "doubtful or marginal cases are to be resolved with a preference for upholding a search under a warrant" (*People v. Mikesell* (1996) 46 Cal.App.4th 1711, 1719, 54 Cal.Rptr.2d 708), [a reviewing court] must be mindful of the "right of residential privacy at the core of the Fourth Amendment" (*Wilson v. Layne* (1999) 526 U.S. 603, 612, 119 S.Ct. 1692, 143 L.Ed.2d 818). The central importance of privacy in the home has been emphasized in many cases. (E.g., *Payton v. New York* (1980) 445 U.S. 573, 589, 100 S.Ct. 1371, 63 L.Ed.2d 639 [in no setting is "zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home"]; *United States v. Martinez-Fuerte* (1976) 428 U.S. 543, 561, 96 S.Ct. 3074, 49 L.Ed.2d 1116 [acknowledging the "sanctity of private

dwellings, ordinarily afforded the most stringent Fourth Amendment protection"]; *People v. Camacho* (2000) 23 Cal.4th 824, 831, 98 Cal.Rptr.2d 232, 3 P.3d 878, and cases cited.)

(*People v. Pressey* (2002) 102 Cal.App.4th 1178, 1189.)

1. *Franks v. Delaware*

In *Franks v. Delaware*, *supra*, 438 U.S. 154, the United States Supreme Court held that a defendant may challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. If the statements are proved by a preponderance of the evidence to be deliberately false or made in reckless disregard of the truth, they must be considered excised from the affidavit. If the remaining contents of the affidavit are insufficient to establish probable cause, the warrant must be voided and any evidence seized pursuant to that warrant must be suppressed. (*Id.* at pp. 155-156.)

An affidavit may also be challenged under *Franks* when it omits material facts adverse to the warrant application. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1297; *People v. Kurland* (1980) 28 Cal.3d 376, 384; *United States v. Stanert* (9th Cir. 1985) 762 F.2d 775, 781, modified, 769 F.2d 1410 [*Franks* applicable where "affiant intentionally or recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading."]) Where material facts are omitted deliberately or with reckless disregard for the truth of the affidavit, those material facts are added into the affidavit, and probable cause is reassessed. (*United States v. Stanert, supra*, 762 F.2d at p. 782.)

"[F]acts are 'material' and hence must be disclosed if their omission would make the affidavit substantially misleading. On review under section 1538.5, facts must be deemed material for this purpose if, because of their

inherent probative force, there is a substantial possibility they would have altered a reasonable magistrate's probable cause determination." (*People v. Kurland, supra*, 28 Cal.3d at p. 385 (italics omitted).) Omitted facts are material if their omission (1) substantially interfered with (or could have an adverse effect on) the magistrate's inference-drawing process, (2) could have negated the magistrate's finding of probable cause, or (3) might have caused the magistrate to find an informant unreliable and his information untrustworthy. (*Id.* at pp. 384-385, fn. 3.)

2. *United States v. Leon*

Where a search warrant is found to be invalid because the supporting affidavit does not establish probable cause, evidence seized pursuant to the warrant is not suppressed if the officer executed the warrant in reasonable reliance that it was valid. (*United States v. Leon, supra*, 468 U.S. at p. 900.) The relevant inquiry is "whether a reasonable and well-trained officer 'would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant.' [Citation.]" (*People v. Camarella, supra*, 54 Cal.3d at pp. 605-606.)

> *Leon* requires that the application of the good faith exception be measured against the standard of objective reasonableness. "The standard of objective good faith derives from something more substantial than a hunch. It requires that officers 'have a reasonable knowledge of what the law prohibits.' [Citation.] A reasonable officer will be found to know a search was illegal when the affidavit is so lacking in indicia of probable cause as to render official belief in its existence unreasonable. [Citation.]" (*Bailey v. Superior Court, supra*, 11 Cal.App.4th 1107, 1113.)

(*People v. Hernandez, supra*, 30 Cal.4th at p. 924.)

"[T]he objective reasonableness of an officer's decision to apply for a warrant must be judged based on the affidavit and the evidence of probable

cause contained therein and known to the officer, 'and without consideration of the fact that the magistrate accepted the affidavit.' [Citation.]" (*People v. Camarella, supra*, 54 Cal.3d at p. 605.) An officer applying for a warrant must exercise reasonable professional judgment and have a reasonable knowledge of what the law prohibits. (*Id.* at p. 604; *People v. Hernandez, supra*, 30 Cal.App.4th at p. 924.)

The prosecution has the burden of establishing the officer's "objectively reasonable" reliance on the warrant. (*United States v. Leon, supra*, 468 U.S. at p. 924; *People v. Camarella, supra*, 54 Cal.3d at p. 596.)

The officer's reliance on the warrant is not objectively reasonable if the record reflects that "(1) the issuing magistrate was misled by information that the officer knew or should have known was false; (2) the magistrate wholly abandoned his or her judicial role; (3) the affidavit was so lacking in indicia of probable cause that it would be entirely unreasonable for an officer to believe such cause existed; [or] (4) the warrant was so facially deficient that the executing officer could not reasonably presume it to be valid." (*People v. Camarella, supra*, 54 Cal.3d at p. 596; *United States v. Leon, supra*, 468 U.S. at p. 923.)

In evaluating the officer's reliance on the warrant, this Court "may not rely on the fact that a warrant was issued in assessing objective reasonableness of the officer's conduct in seeking the warrant." (*People v. Camarella, supra*, 54 Cal.3d at p. 596.)

C. The Search of No. 7 Violated Appellant's Fourth Amendment Rights, Requiring Suppression of the Evidence Obtained as a Result of the Search

1. The Affidavit Did Not Establish Probable Cause to Search No. 7

Review of the facts contained within the four corners of the affidavit demonstrate that there was no basis for reasonable suspicion, much less probable cause, to believe that appellant's home at 4510 Finney Road, No. 7 contained evidence of a crime. There was no basis in the affidavit for a conclusion that "Jason" lived in, stored anything in, or had control or open access to No. 7. There was no basis in the affidavit for a conclusion that the only known resident of No. 7, "Jerald," had anything to do with the homicides at 5223 Elm, or that his residence contained any evidence relevant to those homicides. There was no basis in the affidavit for believing that the items for which the search was authorized would be found in No. 7, or that such items would constitute evidence of the homicides.

The affidavit demonstrates that the officers arrived at 4510 Finney Road primarily in search of the suspect. Determining that the suspect was not there, Deckard decided to search No. 7 and the trailers instead. While Deckard did obtain a search warrant, the affidavit he submitted in support failed to provide probable cause to justify that search. Instead, on a flimsy showing, Deckard obtained what amounted to a general warrant to search appellant's residence for items which had no apparent connection to the homicide. Executing the warrant, officers seized all manner of items which had no identifiable connection with the homicides, in the hope, not based on any articulable facts, that some of it would turn out to be useful to them.

In order to establish probable cause for the search, the affidavit was required to establish a nexus between criminal activity (the homicides), the

place to be searched (No. 7), and the items to be seized. (*People v. Hernandez, supra*, 30 Cal.App.4th at p. 924; cf. *Warden v. Hayden* (1967) 387 U.S. 294, 307.) No such nexus of the homicides to No. 7 is established by the affidavit. The affidavit does not address at all any nexus of the items described in the warrant to the homicides. Nor does the affidavit address any nexus of the items sought to No. 7, i.e., why the evidence sought would likely be found in No. 7.

a. The Affidavit Did Not Contain Sufficient Information Connecting "Jason" to No. 7 to Justify a Search Thereof

The affidavit depended upon two main points in an attempt to establish probable cause to search No. 7: (1) that "Jason", described as a white male with brown afro type hair, was probably the person who pulled a gun on Alvarez and was a suspect in the homicides; and (2) that 4510 Finney Road, No. 7, was "Jason's" residence. Assuming arguendo that the first point, identifying "Jason" as a suspect, was supported by probable cause, the information in the affidavit did not establish probable cause to believe that 4510 Finney Road, No. 7, was "Jason's" residence, or that his connection to that residence was sufficient to establish probable cause that evidence of the homicides would be found there.

"Jason" was serially described in the affidavit as (1) "frequenting" 5223 Elm St.,[85] the scene of the homicides, (2) "staying in a group of apartments located across the street from the laundromat on Finney Road" and (3) "supposed to be staying in apartment across from the laundromat. . . . having a large amount of camo type material draped in front of the residence. . . located in the back or the rear of those group of apartments."

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[85] Misdescribed in the affidavit as 5223 Mason.

The latter two descriptions of where "Jason" was "staying" or was "supposed to be staying" were both based upon that location's relation to a laundromat. A group of apartments was also part of the description. However, no mention is made in the affidavit relating the location of No. 7 to a laundromat. Nor is mention made in the affidavit describing any "group of apartments" at 4510 Finney Road. The affidavit thus fails to establish that 4510 Finney Road, No. 7 was, in fact, the location described by Tumelson and Raper, Jr.

The only basis in the affidavit for tying 4510 Finney Rd, No. 7, to the location described by Tumelson and Raper, Jr. was that it was on Finney Road, had "camo type material" in front of it, and that Kevin Brasuell told Deckard that a white male with brown Afro type hair "frequented" the place. This is an insufficient basis upon which to conclude that No. 7 was the location described. The absence of readily determinable facts, such as the proximity of a laundromat or a group of apartments undermines any conclusion that No. 7 was the specific location described.

Under *Illinois v. Gates*, *supra*, the probable cause determination is based on the totality of the circumstances, including consideration of the "basis of knowledge" of those providing information to the affiant. (462 U.S. at p. 238; *People v. Camarella, supra*, 54 Cal.3d at pp. 600-601.) There are no facts in the affidavit demonstrating the basis of either Tumelson's or Raper, Jr.'s beliefs or thoughts about where "Jason" stayed. There is nothing demonstrating that they had personal knowledge of where he lived.

Even assuming arguendo that 4510 Finney Road consisted of a group of apartments and was across the street from a laundromat, Tumelson's description of "Jason" "staying in a group of apartments located across the

street from the laundromat on Finney Road" equally described No. 7, either of the two trailers, Kevin Brasuell's house, or any of the other residences at 4510 Finney Road as the place where "Jason" stayed.

Raper, Jr. indicated some doubt about the reliability of his own information about "Jason" staying in a specific apartment with "camo type material draped in front" by qualifying his information with the term "supposed to be."[86] The term "supposed to be" suggests that Raper, Jr. had some doubts about whether "Jason" was staying in the described building, or that he was relating not personal knowledge but hearsay or speculation. [87] Raper, Jr.'s use of the term "supposed to be" demonstrates a lack of personal knowledge on the part of Raper, Jr., and Deckard provided no information in the affidavit establishing Raper, Jr.'s "basis of knowledge" beyond supposition or hearsay.

In contrast to Raper, Jr.'s supposition, Deckard received information from Kevin Brasuell, apparently based on person knowledge, that a person matching "Jason's" general description frequented No. 7. However, this information did not corroborate Tumelson or Raper Jr. as to the person's name, nor did it corroborate or confirm that No. 7 was the place which "Jason" (or the person matching his general description) "stayed." Instead,

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[86] As it turned out, and as the trial court's findings demonstrate, Raper, Jr.'s information was inaccurate.

[87] "Supposed" is defined as: "(1) assumed as true, regardless of fact; hypothetical. . .; (2) accepted or believed as true, without positive knowledge. . .; (3) merely thought to be such; imagined. . . ." (Dictionary.com Unabridged (v 1.01), Based on the Random House Unabridged Dictionary© Random House, Inc. 2006. Http://dictionary. reference.com/browse/supposed (Nov. 2, 2006).) It has also been defined as "believed by many people to be true, but not proven and often doubted by the person who is speaking or writing." (Cambridge Dictionary of American English. Http://dictionary. cambridge.org (Nov. 2, 2006).)

Brasuell informed Deckard that "Jerald" lived in No. 7 and that the person matching "Jason's" general description only "frequented" No. 7. Rather than corroborating any inference that "Jason" lived or stayed at No. 7, Brasuell's information demonstrated that the person matching"Jason's" description lived elsewhere.

Thus, assuming arguendo that the affidavit sufficiently describes No. 7 as a location fitting the descriptions of both Tumelson and Raper, Jr., still, the affidavit fails to state facts sufficient to establish probable cause that "Jason" lived there.

That a person who may have matched parts of the general description of the suspect (male, brown afro-type hair) was a frequent visitor of appellant's residence, "was not sufficient to transform otherwise legal . . . activity into circumstances supporting probable cause." (*United States v. Huguez-Ibarra* (9th Cir. 1992) 954 F.2d 546, 552; cf. *Watts v. County of Sacramento* (9th Cir. 2002) 256 F.3d 886, 890 ["the mere fact that [a man] answered the door of his girlfriend's house in his boxer shorts did not establish reasonable belief that he lived there."]; *Bailey v. Superior Court* (1992) 11 Cal.App.4th 1107, 1112-1113 [heavy foot traffic and visits by unknown people did not support search warrant]; *Alexander v. Superior Court* (1973) 9 Cal.3d 387, 391[affidavit that known drug dealer frequently visited a residence did not establish probable cause for warrant to search that residence].) That someone "frequents" a particular residence does not establish a substantial connection of the person to that residence, and especially does not establish a connection of that residence to any crime that person may have committed.

"Frequents" is defined as "to often be in or often visit (a particular

place)"[88] or "to pay frequent visits to; be in or at often"[89] Here, "Jason" is described as frequenting both 5223 Elm Street and No. 7, i.e., he often visited both residences. That he was known to frequent two different locations dilutes any inference to be drawn from his frequenting either one, substantially limiting any inference to be drawn concerning his connection to No. 7. "Jason," according to the affidavit, was no more likely to have lived at No. 7 than he was to have lived at 5223 Elm.

Besides the vagueness of the term "frequent" and the questionable reliability of Raper, Jr.'s supposition, Deckard learned from Brasuell that a guy named "Jerald," not "Jason," actually lived at No. 7, further undercutting any belief that "Jason" lived there.

In *Figert v. State* (Ind. 1997) 686 N.E.2d 827, officers obtained a search warrant for three manufactured houses located in a rural area in close proximity to each other in a "U' shape, on a place known as "the Farm." The affidavit described controlled buys of drugs from persons in two of the three houses. "Besides mere proximity to the general area of the drug sales, the only fact the affidavit detailed as to the third home or [its occupants] was that '[t]here are currently a large number of unidentified individuals living in and frequenting the three trailers.' " (686 N.E.2d at p. 829.)

> This all occurred in the general vicinity of the three homes, but does not support the conclusion that the third home or [its occupants] were necessarily involved. In short, the probable cause affidavit does not allege facts that would establish a fair probability that evidence of crime would be found in [the third home].

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[88] Cambridge Dictionary of American English http://dictionary.cambridge.org (Nov. 2, 2006)

[89] American Heritage Dictionary of the English Language, Fourth Edition copyright ©2000 by Houghton Mifflin Company. (Nov. 2, 2006.) http://yourdictionary.com

(686 N.E.2d at p. 830.)

Deckard failed to conduct an adequate investigation to determine the actual residence of "Jason." What investigation was done, and presented to the magistrate, substantially undercut any reasonable belief that "Jason" lived at No. 7. The information in the affidavit (at best) showed that it was one of two places he "frequented." There was no differentiation in the affidavit between his "frequenting" of 5223 Elm and his "frequenting" of No. 7. There was no information indicating what that "frequenting" consisted of – daily visits? weekly visits? full access? restricted access? Nothing prevented Deckard from asking Brasuell what he meant by frequenting, yet Deckard failed to obtain that information, instead choosing to limit his presentation of probable cause to an inherently vague term. Deckard sought no independent verification of the identity of the residents of No. 7 or the trailers, other than from Kevin Brasuell. He sought no information concerning to whom the utilities or phone service were billed for those locations. He sought no information regarding the identity of the residents from the landlord. The investigation upon which Deckard sought to justify his invasion of appellant's residence was so "bare bones" that it could hardly be considered to present probable cause of anything.

Any conclusion that the suspect "stayed" at No. 7 was based on general descriptions of a location and information based on hearsay or speculation, unverified by investigation, the accuracy of which was substantially undercut by what little "investigation" was done. The affidavit failed to provide any basis for believing that the suspect sought by Deckard had any substantial connection to appellant's residence, or that any connection he had was sufficient to establish an adequate nexus between the homicide and appellant's residence to justify invasion of appellant's home.

b. The Affidavit Did Not Contain Sufficient Information to Demonstrate a Reasonable Probability That There Was Any Evidence of the Homicides Located at Appellant's Residence

In order for an affidavit to establish probable cause to search a specific location, the affidavit must demonstrate a reasonable probability that specific property subject to seizure is located at that place. (*People v. Cook* (1978) 22 Cal.3d 67, 84, fn. 6.) "Mere evidence of a suspect's guilt provides no cause to search his residence." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1206.) Here, the place to be searched was not even established as the suspect's residence. Nor was there any basis for concluding that evidence subject to seizure would be found in the place to be searched.

In this case, the affidavit does not suggest that anyone provided information that instrumentalities or other evidence of the homicides actually were seen at appellant's home. (See, e.g., *Skelton v. Superior Court* (1969) 1 Cal.3d 144, 151-154 [informant had seen stolen items at locale to be searched].) Without this type of information, the only way the affidavit can be found to set forth the necessary probable cause is to determine that it provides enough facts to infer that appellant, or someone with full access to or control of appellant's home, was involved with the homicides at 5223 Elm Street and that there is a reasonable probability that the instrumentalities or other evidence of those homicides would be found in appellant's home.

Review of the affidavit establishes that the only basis presented for concluding that evidence relating to the homicides would be located in appellant's home was Deckard's implicit conclusion[90] that "Jason," a suspect in the homicides, "stayed" at No. 7. As demonstrated above, that

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[90] Deckard never explicitly stated such a conclusion in the affidavit.

conclusion is not supported by the affidavit. Consequently, any basis for believing that evidence relating to the homicides would be located there necessarily fails as well.

Even assuming arguendo that the affidavit did establish a nexus between "Jason" and No. 7, the information provided in the affidavit was insufficient to demonstrate a reasonable probability that there would be evidence relating to the homicides located there.

According to the affidavit, the homicides took place soon before Deckard was notified at 1:20 a.m. Deckard and other law enforcement officers arrived at 4510 Finney Road, No. 7, at approximately 5:00 a.m., and determined that nobody was home. Nothing in the affidavit provides information demonstrating any reasonable probability that anybody connected with the homicide had been to 4510 Finney Road, No. 7 between the time of the homicide and the time the officers arrived there at 5:00 a.m. Nor is there any information from which it could reasonably be concluded that the homicides were planned there. According to the affidavit, Deckard knew almost none of the details of the homicides beyond the facts that four people were killed at 5223 Elm St. He did not know the cause of death of any of the four, nor the motive, if any. He did not know if it was a planned attack or a spontaneous explosion of violence. He did not know what possible weapons had been used. He did not know how many people were involved in the incident. He did know that one person involved had seen and been seen by one surviving witness, and it may have been someone known to frequent 5223 Elm. That a suspect was known in the area and knew he had been seen would suggest the likelihood that the suspect would not return to his home or anywhere he was known to frequent. Deckard also knew that at 5:00 a.m., a matter of a few hours after the homicides, there was

nobody at home in No. 7 or either of the two trailers. The affidavit does not include any indication that Deckard undertook to question Brasuell or anyone else if anybody had been seen or heard anyone near or in No. 7 since the time of the homicides.

Thus, even assuming arguendo that the affidavit establishes a sufficient connection of the suspect "Jason" to No. 7, there is no demonstration of a reasonable probability that any evidence of the homicides would be located there. Deckard provided no opinion, "expert" or otherwise," as a basis for concluding that there would be evidence either of planning or committing the homicides.

The affidavit fails to demonstrate a reasonable probability, even assuming arguendo that the only known suspect in the homicides had any substantial connection to appellant's residence, that such connection demonstrated a reasonable probability that instrumentalities or other evidence of those homicides would be found there.

c. The Affidavit Did Not Contain Sufficient Information to Demonstrate a Reasonable Probability That the Property Identified in the Search Warrant as Subject to Seizure Constituted Evidence of the Homicides

Aside from the failures to establish No. 7 as "Jason's" residence and that evidence of the homicides would be found there, the affidavit did not address an additional point which was crucial to a finding of probable cause to search appellant's home, i.e., that the items described in the search warrant constituted evidence relating to the homicides.

The warrant called for searching for "firearms, ammunition, expended bullets and bullet fragments, expended shell casings, receipts for the purchase of arms, ammunition, bullet holes to be photographed tested and excised if possible . . . , blood splatters, hair fibers, clothing, shoes or other

articles of clothing which tend to establish the identity of the perpetrator, . . . firearms which may have fingerprints or otherwise connect a suspect in the murder weapon, containers and receipts for the above items and bandages which the perpetrator used to mend his own wounds." (42CT:10737.[91]) The warrant also sought the seizure of "documents, letters, notes or videotapes of victim, the co-occupant or other persons which tend to show cause of motive for the killing. . . ." (*Ibid.*.)

However, according to the affidavit, Deckard did not know the cause of death of the victims, had no information that shots had been fired (which suggests that none had been fired, for shots surely would have been mentioned by Ms. Alvarez or the other witnesses), and had no information that any perpetrator had been wounded or had blood splattered on his clothing. He had no idea how many potential suspects there were or what possible weapons had been involved, other than that a single suspect brandished a handgun. There was, therefore, no basis in the affidavit for a conclusion that expended bullets, expended shell casings, bullet fragments or bullet holes, if they fact were found in No. 7, would constitute evidence of the homicides.

Deckard provided no information in the affidavit which explained why there might be "documents, letters or videotapes of the victim" or why they might be found in No. 7. There was, therefore, no basis in the affidavit that those items existed, let alone that they would be found in No. 7.

Deckard did not even include in the affidavit any opinion based upon his experience explaining why these items were likely to be found at 4510 Finney Road, No. 7, or why these items would constitute evidence of the homicides at 5223 Elm.

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[91] See fn. 81, *ante*.

While it may have been reasonable to assume that documentary evidence of the identity of the residents would be found, as it probably would in any residence, there was no basis in the affidavit for concluding that those residents had anything to do with the homicides. There may have been a basis for supporting the belief that they had a connection of some unknown type to a person with curly brown hair. However such an unknown connection is insufficient to establish probable cause to believe they had any connection to the homicides. (See, e.g., *United States v. Huguez-Ibarra*, *supra*, 954 F.2d at p. 552; cf. *Watts v. County of Sacramento*, *supra*, 256 F.3d at p. 890; *Bailey v. Superior Court*, *supra*, 11 Cal.App.4th at pp. 1112-1113; *Alexander v. Superior Court*, *supra*, 9 Cal.3d at p. 391.)

The search for "articles of identification tending to establish the identification to the persons in control of the described premises including but not limited to rent receipts, utility receipts, mail and keys" could only be justified if the affidavit established that "Jason" was "a person in control of the described premises." As shown above, it does not. Therefore, the affidavit is devoid of any nexus between those items and the homicides, and does not state sufficient facts to constitute probable cause to search for or seize those items.

The items specified in the warrant were not linked to the homicides in any way. Rather, this amounted to a general search warrant, unsupported by probable cause.

Deckard determined to search No. 7 and sought a warrant for specifically enumerated items without obtaining sufficient information to adequately inform either the decision to search No. 7 or to identify relevant evidence. As soon as Deckard and other deputies arrived at 4510 Finney Road, they secured the area around No. 7. They became convinced before

Deckard left to get the search warrant that no suspects, or anybody else, was in No. 7 or either of the trailers. At that point, with the area secure, there was no risk of a loss of any evidence that might have been contained in No. 7 or either of the trailers. There was no excuse for Deckard to seek a warrant to invade a residence solely on the basis that someone who "frequented" that residence was a suspect, at a point at which he had no basis for determining what evidence might exist, or where it might be found.

> Probable cause for issuance of search warrant is a "commonsense, practical question" ([*Illinois v. Gates, supra,* 462 U.S.] at p. 230), and there may be some reason to suspect that "everyone engaged in criminal activity (drugs or otherwise), keeps evidence of the criminal activity at home" (*State v. Ward* (2000) 231 Wis.2d 723, 604 N.W.2d 517, 533, dis. opn. of Abrahamson, C.J.). However, such reasoning would "swallow[ ] the Fourth Amendment requirement that applications for warrants must demonstrate reasonable grounds to believe that the item to be seized will be found in the place specified to be searched. 'If a per se exception were allowed for each category,' the Fourth Amendment requirement that a warrant application must demonstrate reasonable grounds to believe that the item to be seized will be found in the place to be searched 'would be meaningless.' " (*Ibid.,* quoting *Richards v. Wisconsin* (1997) 520 U.S. 385, 394, 117 S.Ct. 1416, 137 L.Ed.2d 615.)

(*People v. Pressey, supra*, 102 Cal.App.4th at p. 1189.)

The absence of information explaining *any* basis for believing that *any* evidence of the homicides, much less the specifically described "evidence," would be found in No. 7 renders the search warrant invalid, utterly without a basis in probable cause.

The general principles governing a person's right to be free from unwarranted intrusion are well-understood. (See U.S. Const., 4th Amend.; *Mapp v. Ohio* (1961) 367 U.S. 643, 654-655 [Fourth Amendment made

applicable to the states through the Fourteenth Amendment's Due Process Clause]; Cal. Const., art. I, § 13; see Pen. Code, § 1525.) The Fourth Amendment serves to protect persons against all general searches, and requires that a search of a person's home be restricted to searching for particular items. (*Go-Bart Importing Co. v. United States* (1931) 282 U.S. 344, 357; *Marron v. United States* (1927) 275 U.S. 192, 196 [particularity requirement "makes general searches under [warrants] impossible"].)

The Supreme Court felt that guarding against general searches was critical because historically "such searches have been deemed obnoxious to fundamental principles of liberty." (*Go-Bart Importing Co. v. United States, supra*, 282 U.S. at p. 357; *Coolidge v. New Hampshire* (1971) 403 U.S. 443, 467 (plur. opinion of Stewart, J.) ["the problem [with the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings"; particularity requirement prevents "the specific evil [of] the 'general warrant' abhorred by the colonists"].)[92] The Court also held that "[t]he Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. [Citations]." (*Go-Bart Importing Co. v. United States, supra*, 282 U.S. at p. 357.)

Here, while the warrant particularly described property to be seized, the property so described appears to have been lifted from a warrant in some other case,[93] with no apparent basis for believing that the property might

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[92] For this Court's acknowledgment of the inherent evil posed by general warrants and exploratory searches, see *People v. Bradford, supra*, 15 Cal.4th at pp. 1291, 1296.

[93] Aside from the property described having nothing to do with this case, the description uses the singular "victim" despite the affidavit having (continued...)

have anything to do with this case. In essence, Deckard provided a description of property so unrelated to this case that the warrant became a general warrant, an excuse to invade appellant's home and search without limitation for anything the executing officers chose to seize.

The failure of the affidavit to establish that the property described by the warrant would constitute evidence of the homicides, and the apparent disconnection of the property described from what was known by Deckard about the homicides, renders the warrant invalid and all the evidence obtained thereby should have been suppressed.

d. Conclusion

The affidavit failed to state facts sufficient to constitute probable cause that the lone suspect had any substantial connection to No. 7 sufficient to conclude that any evidence of the homicides would be found there, that the items to be searched for would be found there, or that the items to be searched for constituted evidence of the homicides. The affidavit appears to be nothing but a subterfuge to conduct a general search of appellant's residence. The trial court properly refused to uphold the search based on probable cause stated in the affidavit. The trial court erred, however, in ruling that Deckard reasonably relied on the warrant to conduct the search. (See section 4, *post.*)

2. Detective Deckard Omitted Material Information from the Warrant

Deckard had, prior to preparing the affidavit, substantial material information which undercut his claim of probable cause, but deliberately, or with reckless disregard for the truth, withheld that information from the

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[93] (...continued)
described four victims in this case.

affidavit and from the magistrate. Had he included that information, the affidavit would have even more clearly failed to support a finding of probable cause to search No. 7.

> An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause. . . . Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.

(*Illinois v. Gates*, *supra*, 462 U.S. at p. 239.)

The testimony at the hearing on appellant's section 1538.5 motion established that Deckard withheld from the affidavit information which undercut any conclusion that "Jason" lived in No. 7.

Brasuell told Deckard that appellant, Starn and their children lived in No. 7 (2RT:192, 199-200, 221, 230.) However, Deckard's affidavit only mentions that someone named "Jerald" lived there. (42CT:10741.) Information that a family of four, rather than a single individual, resided in the studio apartment, would have further undercut any conclusion that "Jason" lived there, thus undercutting any conclusion that evidence of the homicides would be found there. Deckard's omission of any mention of Starn or appellant's children living in No. 7 cannot be dismissed as mere oversight. Rather the omission deliberately or recklessly misled the magistrate.

The testimony also established that Deckard withheld information about the trailers which would have substantially altered the probable cause determination, and further undercut any argument that probable cause to search No. 7 existed.

Prior to obtaining the search warrant, Deckard knew that there were two trailers nearby No. 7. He also knew that both were used as residences -- the larger had actually been entered, revealing the residential nature of its

use, and Deckard had looked into the smaller trailer to be sure no one was inside. Furthermore, Deckard knew that each of the three residences was separately locked, demonstrating the separate nature of the three residences for purposes of probable cause to search.

It was not reasonable for Deckard to omit from the affidavit the readily apparent evidence that the two trailers were each a separate residence from No. 7. An officer seeking a warrant is held to the knowledge of basic search and seizure principles, and is required to exercise reasonable professional judgment. (*People v. Camarella, supra*, 54 Cal.3d at p. 604.) Separate residences, not part of a single building, with separate and independently locking doors raise, as an objective matter, the almost necessary, and at least probable, conclusion in a trained officer that separate privacy interests were involved, that the invasions of those privacy interests required probable cause as to each, and that the determination of probable cause needed to be made by a neutral magistrate after review of an affidavit stating all relevant material facts. (*Figert v. State, supra*, 686 N.E.2d at p. 830 ["As a general proposition, a search of multiple units at a single address must be supported by probable cause to search each unit and is no different from a search of two or more separate houses."]; cf. *State v. Martini* (Or. 1990) 799 P.2d 184, 186 [officer knew of a trailer which "from its outward appearance, . . . was a place where a person sleeps and eats, at least temporarily, and was designed to be moved from place to place;" warrant for search of clubhouse and outbuildings did not authorize search of trailer with extension cord attached to clubhouse; separate warrant needed.].)

That No. 7 and the two trailers were separate residences, individually locked, presented an issue concerning the particularity of the warrant's description of the premises to be searched. Whether probable cause to

search one, two or all three of the residences existed is a question which any experienced officer with "a reasonable knowledge of what the law prohibits" *(United States v. Leon, supra,* 468 U.S. at p. 920, fn. 20) would recognize.

Absent a showing of probable cause, a search warrant for one living unit cannot be used to justify a search of other units within a multiple dwelling area, where the units are separate and distinct living quarters occupied by different persons. (*People v. Gorg* (1958) 157 Cal.App.2d 515; cf. *California v. Carney* (1985) 471 U.S. 386, 407-408 (Stevens, J., dissenting) ("These places [mobile homes] may be as spartan as a humble cottage when compared to the most majestic mansion ... but the highest and most legitimate expectations of privacy associated with these temporary abodes should command the respect of this Court"); see also *Steagald v. United States* (1981) 451 U.S. 204, 211; *Coolidge v. New Hampshire, supra,* 403 U.S. at pp. 477-478.

Deckard, who was a well trained and experienced detective, according to the affidavit, knew or should have known that the circumstances presented by the studio apartment and the two trailers raised obvious issues as to the scope of any warrant, and that different considerations would apply if they were considered separate residences or commonly held. Most importantly, if there were separate residences, probable cause would have to be shown as to each one.

The United States Supreme Court's analysis in *Maryland v. Garrison* (1987) 480 U.S. 79 is instructive. There, officers obtained a search warrant to search the third floor apartment of a building, believing that the third floor contained only one apartment. Prior to obtaining the search warrant, the officers "made specific inquiries to determine the identity of the occupants of the third-floor premises" (480 U.S. at p. 86, fn. 10), including a check

with the local power utility which informed him that the third floor was only listed in one name, McWebb. (*Ibid.*)

Upon execution of the warrant and entrance into the vestibule on the third floor, the officers saw Garrison in the hallway. Both his and McWebb's doors were opened. The officers entered Garrison's apartment, found contraband, and *then* found out that the third floor contained two apartments, and that Garrison's and McWebb's apartments were separate. The officers immediately discontinued the search of Garrison's apartment. (*Maryland v. Garrison*, *supra*, 480 U.S. at p. 81.) The Supreme Court stated,

> If the officers had known, *or should have known*, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apartment. Moreover, as the officers recognized, they were required to discontinue the search of respondent's apartment as soon as they discovered that there were two separate units on the third floor and therefore were put on notice of the risk that they might be in a unit erroneously included within the terms of the warrant.

(*Id.*, at pp. 86-87.)

> Plainly, if the officers had known, *or even if they should have known*, that there were two separate dwelling units on the third floor of 2036 Park Avenue, they would have been obligated to exclude respondent's apartment from the scope of the requested warrant.

(*Id.* at p. 85.)

The testimony presented at the hearing on appellant's motion to suppress establishes without question that Deckard knew or should have known that there were three separate dwelling units consisting of No. 7 and the two trailers. He knew, having been told by Brasuell, that his only suspect in the homicides did not live in No. 7, but in the small trailer. He

was obligated to exclude No. 7 from the scope of the requested warrant, or to attempt to justify its inclusion with specific facts while also providing the magistrate with the material relevant information known to Deckard which was adverse to its inclusion. Deckard's failure to submit an accurate and truthful affidavit demonstrates, at the least, reckless disregard for the truth of the affidavit.

The information that Deckard provided in the affidavit did not support probable cause as to each residence, as the trial court found. Yet Deckard withheld from the issuing magistrate information crucial to that probable cause determination. In doing so, he avoided the real risk that the magistrate would refuse to issue the warrant without additional information establishing which of the three was "Jason's" residence or what access "Jason" had to each of the separate residences. Deckard had not conducted an adequate investigation to answer that question, so he withheld material information from the magistrate to prevent the issue from arising, and to have the warrant issue without critical probable cause determinations having been presented to or decided by the magistrate.

Deckard effectively concealed from the magistrate the true nature of the probable cause determinations posed by the search for which authorization was sought.

Deckard claimed in his testimony that he believed that the three residences were "part and parcel of unit No. 7." (2RT:195.) However, he made no such representation in the affidavit. His unstated – and unsupported – opinion on that question is, without question, an insufficient basis for a warrant. (See, e.g., *Mills v. City of Barbourville* (6th Cir. 2004) 389 F.3d 568, 576 ["The officers' independent knowledge, without some explanation in the affidavit, is insufficient to allow the magistrate to find

probable cause . . . ."]; *Figert v. State, supra*, 686 N.E.2d at p. 831 ["If the officer who sought the warrant had information tending to show involvement by the third home in the drug sales, that information should have been offered when the warrant was issued."]; *United States v. Simpson* (S.D.Ind.1996) 944 F.Supp. 1396, 1409 ["single unit" exception cannot sustain warrant where officers failed to present evidence to the magistrate showing that multiple units were being used as single unit.].)

Thus, Deckard's failure to present the material facts regarding the separate nature of the dwellings/residences to the magistrate cannot be excused by his opinion that they were a single living unit. That was a decision for the magistrate to make, based upon a presentation of all the relevant material facts, which may have included Deckard's opinion. However, in the absence of facts presented in the affidavit which supported that opinion, it would remain simple opinion, and insufficient to support a finding of probable cause or issuance of a search warrant. (See *Figert v. State*, *supra*, 686 N.E.2d 827, 831.)

If a statement of conclusory opinions without supporting facts is not adequate to establish probable cause, omitting both the opinion and the supporting facts, as Deckard did here, can hardly be construed as an exercise of reasonable professional judgment. Rather, it demonstrates a reckless disregard for the truth of his affidavit. Under the circumstances faced by Deckard, his decision not to present the facts concerning the three residences to the magistrate deprived the magistrate of material information necessary to the evaluation of probable cause to search No. 7.

While an officer's interpretation of specific facts can provide a basis for a finding of probable cause, Deckard did not include in the affidavit any such interpretation or opinion about the three separate residences, nor did he

include any specific facts to support such an opinion. The magistrate was left with the facts provided, but no interpretation or "expert" opinion.

The trial court properly held that the search warrant did not authorize a search of the trailers, finding that they were separate premises from No. 7. (2RT:344-346.) The trial court initially offered a tentative ruling that the affidavit did provide probable cause to search No. 7, and that if Deckard had included in the affidavit the information that "Jason" lived in the small trailer, it would have only added to the affidavit probable cause to search that trailer as well as, rather than instead of, No. 7. (2RT:346.) In its ultimate ruling, however, the trial court specifically ruled that the search of No. 7 was upheld solely on the basis of *United States v. Leon, supra.* (2RT:347.) By necessary implication, the exclusive nature of that ruling establishes that the trial court also found that no probable cause to search No. 7 remained after Deckard learned from Starn that Jason LaMarsh lived in the small trailer.

The trial court's holding that Starn's information that Jason LaMarsh lived in the small trailer, obtained *after* the warrant was issued, eliminated probable cause to search No. 7 conflicts with the court's preliminary tentative ruling that, if Deckard had information that LaMarsh lived in the small trailer *before* obtaining the search warrant, including such information in the affidavit would not have undercut probable cause to search No. 7. The trial court did not explain the basis for the change in its evaluation of the importance of this information, nor did the court revisit its preliminary tentative ruling that the omission of that information from the affidavit did not undercut the magistrate's probable cause determination. Yet the trial court's ultimate ruling establishes the materiality of the information, i.e., that "there is a substantial possibility" information that "Jason" did not live in

No. 7, but in one of the trailers, which was a separate residence, had it been included in the affidavit by Deckard, "would have altered a reasonable magistrate's probable cause determination." (*People v. Kurland, supra*, 28 Cal.3d at p. 385.) The ruling also establishes that, after adding to the affidavit the omitted information about the separate residences and "Jason's" residence in a trailer rather than in No. 7, reassessment of the affidavit compels the conclusion that it no longer establishes probable cause to search No. 7.

Deckard's omission of the information establishing the separate residential nature of the three residences, that a family of four, not including "Jason," lived in No. 7, and that "Jason" lived in the small trailer, not in No. 7, demonstrates, at the least, reckless disregard by Deckard for the truth of the affidavit. Any reasonable, trained and experienced officer such as Deckard represented himself to be would recognize that omission of that information made the affidavit substantially misleading. In this case, adding the information into the affidavit and reassessing probable cause compels the conclusion that probable cause to search No. 7 did not exist, and the evidence seized or obtained as a result of the search conducted pursuant to that warrant should have been suppressed. (*Franks v. Delaware, supra*, 438 U.S. 154; *People v. Bradford, supra*, 15 Cal.4th 1229, 1297.)

3. Prior to Execution of the Warrant, Detective Deckard Obtained Additional Information Which Negated Probable Cause to Search 4510 Finney, No. 7.

The trial court upheld the search of No. 7 based upon the good-faith doctrine of *United States v. Leon*, and upon that ground alone, implicitly holding that by the time the warrant was executed, Deckard no longer had probable cause to search No. 7.

By the time the search warrant was executed, Deckard had probable cause to believe, if not reason to know, that a white male with brown afro type hair named Jason "stays in" (2RT:198-199), "sleeps in" (2RT:189), resided or lived in (2RT:189;191) the small trailer, and "frequented" (2RT:182, 183, 199, 200) No. 7 (*id.*), the small trailer (*id.*), and 5223 Elm Street. (42CT:10739.) He knew for a fact, based on information provided by Mr. Brasuell and Ms. Starn, that Ms. Starn, Mr. Cruz and their children lived in No. 7. (2RT:199, 200.) He had no information establishing probable cause to believe appellant or Ms. Starn were involved with the homicides. He had, therefore, no reasonable basis for concluding that any evidence of the homicides would be found in No. 7. As set forth in *Maryland v. Garrison*, *supra*, 480 US at p. 85, by the time the search warrant was executed on No. 7, Deckard was obligated to exclude No. 7 from the search.

4. The Search of 4510 Finney, No. 7, Cannot Be Upheld as a Good Faith Search under *United States V. Leon*

> "Good faith is not a magic lamp for police officers to rub whenever they find themselves in trouble."

(*United States v. Reilly* (2d Cir.1996) 76 F.3d 1271, 1280.)

The trial court's ruling that Deckard's search of No. 7 was executed in good faith reliance on the affidavit was in part based upon a finding that is contradicted by the record. The trial court found that by the time he executed the warrant, Deckard "knew that Mr. LaMarsh actually lived in the small trailer. However, he also knew that Mr. LaMarsh frequented No. 7 and may in fact have stayed in it at times. . . ." (2RT:347.)

In fact, there was no evidence that LaMarsh stayed in No. 7 at any time. The only evidence presented at the hearing concerning where LaMarsh stayed at 4510 Finney Road was that he stayed in, slept in, resided

or lived in the small trailer. (2RT:183, 189, 191, 198-200.) While Brasuell testified that he told Deckard that appellant, Starn, their two children, Beck, Vieira and LaMarsh "lived together," at no time did he, or any other witness at the hearing state that LaMarsh ever stayed in No. 7. The only possible reference to LaMarsh staying in No. 7 was Raper, Jr.'s supposition that he stayed in an apartment with camo type material in front. As demonstrated above (see section C.1.a, *ante*), Raper, Jr.'s "supposition" about where LaMarsh was staying was not based upon personal knowledge, but upon hearsay or speculation, the reliability of which was not demonstrated in the affidavit, and the accuracy of which was refuted by the testimony at the hearing. Deckard conceded that he knew LaMarsh lived in the small trailer, not No. 7, before executing the warrant on No. 7. At no time did he claim that he still held a belief that LaMarsh stayed in, or lived in, No. 7.

Thus, the trial court's finding that Deckard knew Lamarsh "may in fact have stayed in [No. 7] at times" is simply not supported by any substantial evidence. This Court, therefore, need pay no deference to that finding. As demonstrated above, information that LaMarsh "frequents" No. 7, without more, provides no basis for believing that probable cause to search No. 7 existed. The factual basis of the trial court's ruling is thus without either factual or legal support.

As demonstrated above, probable cause to search No. 7 was totally lacking. There was no nexus established linking No. 7 to the homicides sufficient to justify invasion of appellant's and Starn's interests in the privacy of their home. Nor was there information sufficient to establish that the items sought would be evidence of the homicides or that the items would be found in No. 7. Under *Leon*, no reasonable officer would have believed that the affidavit established probable cause to search No. 7 for those items.

That the description of the items to be searched for was apparently copied from an affidavit from some other case and was unrelated to the facts of this case further undercuts any reasonable reliance on the warrant. The warrant was invalid and Deckard was unreasonable in relying on it. The seized evidence should therefore have been suppressed.

Furthermore, Deckard misled the magistrate by submitting an affidavit which he knew, or should have known, was false and inaccurate. Because Deckard withheld from the affidavit material facts adverse to the warrant application, which omissions substantially interfered with the magistrate's inference-drawing process and would have negated the magistrate's finding of probable cause, he cannot be found under *Leon* to have reasonably relied on the magistrate's issuance of the warrant. As demonstrated above (see section C.1.a, *ante*), Deckard withheld material information from the affidavit, i.e., the residential and separate nature of the trailers, including the separately locked doors, that appellant, Starn and their children, not Jason, lived in No. 7; and the information that Brasuell knew Jason LaMarsh and informed Deckard that LaMarsh lived in the small trailer. As further demonstrated above, that information would have been crucial to the magistrate's evaluation of probable cause. The United States Supreme Court held in *Leon* that a search may not be upheld as having been conducted in good-faith reliance on a search warrant when the magistrate was misled by information that the officer knew or should have known was false.

Thus, not only was the affidavit lacking in probable cause to believe that any evidence relating to the homicides, or the items specified in the warrant, would be found in No. 7, but the additional information Deckard had both before obtaining the warrant and before execution of the warrant so

completely undercut any reasonable belief that there was probable cause to search No. 7 as to render belief in the validity of the warrant unreasonable. By misleading the magistrate into issuing the warrant, Deckard forfeited any claim to reasonable reliance on the search warrant. The search was therefore a violation of appellant's Fourth Amendment rights and the evidence obtained thereby should have been suppressed.

The trial court's reasoning that Deckard could still reasonably rely on the warrant to search No. 7 is contrary to the United States Supreme Court's reasoning in *Maryland v. Garrison*, *supra*, 480 U.S. 79, discussed *ante*. In that case, prior to obtaining the search warrant, the officers "made specific inquiries to determine the identity of the occupants of the third-floor premises" (480 U.S. at 86, fn. 10), including a check with the local power utility which informed them that the third floor was only listed in one name. (*Ibid.*) The inquiries Deckard made in this case to determine the identity of the occupants of No. 7 or the residence of "Jason" were hardly the kind of specific inquiries made in *Garrison*. In contrast to the situation in *Garrison*, Deckard knew or should have known that there were separate residences in No. 7 and the two trailers, and that any probable cause he might arguably possess applied only to "Jason's" residence. He was obligated, as the Supreme Court stated in *Garrison*, to limit his search to that residence, and to exclude any other residence from the scope of the requested warrant. (480 U.S. at pp. 85-87.)

5. Conclusion – the Evidence Should Have Been Suppressed

As a general rule, evidence obtained in violation of the Fourth Amendment must be excluded from a subsequent criminal prosecution. (*Mapp v. Ohio, supra*, 367 U.S. at p. 655.) As demonstrated above, the search warrant was issued despite a lack of probable cause, based in part of

an inaccurate and misleading affidavit submitted to the magistrate by Deckard with, at the least, reckless disregard for the truth of the affidavit. After its issuance but prior to its execution, Deckard obtained information which removed any reasonable belief in the existence of probable cause to search appellant's home.

The evidence seized from appellant's residence, or obtained as a result of the search of appellant's residence should have been suppressed because it "'ha[d] been come at by exploitation of that illegality.'" (*Wong Sun v. United States* (1963) 371 U.S. 471, 488, citation omitted.) This includes exhibits 4a, 4b, 5 - 7, 188 - 190, and 192, along with the testimony describing their seizure and testimony about those exhibits. This also includes the testimony of Detective Freitas that while he was serving the search warrant on No. 7, he was looking for camouflage masks, knives and bayonets, but found no masks (36RT:3658-3659), and the testimony of Deckard that no masks or knives other than Exhibits 188, 189 and 190 were seized from No. 7 during the execution of the warrant. (36RT:6362.)

Because none of this evidence derived from "'means sufficiently distinguishable to be purged of the primary taint[,]'" all of it should have been suppressed as fruit of the poisonous tree. (*Wong Sun v. United States, supra*, 371 U.S. at p. 488.)

D. Prejudice

The erroneous admission of evidence obtained in violation of a defendant's Fourth Amendment rights requires reversal unless the government can prove the error harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The state cannot meet that burden in this case.

The evidence introduced against appellant that would have been

suppressed had the trial court not erroneously denied appellant's section 1538.5 motion included receipts introduced to show appellant's ownership of knives and camouflage masks. The receipts were used to connect appellant both to the homicides and to the conspiracy, specifically to 2 of the 5 overt acts alleged as part of the conspiracy, i.e., that the defendants obtained and armed themselves with weapons to be used to commit the murders, and that they put on military type face masks in an attempt to conceal their identity. The receipts showing appellant's ownership of knives and masks also bolstered Evans's story about the use of knives and masks at appellant's behest. The prosecution argued that because appellant owned these items, and allegedly handed them out to the others, he was the planner or instigator of the homicides, and acted with premeditation and deliberation. (36RT6526-6527, 6531, 6535; 37RT6728.)

The receipts for the masks and knives, along with Ms. Zavala's testimony about other purchases by appellant at Crescent Supply Company meshed with the inflammatory and prejudicial evidence regarding appellant's possession of firearms (see Arg. II, *ante*), adding further to the prejudicial portrayal of appellant as violent and dangerous. The receipts for masks, coupled with the testimony that no masks were found in the search of appellant's residence bolstered Evans's story that appellant had supplied these items to other codefendants in aid of the supposed plan to kill Raper and his cohorts, that appellant, Beck, Vieira and Willey wore the masks at the time of the homicides and that two of the masks had been destroyed by Willey after the homicides.

Similarly, the three bayonets (Exhibits 188, 189 and 190) added to the prejudicial weapons evidence and provided the basis for argument that knives as shown in the receipts as having been purchased by appellant must

have been disposed of by Willey since they were not found in the search of appellant's residence.

As discussed in Argument II, *ante*, Exhibits 6 and 7 were the basis of substantial prejudicial character evidence presented primarily by Mr. Miller and Mr. Magana in an attempt to portray appellant as violent and dangerous. Had Exhibits 6 and 7 been suppressed as the fruit of the unlawful search, the use of those exhibits, and the testimony about them, would have been inadmissible against appellant, constituting good cause to sever appellant's trial from that of his codefendants if they sought to introduce that evidence in their own defense. (See Arg. I, *ante*.)

Had Exhibit 5, the sais, been suppressed, there would have been no corroboration of Evans's story about loud music and Willey dancing with swords prior to the six codefendants going over to 5223 Elm Street on the night of the homicides. This evidence, while minimally probative of any real issue in the case, was prejudicial as character evidence of further weapons possession and use, and in portraying all the defendants as acting in a premeditated fashion, even celebrating before leaving to carry out the supposed plan to kill Raper and his cohort.

In closing argument, the prosecutor relied upon the receipts for the purchase of camouflage masks and a K-bar knife as corroboration of Evans's testimony. He further argued that the receipt showed purchase of four masks, that two masks were found at the scene, and that because no masks were found in the search of appellant's residence, this corroborated Evans's story that the other two were disposed of with the weapons. (36RT:6531, 6535; 37RT:6731.) "Those masks, I would submit to you, are among the most damning evidence in this case, and that's why their knowledge is disavowed by the defendants." (36RT:6531.)

The prosecution also referred to the search of appellant's residence as a search of a crime scene being handled simultaneously with two other crime scenes "by an understaffed, overworked Sheriff's Office," in an argument to excuse the shoddy handling of the actual homicide crime scene by the Stanislaus County Sheriff's office. (37RT:6735.)

The stun gun was used at the penalty trial to support the prosecution's factor (b)[94] evidence of violent acts by appellant. This evidence is discussed further at Argument XIII, *post*.

The primary issues in this case were less about who was involved in the incident at 5223 Elm Street and more about what their involvement was. Had the receipts for masks and knife, the sais, the three knives found in appellant's residence and testimony about the search of appellant's residence been suppressed, there would have been less evidence available to the prosecution to argue as corroboration of Evans's story, lessening the likelihood that the jury would have found appellant guilty of conspiracy or responsible for any of the homicides. Had the photos of appellant's gun collection been suppressed, it is likely that the codefendants' attempt to use that evidence against appellant would have resulted in severance, which as demonstrated above (see Arg. I, *ante*) would have likely resulted in an outcome more favorable to appellant.

The prosecutor cannot demonstrate beyond a reasonable doubt that the evidence obtained as a result of the illegal search did not affect the verdict. (*Chapman v. California, supra*, 386 U.S. 18.) Each of the convictions and the sentence of death must therefore be reversed.

E. Conclusion

The affidavit submitted to the magistrate by Deckard failed to state

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[94] Penal Code section 190.3, factor(b).

facts sufficient to establish probable cause to search appellant's residence, and was materially misleading due to omissions and misstatements of material information in the affidavit. Based upon the lack of probable cause to search No. 7, the material omissions and misstatements and additional information known to Deckard prior to execution of the warrant, Deckard could not reasonably rely on the warrant to justify the search conducted of appellant's residence. The trial court's ruling upholding the search of No. 7 as based upon reasonable reliance on the search warrant was error. Because the state cannot establish beyond a reasonable doubt that the error did not contribute to the verdicts against appellant, the entire judgment must be reversed. (*Chapman v. California*, *supra*, 386 U.S. 18.)

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VII

APPELLANT'S CONVICTION OF CONSPIRACY TO COMMIT MURDER AND THE MULTIPLE-MURDER SPECIAL CIRCUMSTANCE MUST BE REVERSED DUE TO ERRONEOUS INSTRUCTIONS

The instructions governing the jury's verdict of guilt on Count V, conspiracy to commit murder, and the finding that the multiple-murder special circumstance was true, misstated the elements of the crime and the special circumstance, unconstitutionally lightening the burden of the prosecution, and depriving appellant of a fair and reliable determination of both guilt and penalty. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 17; *Johnson v. Mississippi* (1988) 486 U.S. 578, 586; *Beck v. Alabama, supra*, 447 U.S. at p. 638; see also *Yates v. Evatt* (1991) 500 US 391; *In re Winship, supra*, 397 U.S. 358.) The trial court's instructions to the jury erroneously allowed the jury to convict appellant of conspiracy to commit murder on Count V based upon a finding of implied malice, requiring reversal of the conviction of conspiracy to commit murder on that count. (*People v. Swain* (1996) 12 Cal.4th 593.) Moreover, the trial court's instruction to the jury erroneously allowed the jury to find the multiple-murder special circumstance to be true without finding that appellant was either the actual killer or had an intent to kill. The special circumstance finding must therefore be reversed. (*People v. Williams* (1997) 16 Cal.4th 635, 687-689.) As a result, the judgment of death must be reversed as well, given the absence of a valid special circumstance finding.

A. Instructions and Verdicts

1. Conspiracy to Commit Murder

The trial court defined conspiracy for the jury according to CALJIC No. 6.10, which in relevant part states:

A conspiracy is an agreement entered into between two or more persons with the specific intent to agree to commit the public offense of murder and with the further specific intent to commit such offense followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime.

(36RT:6499; 8CT:1914.) The trial court further instructed the jury concerning the mental states required for conspiracy to commit murder as follows:

In each of the crimes charged in the information, namely, murder and conspiracy to commit murder, there must exist a certain mental state in the mind of the perpetrator. Unless such mental state exists, the crime to which it relates is not committed.

In the crimes of first degree murder and conspiracy to commit first degree murder, the necessary mental states are malice aforethought, premeditation, and deliberation.

In the crime of second degree murder and conspiracy to commit second degree murder, the necessary mental state is malice aforethought.

(36RT:6507-6508; 8CT:1938.)

The trial court defined "malice" for the jury according to CALJIC No. 8.11:

"Malice" may be either express or implied.

Malice is express when there is manifested an intention unlawfully to kill a human being.

Malice is implied when:

One, the killing resulted from an intentional act.

Two, the natural consequences of the act are dangerous to human life. And,

Three, the act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish mental state of malice aforethought.

(36RT:6492; 8CT:1896.)

2. Multiple-Murder Special Circumstance

The trial court instructed the jury concerning the multiple-murder special circumstance according to a modification of CALJIC No. 8.80, as proposed by the prosecution (35RT:6320-6321),[95] stating in relevant part:

If you find beyond a reasonable doubt that a defendant was either the

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[95] Appellant proposed two versions of instructions on intent to kill in relation to the special circumstance allegation. The first was an unmodified version of CALJIC No. 8.80. (CT:2225.) The second was noted as "Adapted from CALJIC 3.01 (5th Ed. 1988)" and read as follows:

[If you find beyond a reasonable doubt that the defendant was [a co-conspirator] [or] [an aider and abetter [*sic*]] [either the actual killer] [a co-conspirator or an aider and abetter [*sic*], but you are unable to decide which], then you must also find beyond a reasonable doubt that the defendant intended to either kill a human being or to aid and abet another in the killing of a human being in order to find the special circumstance to be true.]

To find that the defendant aided and abetted the killing you must find that [he] [she] (1) with knowledge of the unlawful purpose of the perpetrator and (2) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aided, promoted, encouraged or instigated the commission of the crime.

(9CT:2226.)

actual killer, a co-conspirator, or an aider and abettor, but you are unable to decide which, then you must also find beyond a reasonable doubt that the defendant, with intent to kill, participated as a co-conspirator with or aided and abetted an actor in the commission of at least one murder in the first degree and in at least one additional murder of the first or second degree in order to find the special circumstances to be true. On the other hand, if you find beyond a reasonable doubt that defendant was the actual killer of at least one person in the first degree and at least one additional person in the first or second degree, you need not find that the defendant intended to kill a human being in order to find the special circumstance to be true.

(36RT:6511-6512; 8CT:1948.)

3. Vicarious Liability

On the charges of murder, the jury was instructed, inter alia, on both aider and abettor liability and co-conspirator liability. As to co-conspirator liability, the jury was instructed, according to CALJIC No. 6.11, that a defendant may be liable for crimes which are the natural and probable consequences of crimes or acts of co-conspirators in furtherance of the conspiracy:

> Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if such act or such declaration is in furtherance of the object of the conspiracy.
>
> The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy are [*sic*] the act of all conspirators.
> A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates agreed to and did commit, but . . . also . . . for the natural and probable consequences of any crime or act of a co-conspirator to further the object of the conspiracy, even though such crime or act was not intended as a part of the agreed upon objective and even though he was not present at the time of the commission of such crime or act.

> You must determine whether the defendant is guilty as a member of a conspiracy to commit the originally agreed upon crime or crimes and, if so, whether the crime alleged in Count I, II, III, and IV was perpetrated by co-conspirators in the furtherance of such conspiracy and was a natural and probable consequence of the agreed upon criminal objective of such conspiracy.

(36RT:6500; 8CT:1916.)

4. Verdicts

The jury found appellant guilty of four counts of first degree murder. The verdicts did not indicate whether he was found guilty as the actual killer of any of the four victims, as having aided and abetted the killing, or as a co-conspirator. (38RT:6882-6885; 9CT:2279-2285.) The jury also found appellant guilty of conspiracy to commit murder, without specification of the degree of murder. (38RT:6886; 9CT:2284-2285.) Although the instructions given referred to both conspiracy to commit first degree murder and conspiracy to commit second degree murder, the verdict forms given to the jury provided only for a verdict on conspiracy to commit murder, without specification of degree. (See 9CT:2257, 2269, 2277-2278, 2284-2285.) The jury also found the multiple-murder special circumstance to be true. No finding was included concerning whether appellant was the actual killer or had an intent to kill. (38RT:6885; 9CT:2292.)

B. The Instructions, Which Allowed Conviction of Conspiracy to Commit Murder Based upon Implied Malice Were Erroneous, and Require Reversal of the Conviction on Count V

In *People v. Swain*, *supra*, this Court held that " a conviction of conspiracy to commit murder requires a finding of intent to kill, and cannot be based on a theory of implied malice." (12 Cal.4th at p. 607.) As shown by the instructions quoted above (see section A.1, *ante*), the jury was

informed that to find a conspiracy to commit murder, the jury need not find that the conspiracy was based on premeditation and deliberation, or even an intent to kill, but could be found based upon a finding of malice aforethought, which was defined for them in the instructions to include implied malice. The instructions were thus erroneous. (*Ibid.*) The conviction of conspiracy to commit murder must be reversed, "for it cannot be determined beyond a reasonable doubt that the erroneous implied malice murder instructions did not contribute to the convictions on the conspiracy count[]." (*Ibid*; *Chapman v. California, supra*, 386 U.S. at p. 24.)[96]

As in *Swain*, here the jury returned general verdicts, and it cannot be determined that the jury necessarily found express malice or intent to kill under other properly-given instructions. (*People v. Swain, supra*, 12 Cal.4th at p. 607.) As shown by the instructions set forth above (see section A.3., *ante*), the murder charges had been submitted on theories of, inter alia, vicarious liability as an aider and abettor or as a co-conspirator. The prosecutor relied upon vicarious liability in his argument to the jury. For example, after attempting to persuade the jury that appellant had cut Richard Ritchey's throat, notwithstanding co-defendant Willey's testimony that co-defendant Beck had done so, the prosecutor stated: "If you want to believe it was Dave Beck that killed him out there or cut his throat out there, that's fine, too. I really don't care. They're all equally liable." (37RT:6745.)

Where the verdict of first degree murder is based upon a theory of

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[96] "In our view, . . . instructional errors – whether misdescriptions, omissions, or presumptions – as a general matter fall within the broad category of trial errors subject to *Chapman* review on direct appeal." (*People v. Huggins* (2006) 38 Cal.4th 175, 211-212; *People v. Flood* (1998) 18 Cal.4th 470, 499, 502-503; *People v. Williams, supra*, 16 Cal.4th at p. 689; *People v. Osband* (1996) 13 Cal.4th 622, 681.)

aiding and abetting, "the manner in which the actual perpetrator committed the murders . . . [does] not itself reveal an intent to kill by defendant as an aider and abettor." (*People v. Williams, supra*, 16 Cal.4th at p. 690.) "A defendant guilty as an aider and abettor under the 'natural and probable consequences' doctrine need not share the perpetrator's intent to kill. (See *People v. Prettyman* [(1996)] 14 Cal.4th 248, 58 Cal.Rptr.2d 827, 926 P.2d 1013.)" (*People v. Williams, supra*, 16 Cal.4th at p. 691.) By the same reasoning, a defendant guilty as a coconspirator under the "natural and probable consequences" doctrine need not share the perpetrator's intent to kill. (*People v. Hardy, supra*, 2 Cal.4th at pp. 188-189; *People v. Price* (1991) 1 Cal.4th 324, 442.) Therefore, under the instructions given in this case, the first degree murder convictions of appellant could have been based upon vicarious liability as a coconspirator, which does not require a finding of express malice or intent to kill.

"Nor is there anything else discoverable from the verdicts that would enable [this Court] to conclude that the jury necessarily found the defendants guilty of conspiracy to commit murder on a proper theory, i.e., based on express malice or intent to kill." (*People v. Swain, supra*, 12 Cal.4th at p. 607.) As explained below, the instruction given regarding the multiple-murder special circumstance was also erroneous, allowing a finding of the special circumstance without a finding that appellant was the actual killer or had an intent to kill.

C. The Instructions Allowed a Finding of the Multiple-murder Special Circumstance Without a Finding That Appellant Was the Actual Killer or Had an Intent to Kill; the Special Circumstance Finding Must Therefore Be Reversed

Prior to June 6, 1990,[97] former Penal Code section 190.2, subdivision (b), required that a defendant found guilty of murder as an aider and abettor or coconspirator must be proved to have had an intent to kill to sustain a finding of a special circumstance other than section 190.2 subdivision (a)(2) (prior conviction for murder). (*People v. Anderson* (1987) 43 Cal.3d 1104, 1141-142.) The homicides in this case occurred on May 20 or 21, 1990, and are thus governed by the pre-June 6, 1990 law. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 298-299.)

Under the instructions given by the trial court (see section A.2, *ante*), in order to find the special circumstance true, the jury was required to find an intent to kill only if they could not decide whether appellant was the actual killer, an aider and abettor, or a coconspirator. If the jury did determine that appellant was guilty as an aider and abettor, or as a coconspirator, this instruction required no finding of intent to kill. The instruction thus omitted a necessary element of the special circumstance finding for multiple-murder, allowing a finding of the special circumstance without a finding of intent to kill in circumstances in which it was an element of the special circumstance, and which circumstances may have been the basis of the jury's verdicts. (*People v. Williams, supra*, 16 Cal.4th at pp. 687-689.)

The prejudicial effect of a trial court's failure to instruct the jury on an element of a special circumstance allegation is assessed under the test set

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[97] June 6, 1990 was the effective date of Proposition 115, which amended Penal Code section 190.2 in this regard. (*Tapia v. Superior Court, supra*, 53 Cal.3d at pp. 298-299.)

forth in *Chapman v. California, supra,* 386 U.S. at page 24. (*People v. Williams*, *supra*, 16 Cal.4th at p. 689; *People v. Osband* (1996) 13 Cal.4th 622, 681; *People v. Johnson* (1993) 6 Cal.4th 1, 45.) Under *Chapman*, the error is harmless only when, beyond a reasonable doubt, it did not contribute to the verdict. (386 U.S. at p. 24.) This Court has held such error harmless when it can be determined that "in determining the truth of the special circumstance allegation the jury had necessarily found an intent to kill under other properly given jury instructions." (*People v. Williams*, *supra*, 16 Cal.4th at p. 689.)

As explained above, where the verdict of first degree murder is based upon a theory of aiding and abetting or as a co-conspirator under the "natural and probable consequences" doctrine, the defendant need not have shared the perpetrator's intent to kill. (*People v. Williams*, *supra*, 16 Cal.4th at p. 691; See *People v. Prettyman*, *supra*, 14 Cal.4th 248; *People v. Hardy*, *supra*, 2 Cal.4th at pp. 188-189; *People v. Price, supra*, 1 Cal.4th at p. 442.) In this case, the instructions quoted above (see section A. 3, *ante*) allowed the jury to find appellant guilty of first degree murder as a coconspirator under the "natural and probable consequences" doctrine. The first degree murder verdicts did not, therefore, necessarily include an implicit finding of intent to kill.

There is nothing else discoverable from the verdicts that would enable this Court to conclude that the jury necessarily found that appellant either was the actual killer or had an intent to kill. As explained above (see section B, *ante*), the instructions in this case allowed the jury to find appellant guilty of conspiracy to commit murder based upon implied malice, without an intent to kill. Because the jury's verdict found appellant guilty of conspiracy to commit murder, without specifying degree, it cannot be determined from

the verdict or the instructions whether the jury based its verdict upon a finding of express or implied malice. Thus, the verdict does not demonstrate that "the jury had necessarily found an intent to kill under other properly given jury instructions." (*People v. Williams*, *supra*, 16 Cal.4th at p. 689.)

Given the evidence, including appellant's own testimony that he neither killed anyone nor intended that anyone be killed, it cannot be determined that the jury "necessarily found an intent to kill under other properly given instructions." (*People v. Williams*, *supra*, 16 Cal.4th at p. 689.) Nor can the evidence of intent to kill be said to be overwhelming in this case. None of the five participants in the events at 5223 Elm Street who testified in this trial testified that they had an intent to kill, or understood any of the others to have an intent to kill. Even Michelle Evans, the prosecution's star witness, testified that she believed no one would get killed, but that the most that would happen is that people would get beaten. (24RT:4211, 4300-4301, 4337-4339; 25RT:4376, 4414.)

Moreover, substantial evidence, especially appellant's own testimony, supported a finding that appellant was not the actual killer of any of the four "residents" of 5223 Elm Street. The prosecution theory was that appellant cut Richard Ritchey's throat, but Ronald Willey identified David Beck as the culprit. Jason LaMarsh claimed appellant killed Franklin Raper, but the prosecution presented evidence and argued that LaMarsh killed Raper. No evidence was presented that appellant killed either Dennis Colwell or Darlene Paris.

The trial court's omission of the requirement that the jury find that appellant had the intent to kill if the jury based its verdicts and finding of the multiple-murder special circumstance on a theory of vicarious liability was, therefore, reversible error. (*People v. Williams*, *supra*, 16 Cal.4th at p. 691.)

The multiple-murder special circumstance finding, and the judgment of death which relies upon it, must therefore be reversed. (*Ibid.*)

D. Conclusion

Because the trial court erred in giving instructions which allowed a finding of guilt on Count V on a legally erroneous theory, and a finding of the truth of multiple-murder special circumstance in the absence of a necessary element of that special circumstance, the conviction on Count V and the special circumstance finding, as well as the death judgment, must be reversed.

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VIII

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE THEORY OF IMPERFECT SELF-DEFENSE WAS ERROR REQUIRING REVERSAL OF THE JUDGMENT

A. Introduction

In *People v. Flannel* (1979) 25 Cal.3d 668, this Court set forth the doctrine of "imperfect" or "unreasonable" self-defense, under which a defendant's "honest but unreasonable belief that it is necessary to defend [him]self from imminent peril to life or great bodily injury negates malice aforethought," and reduces a charged homicide from murder to manslaughter. (*Id.* at p. 674; *People v. Blakely* (2000) 23 Cal.4th 82, 88; see also *People v. McCoy* (2001) 25 Cal.4th 1111, 1116.) Subsequently, this Court said that the *Flannel* doctrine "was demonstrably and firmly established" by 1981. (*In re Christian S.* (1994) 7 Cal.4th 768, 774.) Thus, at the time of appellant's trial, in 1992, it was well-established that the trial court was required to instruct on imperfect self-defense where a sufficient factual basis existed. (*Flannel*, *supra*, 25 Cal.3d at pp. 680-683.)

Appellant submitted proposed jury instructions which would have told the jury he was guilty of either voluntary or involuntary manslaughter, not murder, if he killed "in the honest but unreasonable belief in the necessity to defend against immediate peril to life or great bodily injury . . . ." (9CT2178 [CALJIC No. 5.17 (Honest But Unreasonable Belief in Necessity to Defend - Manslaughter)]; 9CT2211 [CALJIC No. 8.40 (Voluntary Manslaughter – Defined)]; 9CT2215 [CALJIC No. 8.50 (Murder and Manslaughter Distinguished)].) The proposed instructions were supported by substantial evidence, presented in the prosecution's case as well as the defense cases, that throughout the events leading up to the

homicides, and during the melee at 5223 Elm, appellant was acting in the actual, but unreasonable belief that his actions were necessary to defend himself, his family and his friends, from imminent peril from Raper and his cohort. That evidence was sufficient for the jury to find that the killings were the product of an unreasonable belief in the need for self-defense, and thus voluntary manslaughter. (See *People v. Blakely* (2000) 23 Cal.4th 82, 88-89 [an unlawful killing, whether intentional or not, committed in an attempt at unreasonable self-defense is voluntary manslaughter].)

However, the trial court refused to give appellant's proposed instructions on imperfect self-defense. (See 35RT6259, 6267-6273, 6280-6281, 6309; 36RT6440-6441.) The trial court did not give CALJIC No. 5.17, and, although standard instructions on voluntary manslaughter (CALJIC No. 8.40) and the distinction between murder and manslaughter (CALJIC No. 8.50) were given, the trial court deleted those portions of the instructions referring to voluntary manslaughter based on an "honest but unreasonable belief" in the need for self-defense. (8CT1902, 1906.)

The trial court's failure to instruct that imperfect self-defense which resulted in a killing lacked malice and was therefore voluntary manslaughter was error. (See *People v. Breverman* (1998) 19 Cal.4th 142, 154-155; see also *People v. Blakely*, *supra*, 23 Cal.4th at pp. 88-89.) That failure deprived appellant of his constitutional rights to due process, to a fair trial and to present a defense, prevented the jury from considering all the issues in the case, lightened the burden of the prosecution, and deprived him of a reliable determination of both guilt and penalty. (U.S. Const., 5th, 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7(a), 15; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099; *People v. Geiger* (1984) 35 Cal.3d 510, 518-519; see *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.)

B. Factual Background

1. Procedural Facts

Appellant proposed that the trial court give CALJIC Nos. 5.17 (9CT2178), and include in CALJIC Nos. 8.40 and 8.50 the corresponding language explaining that if the homicides were the result of an honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury, then the jury must return verdicts of voluntary manslaughter. (9CT2211; 2215; 35RT6219, 6264, 6266, 6269-6272, 6276-6281; 36RT6437-6441, 6449-6450.)

In initially rejecting appellant's requests for those instructions the trial court stated that there was no evidence of imminent peril. (35RT6267-6269.) The trial court did, however, state that it would reconsider the instruction if counsel could provide citations to the record demonstrating evidence, e.g., that on the night of the homicides Evans had told appellant that Raper was going to come over to attack the Camp that night. (35RT6269-6272.)

The next day, counsel for appellant cited for the trial court various relevant portions of appellant's testimony,[98] which demonstrated continuing threats by Raper to appellant (29RT5169:3-6), that Evans informed him that Raper and his biker friends were coming to assault everybody in the Camp that night (29RT5064:18-26), that appellant told Beck and Vieira about Raper's planned assault (30RT5178:17-25), and that upon hearing of that planned attack appellant was concerned for his own safety and the safety of his family (29RT5065:11-14). (35RT6276-6278.) Counsel for appellant

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[98] Counsel for appellant represented to the trial court that, in the time available, he had been able to review only appellant's testimony, but believed there was further supporting evidence in Evans's testimony. (35RT6281.)

argued that such evidence constituted substantial evidence from which a jury could conclude that appellant acted, either in entering into a conspiracy or committing or aiding and abetting homicide, out of a perceived need to defend himself and his family (35RT6278-6279.)

The trial court reiterated its denial of the instructions, stating,

> As I may have commented yesterday, originally I didn't see the need for giving any manslaughter instructions, and then I came across the notes -- I think it was with -- under 8.10 and 8.20, referring to *People versus Alexander*; and after reading *People versus Alexander*, I felt that I was required to give instructions on voluntary manslaughter.
>
> And yesterday I indicated that I was going to give those instructions, however, based only on the theory of heat of passion or provocation, not on the theory of an unreasonable belief in self-defense. I still believe that that is correct.
>
> The best I can explain it, the evidence presented by the Prosecution could be susceptible that the conspiracy and killings were done in the heat of passion meriting the giving of voluntary manslaughter instructions. The Prosecution's evidence is not susceptible to finding that the conspiracy and killings were done as the result of any of the defendants having an unreasonable belief in the need to act in self-defense. The defendants' absolute denial of any conspiracy whatsoever, of any killings whatsoever, does not ipso facto prohibit the jury from finding that all the District Attorney proved was manslaughter. And if that's all they believe the prosecution proved, that's all they should find the defendants guilty of.
>
> However, the defendants' denial entering into any conspiracy and denial of committing any murders deprives them of -- excuse me, of any killings, deprives them of asserting any type of self-defense claim whatsoever, Whether it be actual self-defense or of the unreasonable belief of the need to act in self-defense. If you don't kill anybody, you can't say that you did it in self-defense or the unreasonable belief that you needed to act in self-defense.

(35RT6279-6281.)

In rejecting appellant's arguments that instructions on conspiracy to commit manslaughter should include provision for a finding of imperfect self-defense, the trial court again addressed the issue, stating,

> Your argument that he can both deny the conspiracy and then -- and then assert that he entered into the conspiracy as a result of an unjustified belief in the need of self-defense, that is correct in theory. I'm going to make a finding that there is no -- in spite of what Mr. Cruz has said, there is no evidence -- there is no substantial evidence which merits consideration by the jury that there was any belief or need for self-defense by Mr. Cruz, or unreasonable belief in the need. That's the ruling I'm making.

(35RT6309-6310.)

Counsel for appellant raised the matter again at a later point, arguing that appellant's denial of entering into a conspiracy and denial of killing anyone did not preclude instruction on imperfect self-defense, that the jury could believe appellant's testimony about his concern for his and his family's safety and determine that he entered into a conspiracy "because he felt that he had to defend his family and himself, a misguided self-defense. . . . And I think that it's in the record and substantial evidence there, and I think the jury should be given the opportunity to make their decision on it." (36RT6439.)

The trial court acknowledged that the defense can present inconsistent defenses, then explained its decision refusing the instructions:

> What I further stated was that there still has to be some substantial evidence of the inconsistent defense, and I've found that there is no substantial evidence of this inconsistent, unreasonable belief in the need to act in self-defense defense. . . .
>
> I'm looking at what is necessary for a self-defense defense or even an unreasonable belief in the need to act in self-defense defense, and that primarily deals with when the imminent danger is. . . .

> I take the view that if -- there just isn't substantial evidence that -- from which even an unreasonable belief in the need for self-defense could arise here, and that's the basis of not so instructing.

(36RT6439-6440.)

While refusing instructions on imperfect self-defense, the trial court did give instructions on voluntary manslaughter and conspiracy to commit manslaughter based upon heat of passion or sudden quarrel as lesser included offenses. (8CT1902, 1906, 1928; 36RT6494-6497, 6504.) The trial court also gave instructions on self-defense, but specifically limited their application to LaMarsh on the homicide of Raper. (8CT1940-1946; 36RT6509-6511.)

2. Facts Supporting an Actual But Unreasonable Belief in the Need to Defend Against Imminent Peril

Both the prosecution and defense presented evidence of numerous prior threats by Raper and Colwell to appellant and the other residents of the Camp. (19RT3289-3290, 3581-3582; 29RT5050-5051, 5064-5067, 5129, 5160-5161, 5165-5170; 30RT5233-5236, 5238-5239, 5249-5250; 32RT5638-5639.) Appellant testified that he, Beck, Vieira and possibly LaMarsh had stood guard at night for approximately one month prior to the homicides to protect against an attack by Raper and his cohorts. (29RT5065.) Appellant started carrying a pistol while at the Camp for protection, and as a deterrent to Raper. (29RT5166-5167.) Appellant testified to and put on evidence of his (unsuccessful) attempts to obtain protection by law enforcement from Raper and his threats. (28RT4974-4979; 29RT5168-5170; 30RT5249-5250.)

Appellant further testified that Evans informed him on the evening of May 20 that Raper intended to attack the Camp that night with a bunch of bikers, and kill everybody there. Appellant later informed Beck and Vieira

about the planned attack on the Camp. (29RT5064-5065; 30RT5178-5179.) Beck confirmed, in his testimony, that appellant and Evans told him about Raper's planned attack. (30RT5290-5291, 5344-5345.)

Based on that evidence, a reasonable juror would have been justified in concluding, or at least maintaining a reasonable doubt, that appellant and Beck had determined the need to defend themselves, appellant's family, and the others at the Camp from imminent attack by Raper and his group of bikers, and that to defend against the attack, it was necessary to confront those threatening them in order to prevent the attack, leading to an agreement to go to 5223 Elm Street to do so.

Evidence of appellant's actions, as well as those of other codefendants, after arriving at 5223 Elm Street that night also support an instruction on imperfect self-defense. All four codefendants in this trial testified that the purpose in going over to 5223 Elm Street the night of the homicides was to assist Evans in moving furniture or clothing from that building. Given the history of threats and harassment by Raper, coupled with the information that Raper intended to attack them that night, the codefendants, to protect themselves, took along bats, a baton, and the knives some of them customarily wore.

After dropping Evans and LaMarsh off at 5223 Elm Street the night of the homicides, appellant drove his car some distance from the house as protection against being recognized and attacked by Raper's associates, demonstrating a continuing belief in the imminence of attack. (29RT5080, 5083; 30RT5240.)

Appellant testified that when Beck, Willey and Vieira started running toward the house, he heard someone say, "He's going crazy," or something to that effect. (29RT5090-5091.) Beck testified that, after parking the car,

he and the others ran toward 5223 Elm upon hearing a girl (he thought it was Evans) scream. He also testified that, once in the house, he feared for his life. (30RT5301-5303, 5332, 5346, 5355, 5368, 5398-5399.) Willey testified that as he approached the house, LaMarsh said, "Hey, man, come on. The shit's starting." (RT5992, 6082-6083.)

LaMarsh testified that, while inside the house, he was approached by Ritchey and Colwell in a manner which convinced him that they intended to do him serious bodily harm, at which point he pulled his gun. (32RT5649-5651; 33RT5734.) LaMarsh also testified that after jumping out the window, getting his bat, and reentering the house, Raper attacked him with a knife, saying he was going to kill LaMarsh, and at that point LaMarsh hit him with a bat. (32RT5652-5656; 33RT5738-5746, 5812, 5826-5827, 5849, 5856-5857.) LaMarsh further testified that it was at that point that appellant entered the house and continued the fight with Raper. (32RT5656; 33RT5746, 5827.)

Appellant testified that when he entered the house, he saw Beck pull Colwell off of the top of Vieira and throw him. (29RT5099-5101, 5183-5186.) Although he did not know who had started the fighting, based upon the information he had as to Raper's plans to attack, and his demonstrated concern about imminent attack even at 5223 Elm Street, it is reasonable to conclude that he might have determined that the fighting had been initiated by the inhabitants of 5223 Elm Street, just as he had feared.

Moreover, there was evidence suggesting that Raper and his associates were the aggressors in this incident. The defense presented expert testimony that the amounts of methamphetamine in Ritchey's system, and methamphetamine, alcohol and phencyclidine in Raper's system, at the time of the homicides was consistent with agitation, aggression, paranoia, and

derangement. (33RT5773-5774, 5788, 5791-5792, 5799.) LaMarsh testified that he pulled his gun only because Ritchey and Colwell appeared ready to do him harm. (32RT5649-5651; 33RT5734.) Thereafter, according to LaMarsh's testimony, he initially struck Raper only after Raper approached him with a knife, threatening to kill him. (32RT5652-5656; 33RT5738-5746, 5812, 5826-5827, 5849, 5856-5857.) According to LaMarsh, appellant entered the house only after the conflict had been initiated. At that point, as suggested by Mr. Miller, counsel for Willey, "Mr. Cruz, his attorney may argue that Mr. LaMarsh in fact told the truth about what happened, Mr. Cruz did strike Mr. Raper, he did so only because he was under the impression that Mr. Raper was trying to kill Mr. LaMarsh." (35RT6262.)

Based on all of the above, the jury would have been justified in concluding, or maintaining a reasonable doubt, that appellant had, and acted upon, an actual, albeit unreasonable belief in a need to defend against imminent peril to himself and his friends, as well as that the other codefendants similarly acted upon such a belief.

C. Legal Standards

The distinguishing element between murder and manslaughter is malice. (*People v. Coad* (1986) 181 Cal.App.3d 1094, 1106.) Proof that the defendant acted in unreasonable self-defense, i.e., with an honest but unreasonable belief in the need for self-defense, is not a complete defense to a murder charge, but it does negate the malice required to commit murder, reducing the offense to manslaughter. (*Flannel, supra*, 25 Cal.3d at p. 674; *In re Christian S., supra*, 7 Cal.4th at p. 773.) The malice required for murder "cannot coexist with such an unreasonable belief" in the necessity for self-defense. (*Flannel, supra*, 25 Cal.3d at p. 675, citing *People v. Wells*

(1949) 33 Cal.2d 330, 345.)

The prosecution has the burden of proving beyond a reasonable doubt that the defendant did not act in the honest but unreasonable belief in the need for self-defense. (See *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704 ["the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case"].) The erroneous failure of the trial court to instruct on imperfect self-defense as negating malice thus constitutes a failure to fully instruct on all the elements of the crime of murder, resulting in the denial of the defendant's right to due process and trial by jury. (See *Mullaney v. Wilbur* (1975) 421 U.S. 684; *People v. Breverman, supra*, 19 Cal.4th at pp. 188-190 (dis. opn. of Kennard, J.).) Omitting an essential element from the instructions defining the charged crime violates the defendant's right to instructions which require the jury to find each essential element of the crime beyond a reasonable doubt, and unconstitutionally lightens the burden of the prosecution. (*Neder v. United States* (1999) 527 U.S. 1, 9-10; *United States v. Gaudin* (1995) 515 U.S. 506, 510-511, 522-523; *People v. Flood* (1998) 18 Cal.4th 470, 480-482, 491-492.)

Under *Flannel*, the necessary substantial evidence of the defendant's state of mind "may be present *without* defendant testimony." (*People v. De Leon* (1992) 10 Cal.App.4th 815, 824 (original emphasis); *People v. Viramontes, supra*, 93 Cal.App.4th at p. 1262.) In fact, an unreasonable self-defense instruction is required whenever substantial evidence supports it, even if the "factual premise underlying [it] is contrary to the defendant's own testimony." (*People v. Elize* (1999) 71 Cal.App.4th 605, 615; cf. *Mathews v. United States* (1988) 485 U.S. 58, 63-66.) The testimony of one

witness, even the defendant, "can constitute substantial evidence requiring the trial court to instruct on [unreasonable self-defense] on its own initiative." (*People v. Lewis* (2001) 25 Cal.4th 610, 645.)

California's state constitutional right to due process guarantees the right to instructions on any relevant and applicable lesser offenses. (Cal. Const., art. I, §§ 7, 15; *People v. Turner* (1990) 50 Cal.3d 668, 690; see also *People v. Sedeno* (1974) 10 Cal.3d 703, 716.) Thus, trial courts have a sua sponte duty to instruct on all lesser included offenses when "the evidence raises a question as to whether all of the elements of the charged offense [a]re present . . . ." (*People v. Breverman, supra*, 19 Cal.4th at p. 154; see *People v. Waidla* (2000) 22 Cal.4th 690, 733.) In murder cases, the "duty to instruct sua sponte . . . on unreasonable self-defense is the same as [that] to instruct on any other lesser included offense," and "arises whenever . . . a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*Barton, supra*, 12 Cal.4th at p. 201; see *People v. Wickersham* (1982) 32 Cal.3d 307, 326.)

The scope of the trial court's duty to give requested instructions is greater than its duty to instruct sua sponte on principles of law relevant to the case (*People v. Stevenson* (1978) 79 Cal.App.3d 976, 985); requested instructions must be delivered "upon every material question upon which there is *any evidence deserving of any consideration whatever*." (*Flannel, supra*, 25 Cal.3d at p. 684, quoting *People v. Burns* (1948) 88 Cal.2d 867, 871, emphasis original; accord, *People v. Breverman, supra*, 19 Cal.4th at p. 162.)

The "substantial evidence" required to trigger the duty to instruct on a legal theory is evidence from which a reasonable jury could conclude that

the particular facts underlying the instruction exist. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 85, citing *People v. Lemus* (1988) 203 Cal.App.3d 470, 477.) In deciding whether the evidence supports a requested instruction, courts must resolve all "[d]oubts as to the sufficiency of the evidence . . . in favor of the accused." (*People v. Tufunga* (1999) 21 Cal.4th 935, 944; *People v. Breverman*, supra, 19 Cal.4th at p. 177 ["In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight."].)

Federal constitutional due process also requires instructions on lesser included offenses in capital cases. (See *Schad v. Arizona* (1991) 501 U.S. 624, 646; *Beck v. Alabama* (1980) 447 U.S. 625, 634.)[99] Failing to instruct on lesser-included offenses supported by the evidence is a denial of the federal right to due process. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 625; *Anderson v. Calderon* (9th Cir. 2000) 232 F.3d 1053.)

Failing to instruct on all necessarily included offenses deprives the defendant of the constitutional right to have the jury determine every material issue presented by the evidence. (*People v. Wickersham*, *supra*, 32 Cal.3d at p. 335; *People v. Geiger*, *supra*, 35 Cal.3d at pp. 519-520.) Thus, failing to give a requested instruction on a lesser included offense supported by substantial evidence requires reversal, unless it can be determined that the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other instructions that were given. (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351-352; *People v. Sedeno* (1974) 10

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[99] As under California law, in federal cases "the independent prerequisite for a lesser included offense instruction [is] that the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater." (*Schmuck v. United States* (1989) 489 U.S. 705, 716, fn. 8.)

Cal.3d 703, 721.)

D. The Evidence Was Sufficient to Support Giving the Requested Instruction, and Failing to Give It Was Reversible Error, Because the Factual Question Whether Appellant Acted in Unreasonable Self-Defense Was Not Adversely Resolved Under Other, Properly-Given, Instructions

As shown above, there was ample evidence from which the jury could have concluded, or at least maintained a reasonable doubt, that appellant's actions, from the evening hours of May 20, when Evans warned appellant that Raper and his gang of bikers were going to come over that night to attack the Camp, through and including appellant's actions at 5223 Elm Street, were taken in the actual belief that he needed to defend himself, his family and his friends from imminent peril.

The evidence was consistent with the theories that appellant agreed to go to 5223 Elm Street to confront, fight or possibly to kill the people there in the belief it was necessary to defend against imminent attack, while drawing any violence away from the Camp and his family. The evidence was also consistent with the theory that appellant agreed to go to 5223 Elm Street to help Evans, that he proceeded with caution due to his concern over an attack by Raper's associates, and that upon hearing a scream, or "he's gone crazy," or LaMarsh's call, "the shit's started," or upon walking into the house and seeing Colwell on top of Vieira and Raper trying to kill LaMarsh, he believed that it was necessary to defend himself and his friends from imminent harm.

The trial court indicated that the requested instruction was rejected due to a lack of evidence of any imminent harm against which appellant

might be defending.[100] However, the trial court appears to have restricted its review to the question of whether the threat of Raper attacking the camp that night represented a threat of imminent harm. Although that was one source of appellant's concern for the safety of himself and his family and friends, the evidence demonstrated that actual fear of imminent harm would also have arisen, or been strongly reinforced, immediately before and during the melee which resulted in the homicides.

Given the pattern of threats and harassment from Raper, the immediate threat of an attack on the Camp that night, and appellant's concern that they might get attacked if recognized when they dropped Evans and LaMarsh at 5223 Elm Street, the unfolding events thereafter were of the sort which would reinforce and increase a sense of imminent harm – a scream or yell came from 5223 Elm Street, causing Beck, Vieira and Willey to begin running towards the house, Beck concerned that it was Evans who

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[100] The trial court's initial rejection of the instruction was based on the view that because appellant denied killing anyone or entering into a conspiracy, he could not also argue to the jury that any killing he committed was due to imperfect self-defense:

> However, the defendants' denial entering into any conspiracy and denial of committing any murders deprives them of -- excuse me, of any killings, deprives them of asserting any type of self-defense claim whatsoever, Whether it be actual self-defense or of the unreasonable belief of the need to act in self-defense. If you don't kill anybody, you can't say that you did it in self-defense or the unreasonable belief that you needed to act in self-defense.

(35RT6279-6281.)

As stated above, unreasonable self-defense instructions must be given whenever substantial evidence supports it, even if the "factual premise underlying it is contrary to the defendant's own testimony." (*People v. Elize*, *supra*, 71 Cal.App.3d at p. 615.) The trial court later acknowledged this point, and stated that its rejection of the instruction was based on the absence of evidence of imminent harm. (36RT6439-6440.)

screamed; LaMarsh responding to Raper's knife attack by hitting Raper with a bat at the point that appellant entered the residence; and Vieira and Colwell struggling in the kitchen, with Colwell on top of Vieira when appellant entered the residence.

Given the ongoing harassment and threats by Raper against appellant, recently escalated by the attack threatened for that night, each of these points would reasonably have been interpreted by appellant that he was in danger of imminent harm.

Moreover, the trial court's apparent conclusion that the threat of Raper's attack on the Camp did not pose a threat of imminent harm is fundamentally based on hindsight, not on consideration of appellant's perception at the time. Appellant did not know precisely when the attack would come, but he had to consider that it could come at *any* time. Whether it would come immediately or later in the night, appellant could not know, but he would have to expect it at any time, imminently.

Accordingly, appellant had an absolute right to an instruction on unreasonable self-defense, and the jury should have been allowed to consider the lesser offenses of voluntary manslaughter and conspiracy to commit voluntary manslaughter under that theory. (*People v. Breverman, supra*, 19 Cal.4th at p. 154; *People v. Duncan* (1991) 53 Cal.3d 955, 969.)

The instructions given did not direct the jury to consider appellant's state of mind that night in terms of his actual belief, whether or not reasonable, in the need to defend himself, his family, or his friends. Thus, one of the fundamental issues presented by the evidence was never presented to the jury for decision. While the jury heard extensive evidence of Raper's harassment and threats to appellant and others in the community, there was no legal framework provided in the instructions by which the jury could fully

or properly assess the effect of those threats on appellant's state of mind at the time of the homicides. Rather, the relevance of Raper's harassment and threats was left untethered to any legal basis for a verdict less than first degree murder, while it was available to the prosecution as evidence providing a motive for appellant to kill Raper.

Similarly, the instructions provided the jury no legal framework by which to fully consider the evidence which demonstrated appellant's belief in the imminence of attack, such as parking the car out of the sight of 5223 Elm to avoid recognition and resulting attack by Raper's biker cohort. Without instruction which gave meaning to that evidence in a manner relevant to the defenses presented, appellant's activity would be likely interpreted as "planning activity" rather than caution, consistent with the prosecution's theory of the case rather than that of the defense.

Furthermore, instructions on self-defense were given, but were restricted specifically to LaMarsh. Such a restriction, without any other instruction linking the evidence of Raper's threats and harassment to appellant's statement of mind, left a clear implication that the threats had nothing to do with appellant's state of mind, or the reasons he took the actions he took, other than as evidence of motive, supporting the prosecution's case.

The failure to instruct on unreasonable self-defense requires reversal of the convictions on all counts, including the conspiracy, because the factual question posed by the omitted instruction was not resolved under any instructions that were given. (*People v. Ramkeesoon*, *supra*, 39 Cal.3d at pp. 351-352.) "Such an error cannot be cured by weighing the evidence and finding it not reasonably probable that a correctly instructed jury would have convicted [appellant] of the lesser-included offense." (*Id.*, at p. 352.)

There were no other jury instructions or verdicts from which it can be inferred that the jury necessarily resolved the factual question posed by the omitted instruction on unreasonable self-defense. (*People v. Sedeno*, *supra*, 10 Cal.3d at p. 72.) The failure to instruct on "unreasonable self-defense" voluntary manslaughter cannot be considered harmless in this case.

The jury's verdicts of first degree murder did not necessarily resolve the question of whether appellant entertained an honest but unreasonable belief in the necessity for self-defense. (See *People v. Wickersham*, *supra*, 32 Cal.3d at p. 336 [failing to instruct on voluntary manslaughter was not harmless, because the jury did not necessarily reject the theory that defendant acted without malice].) Indeed, that a jury returns a guilt verdict on first or second degree murder is never conclusive proof that the erroneous failure to instruct on "unreasonable self-defense" voluntary manslaughter was harmless, because if the jury is not told that the malice required for murder "cannot coexist with an honest but unreasonable belief" in the need for self-defense, the verdict may simply be a product of the jury's ignorance on that point.

While the jury's verdicts of first degree murder necessarily involved a finding that the homicides in this case were premeditated and intentional, the verdicts do not establish that *appellant* acted with premeditation or intent. The jury was instructed on coconspirator liability "for the natural and probable consequences of any crime or act of a co-conspirator to further the object of the conspiracy . . . ." (36RT6500; 8CT1916; CALJIC No. 6.11.) A defendant guilty as a coconspirator under the "natural and probable consequences" doctrine need not have shared the perpetrator's intent to kill. (*People v. Hardy*, *supra*, 3 Cal.4th at pp. 188-189; *People v. Price*, *supra*, 1 Cal.4th at p. 442; see Arg. VII, *ante*.)

The jury's verdict of guilt on conspiracy to commit murder did not necessarily resolve any factual question regarding appellant's state of mind in this regard, for no instruction on that count gave the jury any basis for determining whether or not appellant had an honest belief in the need to defend himself.

Even assuming arguendo that the jury's verdicts involved a finding that appellant acted with premeditation and intent, such a finding is not dispositive of whether it was prejudicial error to refuse to give the *Flannel* instruction. An intentional killing can be a voluntary manslaughter where malice is absent. (*People v. Berry* (1976) 18 Cal.3d 509, 515; *People v. Blakely*, *supra*, 24 Cal.4th at p. 88; Pen. Code, §192.) Indeed, *Flannel* itself involved a killing which was clearly both premeditated and intentional. (25 Cal.3d at pp. 673-674 [the defendant, feeling threatened, shot the victim in the "temple from a distance of approximately two feet"].)

The instructions relating to second degree murder required that appellant have acted with malice, aided and abetted another who committed such an offense, or conspired with another who committed the offense as a natural and probable consequence of the conspiracy, but did not require the jurors to determine whether or not appellant had an actual belief in the need for self-defense. (8CT1901, 1916; CALJIC Nos. 6.11, 8.30.)

The instruction on voluntary manslaughter required that appellant have acted without malice aforethought, but with an intent to kill, . . . [i.e.] if the killing occurred upon a sudden quarrel or heat of passion." (8CT1902; CALJIC 8.40.) "Heat of passion" manslaughter is entirely distinct from unreasonable self-defense manslaughter. (See *People v. Flannel*, *supra*, 25 Cal.3d at p. 678 [noting the "distinct nature of the two" types of voluntary manslaughter]; *People v. Rios* (2000) 23 Cal.4th 450, 461-462 [explaining

the basis for each theory of voluntary manslaughter].) The theory behind heat of passion manslaughter is rooted in common law and assumes that the victim's conduct can be so provocative that the defendant loses "control of [his] reason," i.e., the accused's loss of control under the stress of emotion negates malice. With unreasonable self-defense manslaughter, it is not a loss of control, but a mistake of fact, which negates malice; the defendant mistakenly believes that self-defense is necessary, and thus does not "form the necessary mens rea for murder." (Magee, *The Absence of Malice? In re Christian S., The Second Wind of the Imperfect Self-Defense Doctrine* (1995) 25 Golden Gate U. L.Rev. 297, 300.)

Instructions on voluntary manslaughter are required in homicide cases because the "complete definition of malice [in first degree murder] is the intent to kill . . . *plus the absence of* both heat of passion and unreasonable self-defense." (*People v. Breverman, supra*, 19 Cal.4th at p. 189 (dis. opn. of Kennard, J.), italics original.) But here, the jurors were informed that they could return a voluntary manslaughter verdict only if they found that appellant's will was overmastered by emotion, not that they could return the same verdict if he acted based on a mistaken belief that he needed to use or aid and abet deadly force to protect himself. Those determinations are entirely distinct. (*People v. Rios, supra*, 20 Cal.4th at pp. 461-462.) That the jury apparently decided that appellant did not lose control does not mean the jurors necessarily decided that he did not act under a mistaken belief.

E. Reversal of The Convictions, and the Death Judgment, Is Required

Due process requires proof beyond a reasonable doubt of each element of a criminal offense. (*In re Winship* (1970) 397 U.S. 358, 365; *Mullaney v. Wilbur, supra*, 421 U.S. 684.) The trial court's failure to instruct on voluntary manslaughter based on unreasonable self-defense in

this case violated that requirement, lightening the prosecution's burden and making it likely that "the jury . . . resolve[d] its doubt in favor of a [first degree murder conviction." (*Beck v. Alabama*, *supra*, 447 U.S. at p. 634.) That failure also deprived appellant of his state constitutional rights to due process, to present a defense and to a fair jury trial (Cal. Const., art. I, §§ 7(a), 15; *People v. Geiger* (1984) 35 Cal.3d 510, 518-519), and his federal rights to due process, under the Fifth and Fourteenth Amendments (*Anderson v. Calderon*, *supra,* 232 F.3d at p. 1081), and to a jury trial (U.S. Const., 6th and 14th Amends.). Failing to give the requested instruction prevented the jury from considering all the issues in the case, in violation of appellant's right to a fair jury trial, under the Sixth and Fourteenth Amendments, and most importantly, diminished the reliability of the guilt and penalty verdicts, in violation of the Eighth Amendment. (See *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Appellant's convictions, as well as the sentence of death based thereon, must be reversed.

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IX

THE TRIAL COURT ERRONEOUSLY DIRECTED THE JURY TO FOCUS ON ALLEGED ACTS OF APPELLANT AS EVIDENCE OF HIS CONSCIOUSNESS OF GUILT

The trial court delivered three instructions regarding acts the jury could consider as evidence of appellant's consciousness of guilt which were misleading, allowed inferences unsupported by the evidence, and constituted improper pinpoint instructions.

The trial court instructed the jury pursuant to CALJIC Nos. 2.03 and 2.06, as follows:

> If you find that before this trial a defendant made a willfully false and deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt on the part of such defendant. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your determination.
>
> If you find that a defendant attempted to suppress evidence against himself in any manner, such as by attempting to induce a person to alibi for him, or by destroying or concealing evidence, such attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(36RT:6474-6475; 8CT:1853-1854.)

The trial court also instructed the jury pursuant to CALJIC No. 2.52, 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. It is a fact which, if proved, may be considered by you in the light of all other proved facts in

deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

(36RT:6482; 8CT:2141.)

Appellant requested modification of the instructions. The modified version of CALJIC 2.03 submitted by appellant added to the language above the following:

> Before considering the defendant's statements, you must determine the existence of the following preliminary facts:
>
> 1. Whether the defendant made the statements; and
>
> 2. Whether the defendant deliberately lied to hide his complicity in the crime.
>
> Unless you find both these preliminary facts to exist, you must disregard the statements.
>
> The defendant's consciousness of guilt, if any, is relevant upon the questions or [sic] whether the defendant thought he had committed a crime. Consciousness of guilt may not be considered [in determining the degree of defendant's guilt] [or] [in determining which of the charged offenses the defendant committed.]

(8CT:2120.) Appellant cited *People v. Kimble* (1988) 44 Cal.3d 480, 498 (8CT:2120) as well as the 6th, 8th and 14th Amendments (35RT:6157) in support of the requested modification. The trial court denied the requested modifications without explanation, merely noting that it would give only the CALJIC version of No. 2.03. (35RT:6156-6157.)

Appellant requested a modification of CALJIC No. 2.52, to instruct the jury with the following additional language:

> The defendant's consciousness of guilt, if any, is relevant upon the question or [sic] whether the defendant was

afraid of being apprehended and whether the defendant thought [he][she] had committed a crime. Consciousness of guilt may not be considered [in determining the degree of defendant's guilt] [or] [in determining which of the charges [sic] offenses the defendant committed.

(9CT:2141.) The trial court denied the requested modification without explanation. (35RT:6176-6177.)

Counsel for Beck also requested two different modifications of CALJIC No. 2.03. The first stated:

Evidence has been introduced of statements made by the defendant before this trial from which an inference of his consciousness of guilt may be drawn. However, it is entirely up to you to find whether the evidence presented suggests that the defendant's statement was false and even if false, whether the defendant deliberately lied to hide his complicity in the criminal charged [sic] against him.

(8CT:2074 [Defendant's Special Instruction HHH].[101]) The second stated:

Evidence that the defendant attempted to hide or cover up the killing by false or evasive statements made after the killing cannot be considered by you in determining whether the killing was deliberate and premeditated.

(8CT:2098 [Defendant's Special Instruction ZZ].) Counsel for Beck cited *People v. Anderson* (1968) 70 Cal.2d 15, in support of the instruction. Appellant joined in the request for the proposed modified instructions. (36RT:6412.) The trial court denied the requested modifications, stating that they were "adequately covered in CALJIC 2.03." (36RT:6421.) As to Special Instruction ZZ, the trial court wrote on the proposed instruction that it "conflicts w[ith] CALJIC 2.03. Also, I am not sure whether the Anderson case should be limited to the facts or is applicable in all situations. Also, no

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[101] Counsel for Beck also requested a modified version of CALJIC No. 2.03 which more closely tracked the language of the CALJIC instruction. (8CT:2075.)

evidence that a defendant tried to hide or cover up the killings by post killing false or evasive statements – just [unintelligible]." (8CT:2098.)

The instructions given were erroneous. They were unnecessary, improperly argumentative and permitted the jury to draw irrational inferences against appellant. The refusal to modify those instructions as requested by appellant, which would have largely, albeit not completely, cured the errors inherent in the instructions given, was also error. The instructional error deprived appellant of his rights to due process, a fair trial, a jury trial, equal protection, and reliable jury determinations on guilt, the special circumstances and penalty. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.) The instructions were particularly prejudicial because the evidence regarding appellant's culpability, his state of mind, his participation in any conspiracy as well as the degree or nature of the homicides, was in substantial conflict and based in large part upon suspect testimony. Accordingly, reversal of the convictions on all counts, the special circumstance finding, and the death judgment is required.[102]

As shown in the Statement of Facts, *ante*, the evidence presented at trial which arguably supported these instructions included appellant's flight, along with the others, from 5223 Elm Street to Willey's house after the homicides, appellant's phone call to Starn regarding having Starn check into

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[102] Although counsel for appellant did not specifically object to or request modification of CALJIC No. 2.06, instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (Pen. Code, §§ 1259 & 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.) Merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request modification or amplification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.)

a motel where appellant would meet her (24RT:4254; 29RT:5124, 5128-5129; 30RT:5315; 34RT:6006, 6008), a discussion with Beck about getting stories together to tell the police (30RT:5366-5367; 33RT:5723), his statement to the police that he had spent the night in Oakdale (29RT:5128-5129), and his actions in giving Willey a gun from his car, a bat and a knife, cleaning blood off of himself and having Vieira clean blood off of his shoes and clean the car. (24RT:4251-4254, 32RT:5667; 33RT:5721; 34RT:6009-6010.)

A. The Consciousness Of Guilt Instructions Improperly Duplicated The Circumstantial Evidence Instruction

The instructions given on false statements prior to trial, flight, and attempts to suppress evidence or to induce someone to alibi him, were unnecessary. This Court has held that specific instructions relating to the consideration of evidence which simply reiterate a general principle upon which the jury has already been instructed should not be given. (See *People v. Lewis, supra*, 26 Cal.4th at pp. 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 444-445.) Here, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00, 2.01 and 2.02. (36RT:6472-6473, 6508-6509; 8CT:1849-1850, 1939.) These instructions amply informed the jury that it could draw inferences from the circumstantial evidence, i.e., that it could infer facts tending to show appellant's guilt – including his state of mind – from the circumstances of the alleged crimes. There was no need to repeat this general principle in the guise of permissive inferences of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt, nor of permissive inferences of guilt of prosecution witnesses. This unnecessary benefit to the prosecution violated both the Due Process and Equal Protection Clauses of the Fourteenth

Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479; *Lindsay v. Normet* (1972) 405 U.S. 56, 77.)

B. The Consciousness Of Guilt Instructions Were Unfairly Partisan And Argumentative

The instructions here directed the jury's attention, inter alia, to actions which, according to the testimony at trial, were taken not just by appellant or other defendants, but by Evans as well. In Evans's testimony, she attempted to portray herself as an unknowing, unwitting participant, and not one of the actual killers. Yet there was substantial evidence that Evans was one of the actual killers, and had motive and intent unknown to appellant at the time. (26RT:4533-4534, 4551, 4559, 4569, 4571, 4573; 29RT:5126; 30RT:5355, 5415.) The evidence demonstrated that Evans fled the scene with the others and, at Willey's residence after leaving 5223 Elm, all, including Evans, took part in cleaning up and handing over evidence to Willey, apparently for purposes of concealment. (24RT:4252; 33RT:5718.) Similarly, Evans attempted to set up an alibi. (24RT:4272-4273; 26RT:4569-4570.) Moreover, the evidence established that Evans made numerous false and misleading statements about her own involvement in the homicides. (24RT:4257, 4280; 27RT:4758-4762.) Yet the instructions specifically addressed and allowed for an inference of consciousness of guilt only as to appellant or the other defendants. Clearly, the evidence supporting consciousness of guilt on the part of Evans's, especially her numerous false statements, intended to mislead the police about her own involvement in the homicides, was as probative, if not more so, that any such evidence presented regarding appellant, yet the instructions isolated for the jury's consideration as pointing to appellant's guilt only evidence as to appellant and his codefendants.

Thus, the instructions were impermissibly argumentative. The trial

court must refuse to deliver any instructions which are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly single out and bring into prominence before the jury isolated facts favorable to one party, thereby, in effect, "intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

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

Judged by this standard, the consciousness of guilt instructions given in this case are impermissibly argumentative. Structurally, they are almost identical to the defense "pinpoint" instruction which this Court found to be argumentative in *People v. Mincey, supra*, 2 Cal.4th at p. 437. The instruction told the jurors that if they find certain preliminary facts, they may rely on those facts to find additional facts favorable to one party or the other. Since the instruction in *Mincey* was held to be argumentative, the instruction at issue here should be held argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness of guilt instructions based on an analogy to *People v. Mincey, supra*, 2 Cal.4th 408, holding that *Mincey* was "inapposite

for it involved no consciousness of guilt instruction" but rather a proposed defense instruction which "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense. [Citation omitted].'") This holding, however, does not explain why two instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions...." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; accord *Reagan v. United States* (1895)157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon, supra,* 412 U.S. at p. 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law. (*Lindsay v. Normet, supra,* 405 U.S. at p. 77.)

To insure fairness and equal treatment, this Court should reconsider those cases that have found California's consciousness of guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara, supra,* 30 Cal.4th at p. 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC No. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]) and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence." (*People v. Wright,*

supra, 45 Cal.3d at p. 1137.)

The alternate rationale this Court employed in *People v. Kelly* (1992) 1 Cal.4th, 495, 531-532, and a number of subsequent cases (e.g., *People v. Arias, supra*, 13 Cal.4th at p. 142), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of the instructions, noting that they tell the jury that the consciousness-of-guilt evidence is not sufficient by itself to prove guilt. From this fact, the *Kelly* court concluded: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly*, *supra*, at p. 532.)

More recently, this Court abandoned the *Kelly* rationale, holding that the error in not giving a consciousness-of-guilt instruction was harmless because the instruction "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th, 598, 673.) Moreover, the allegedly protective aspect of the instructions is weak at best and often entirely illusory. The instructions do not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. They thus permit the jury to seize upon one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use that *in combination* with the consciousness-of-guilt evidence to conclude that the defendant is guilty.

Finding that a flight/consciousness of guilt instruction unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming recently held that giving such an instruction always will be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, it joined a number of other state courts that have found similar flaws in the flight instruction. Courts in at least eight other states have held that

flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d 939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)[103]

The reasoning of two of these cases is particularly instructive. In *Dill v. State*, *supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey*, *supra*, 741 P.2d 738, the Kansas Supreme Court

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[103] Other state courts also have held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

cited a prior case which had disapproved a flight instruction (Id. at p. 748) and extended its reasoning to cover all similar consciousness-of-guilt instructions:

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [holding that the reasons for the disapproval of flight instructions also applied to an instruction on the defendant's false statements].)

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

C. The Consciousness-Of-Guilt Instructions Permitted The Jury To Draw Two Irrational Permissive Inferences About Appellant's Guilt

The consciousness-of-guilt instructions given here suffer from an additional constitutional defect. They embody improper permissive inferences. The instructions permit the jury to infer one fact, such as appellant's consciousness of guilt, from other facts, i.e., false statements, flight, attempting to suppress evidence or attempting to induce someone to

provide an alibi. (See *People v. Ashmus, supra*, 54 Cal.3d at p. 977.) A permissive inference instruction can intrude improperly upon a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and lead them to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (*en banc*).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren, supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid*; see also *id.*, at p. 900 (conc. opn. Rymer, J.) ["I must say that inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury."].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal, supra*, 967 F.2d at p. 926.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County Court v. Allen, supra*, 442 U.S. at pp. 165-167, and fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971

F.2d 313 [noting that the Supreme Court has required "'substantial assurance' that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County Court v. Allen, supra*, at pp. 157, 162-163.)

In this case, the consciousness-of-guilt instructions were not limited to the question of whether appellant was conscious of wrongdoing in his involvement in the events at 5223 Elm Street, but also allowed the jury to consider them of his guilt – which involves questions of his involvement in specific acts, his state of mind before and during the events and even the questions of whether or not he conspired to commit murder beforehand. Under the facts here, two types of irrational inferences were permitted by the instructions.

The first irrational inference concerned appellant's mental state at the time the charged crimes allegedly were committed. The improper instruction permitted the jury to use the consciousness-of-guilt evidence to infer, not only that appellant killed Raper and/or Ritchey, but that he also had done so while harboring the intents or mental states required for conviction of first degree murder and that he had conspired to do so. Although the consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind after the killing, it is *not* probative of his state of mind prior to or during the killing. (*People v. Anderson, supra*, 70 Cal.2d at pp. 32-33.) As this Court explained,

> evidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.

(*Id.* at p. 33.)[104/] [105/]

Appellant's actions after the crimes, upon which the consciousness-of-guilt inferences were based, simply were not probative of whether he harbored the mental states for first degree premeditated murder or conspired to commit murder. There was no rational connection – much less a link more likely than not – between appellant giving Willey a knife at Willey's house after the homicides, or cleaning blood while at Willey's house, or arranging *after* the homicide to try to set up an alibi, or fleeing the scene of a homicide, and consciousness by him of having committed a homicide with (1) premeditation; (2) deliberation, (3) malice aforethought, (4) a specific intent to kill, or (5) having conspired to commit murder. Appellant's attempt to construct an alibi cannot reasonably be deemed to support an inference that he had the requisite mental state for first degree murder, as opposed to second degree murder or manslaughter, or that he conspired to commit the murder. In fact, that the futile attempt to construct an alibi arose after the fact, rather than before, supports a contrary inference, i.e., that the events at

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[104] Professor LaFave makes the same point:

> Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only goes to show the defendant's state of mind at the time and not before or during the killing.

(LaFave, Substantive Criminal Law (2nd ed. 2003), vol. 2, § 14.7(a), pp. 481-482, original italics, fn. omitted.)

[105] The trial court noted in its denial of Beck's proposed instruction ZZ that it was "not sure whether the *Anderson* case should be limited to its facts or is applicable in all situations." (11 RT:2098.) This suggests that the trial court considered that inferences concerning state of mind at the time of commission of the offenses, or even before, were legitimate, a clearly erroneous view. In any case, the trial court refused to instruct the jury not to make such erroneous and prejudicial inferences.

5223 Elm St. were not planned, for an alibi such as appellant attempted would have required prior planning, rather than afterthought, for checking into a motel after the killing hardly provides an alibi for the time of the killing.

This Court has previously rejected the claim that the consciousness-of-guilt instructions permit irrational inferences concerning the defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52]; *People v. San Nicolas, supra*, 34 Cal.4th at pp. 666-667 [CALJIC Nos. 2.03 & 2.06] .) However, Appellant respectfully asks this Court to reconsider and overrule these holdings and to hold that in this case delivery of the consciousness-of-guilt instructions was reversible constitutional error.

The foundation for these rulings is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833, which noted that the consciousness-of-guilt instructions do not specifically mention mental state and concluded that:

> A reasonable juror would understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged."

(*Id.* at p. 871.)

The *Crandell* analysis is mistaken for three reasons. First, the instructions do not speak of "consciousness of some wrongdoing;" they speak of "consciousness of guilt," and *Crandell* does not explain why the jury would interpret the instruction to mean something they do not say. Elsewhere in the instructions the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., 8CT:1885 [CALJIC No. 2.90 stating that the

defendant is entitled to a verdict of not guilty "in case of a reasonable doubt whether his [or] her guilt is satisfactorily shown."].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that appellant was entitled to a verdict of not guilty only if the jury had a reasonable doubt as to whether his "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship*, *supra*, 397 U.S. at p. 364; see *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 323-324.)

Second, although the consciousness-of-guilt instructions do not specifically mention the defendant's mental state, they likewise do not specifically exclude it from the purview of permitted inferences or otherwise hint that any limits on the jury's use of the evidence may apply. On the contrary, the instructions suggest that the scope of the permitted inferences is very broad, expressly advising the jury that the "weight and significance" of the consciousness-of-guilt evidence "if any, are matters for your" determination.[106]

Third, this Court itself has drawn the very inference that *Crandell* asserts no reasonable juror would make. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court reviewed the evidence of defendant's mental state at the time of the killing, expressly relying on consciousness-of-guilt evidence

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[106] In a different context, this Court repeatedly has held that an instruction which refers only to "guilt" will be understood by the jury as applying to intent or mental state as well. It has ruled that a trial court need not deliver CALJIC No. 2.02, which deals specifically with the use of circumstantial evidence to prove intent or mental state, if the court has also delivered CALJIC No. 2.01, the allegedly "more inclusive" instruction, which deals with the use of circumstantial evidence to prove guilt and does not mention intent, mental state, or any similar term. (*People v. Marshall* (1996) 13 Cal.4th 799, 849; *People v. Bloyd* (1987) 43 Cal.3d 333, 352.)

among other facts, to find an intent to rob. (*Id.* at p. 608.)[107] Since this Court considered consciousness-of-guilt evidence to find substantial evidence that a defendant killed with intent to rob, it should acknowledge that lay jurors might do the same.

The consciousness-of-guilt instructions permitted a second irrational inference, i.e., that appellant was guilty not only of unlawfully killing Raper and/or Ritchey, but also of conspiring with others to murder. This Court approved an inference precisely that far-reaching in *People v. Rodriguez* (1994) 8 Cal.4th 1060, when it held that the defendant's false statements about an injury to his arm "tended to show consciousness of guilt of *all* the charged crimes." (*Id.* at p. 1140, original italics; accord, *People v. Griffin* (1988) 46 Cal.3d 1011, 1027 [holding that it is rational to infer "that false statements regarding a crime show a consciousness of guilt of all the offenses committed during a single attack"].)

To determine if the sweeping inferences permitted by the consciousness-of-guilt instruction are constitutional in this case, the Court must ask: If the defendant fled the scene of the homicide, disposed of evidence of the homicide, or attempted to set up an alibi with the assistance of Starn, is it more likely than not that he had *also* conspired to commit

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[107] In *Hayes*, this Court wrote:

> There was also substantial evidence, apart from James' testimony, that defendant killed Patel *with the intent to rob him* and then proceeded to ransack the motel's office and the manager's living quarters. *Defendant demonstrated consciousness of guilt by fleeing the area and giving a false statement when arrested*, the knife that killed Patel was found in the manager's living quarters, defendant was seen carrying a box from the office to James' car, and four days later defendant committed similar crimes against James Cross.

(*People v. Hayes*, *supra*, 52 Cal.3d at p. 608, italics added.)

murder? Or that he personally killed either Raper or Ritchey or both? Obviously, the answer to each question is, "No,"[108] and the inferences permitted by the consciousness-of-guilt instruction are accordingly constitutionally infirm. (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167.)

Appellant requested a modification of CALJIC No. 2.03 which would have specifically addressed, and precluded, the unconstitutional inferences the unmodified instructions allowed. Appellant requested, inter alia, that the jury be instructed that

> The defendant's consciousness of guilt, if any, is relevant upon the questions or [sic] whether the defendant thought he had committed a crime. Consciousness of guilt may not be considered [in determining the degree of defendant's guilt] [or] [in determining which of the charged offenses the defendant committed.]

(8CT:2120.) The trial court denied the requested modification without explanation. (35RT:6156-6157.) The denial of this modification was error. The requested modification tracks this Court's reasoning in *Crandell*, and is a correct statement of the law. In *People v. Welch* (1999) 20 Cal.4th 701, this Court, found no error in denial of a modification of CALJIC No. 2.52 to include a statement that "While this inference of guilt goes to identity it does

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[108] Appellant's flight from the scene of the homicide, disposal of evidence, and attempt to create an alibi could not conceivably indicate consciousness of guilt of conspiracy unless one first assumes that appellant, in fact, committed such a crime. (See *United States v. Durham* (10th Cir. 1998) 139 F.3d 1325, 1332; *United States v. Littlefield* (1st Cir. 1988) 840 F.2d 143, 149 [ruling that consciousness of guilt instructions should not be given where they, in effect, tell the jury "that once they found guilt, they could find consciousness of guilt, which in turn is probative of guilt.") Embodying such "circular" reasoning (*ibid.*) in a jury instruction permitting a jury to arbitrarily infer guilt therefrom would – and in this case did – constitute a clear denial of due process. (U.S. Const., 14th Amend.)

not tell us anything about degree," stating

> The trial court committed no error in refusing this modification to the standard flight instruction, which accurately conveys the potential significance of flight. "[T]he flight instruction '[does] not address the defendant's mental state at the time of the offense and [does] not direct or compel the drawing of impermissible inferences in regard thereto.' " (*People v. Nicolaus* (1991) 54 Cal.3d 551, 579-580, 286 Cal.Rptr. 628, 817 P.2d 893.)

(20 Cal.4th at 757[109].) As shown above, the consciousness of guilt instructions address "guilt" without limitation, and thus do address mental state at the time of the offense. Appellant submits that the holding in *Fudge* should be reconsidered.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instructions, and the denial of the requested modifications violated appellant's Sixth Amendment

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[109] Neither *People v. Nicolaus* nor *Crandell*, upon which *Nicolaus* relied, involved a request for a modification of consciousness of guilt instructions.

rights as well.

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

D. The Giving Of The Pinpoint Instructions On Consciousness Of Guilt Was Not Harmless Beyond A Reasonable Doubt

Giving the consciousness-of-guilt instructions was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, appellant's murder and conspiracy convictions as well as the special circumstance finding must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, supra, 386 U.S. at p. 24; see *Schwendeman v. Wallenstein, supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].)

The jurors in this case did not view the evidence in this case as clear-cut. They took at least six days of deliberation to reach their verdicts as appellant, and an additional four days of deliberation before they were

willing to deliver those verdicts to the trial court.[110] During deliberations, the jury sent out a number of requests, including requests for readback of the testimony of Evans (37RT:6771, 6781, 6791, 6798-6799, 6815) and Alvarez (37RT:6815, 6820), and a request for readback of the prosecution's opening statement, which request was denied by the trial court. (37RT:6832-6835, 6842.) (See, e.g., *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six hours of deliberations indicates case not open and shut, and that jury had misgivings about guilt]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine hours of deliberations indicates case not clear-cut].)

The jury was given unconstitutional instructions which related to a number of different activities reflected in the evidence presented to the jury, which magnified the argumentative nature of the instruction as well as its impermissible inferences. In the context of the untrustworthy evidence of Evans concerning the supposed meeting in the trailer at which the alleged conspiracy was formed, which was uncorroborated in any form, the evidence that Evans was lying about her own involvement in the violence inside 5223 Elm Street, the questionable identification, by Creekmore and Moyers, of appellant as the person who cut Ritchey's neck, and the conflicting evidence as to appellant's involvement in the killing of Raper (as to which the prosecution took the position that LaMarsh, rather than appellant, was the responsible party) the instructions were extremely prejudicial to appellant's case.

The prosecution specifically relied upon these instructions in

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[110] See 8CT:1794-1795, 1823-1827, 1831-1833; 9CT:1870-1871. The verdicts as to appellant and Beck were signed on the sixth day of deliberations, but the jury declined to return those verdicts to the trial court until their deliberations were compete, after another 4 days of deliberations. (7CT:1827; 9CT:2272-2285; 38RT:6847, 6853-6858.)

argument to the jury, noting evidence of concealment of weapons, false statements, and attempting to induce a person to alibi, as evidence of guilt not only of involvement in the violence at 5223 Elm Street, but involvement in the conspiracy. (37RT:6731-6732.) In the context of this case, these instructions were not harmless beyond a reasonable doubt. Therefore, the judgments of first degree murder, conspiracy and the special circumstance finding must be reversed.

Moreover, since appellant's death sentence relies on an unreliable guilt verdict, and the death verdict was not surely unattributable to the erroneous instruction (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279), the death sentence was obtained in violation of appellant's rights to due process, to a fair and reliable determination of penalty, and to be free from cruel and unusual punishment. (U.S. Const., 5th, 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.) The penalty judgment, must also be reversed.

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THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship*, *supra*, 397 U.S. at p. 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra*, 397 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

A. Instructions On Circumstantial Evidence Undermined The Requirement Of Proof Beyond A Reasonable Doubt (CALJIC Nos. 2.01, 2.02, 2.90, 8.83 and 8.83.1)

The jury was instructed that appellant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (8CT:1885; 36RT:6487 [CALJIC No. 2.90].) CALJIC No. 2.90 defined reasonable doubt 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. 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.

(8CT:1885; 36RT:6487.)

The terms "moral evidence" and "moral certainty" as used in the reasonable doubt instruction are not commonly understood terms. While this same reasonable doubt instruction, standing alone, has been found to be constitutional (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 13-17), in combination with the other instructions given in this case, it was reasonably likely to have led the jury to convict appellant on proof less than beyond a reasonable doubt in violation of his Fourteenth Amendment right to due process.

The jury was given four interrelated instructions – CALJIC Nos. 2.01, 2.02, 8.83 and 8.83.1 – that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. (8CT:1850,

36RT:6473 [CALJIC No. 2.01[111]]; 8CT:1939, 36RT:6508-6509 [CALJIC No. 2.02][112]; 8CT:1951-1952, 36RT:6512-6513 [CALJIC No. 8.83][113];

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[111] CALJIC No. 2.01 as read to the jury states:
However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.
Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.
If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(8CT:1850; 36RT:6473.)

[112] CALJIC No. 2.02, as read to the jury, states:
The specific intent or mental state with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not find the defendant guilty of the offenses charged unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required specific intent or mental state but (2) cannot be reconciled with any other rational conclusion.
Also, if the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the
(continued...)

8CT:1953-1954, 36RT:6513-6514 [CALJIC No. 8.83.1][114].)

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[112] (...continued)
absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state. If, on the other hand, one interpretation of the evidence as to such specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(8CT:1939; 36RT:6508-6509.)

[113] CALJIC No. 8.83, as read to the jury, states:

You are not permitted to find a special circumstance alleged in this case to be true based upon circumstantial evidence unless the proved circumstances are not only, one, consistent with the theory that a special circumstance is true, but cannot be reconciled with any other rational conclusion.

Further, each fact which is essential to complete a set of circumstances necessary to establish the truth of the special circumstance must be proved beyond a reasonable doubt.

In other words, before an inference essential to establish a special circumstance may be found to have been proved beyond a reasonable doubt, each fact or circumstance upon which such inference necessarily rests must be proved beyond a reasonable doubt.

Also, if the circumstantial evidence is susceptible of two reasonable interpretations, one of which points to the truth of a special circumstance and the other to its untruth, you must adopt the interpretation which points to its untruth and reject the interpretation which points to its truth.

If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.
(8CT:1951-1952; 36RT:6512-6513.)

[114] CALJIC No. 8.83.1, as read to the jury, states:

The specific intent or mental state with which an act is done may be shown by the circumstances surrounding its commission. But you may not find a special circumstance alleged in this case to be true unless the proved surrounding circumstances are not only:

(1) consistent with the theory that the defendant had the required

(continued...)

These four instructions, addressing different evidentiary issues in almost identical terms, advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (8CT:1850, 1939, 1952, 1954; 36RT:6473, 6508-6509, 6513-6514 .) These instructions informed the jury that if appellant *reasonably appeared* to be guilty, they were to find him guilty – even if they entertained a reasonable doubt as to his guilt. This repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to Due Process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15), trial by jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)[115]

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[114] (...continued)
specific intent or mental state but,

(2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state.

If, on the other hand, one interpretation of the evidence as to such specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.
(8CT:1953-1954; 36RT:6513-6514.)

[115] Although there is no record that defense counsel objected to CALJIC No. 2.01, 2.02, 8,83 or 8.83.1 and, at least initially, requested those (continued...)

First, the instructions not only allowed, but compelled, the jury to find appellant guilty on all counts and to find the special circumstance to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instructions directed the jury to find appellant guilty and the special circumstances true based on the appearance of reasonableness: the jurors were told that they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." (8CT:1850, 1939, 1952, 1954; 36RT:6473, 6508-6509, 6513-6514 .) An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty"

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[115] (...continued)
instructions (see 8CT:2117, 9CT:2228, 2229), the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (§§ 1259, 1469; see *People v. Flood*, *supra*, 18 Cal.4th at p. 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.) Merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request amplification or modification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith*, *supra*, 9 Cal.App.4th at p. 207, fn. 20.) Because the trial court bears the ultimate responsibility for instructing the jury correctly, the request for erroneous instructions will not constitute invited error unless defense counsel both (1) induced the trial court to commit the error, and (2) did so for an express tactical purpose which appears on the record. (*People v. Wickersham* (1982) 32 Cal.3d 307, 332-335, disapproved of on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3.) Here, neither condition for invited error has been met.

(emphasis added)].) Thus, the instructions improperly required conviction and findings of fact necessary to a conviction on a degree of proof less than the constitutionally-required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions improperly shifted the burden of proof to appellant by requiring the jury to find that the prosecution's interpretation of the evidence was correct, and hence that appellant was guilty as charged, if the prosecution's interpretation appeared to be reasonable and appellant did not produce a countervailing reasonable interpretation pointing toward his innocence. (Cf. *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.) The instructions thus created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by presenting the jury with a reasonable exculpatory interpretation.

"A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314 (emphasis added; footnote omitted).) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana*, *supra*, 442 U.S. at p. 524.)

Here, these instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." (8CT:1850, 1939, 1952, 1954; 36RT:6473, 6508-6509, 6513-6514 [emphasis added].) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element

of the crime unless the defendant raised a reasonable doubt as to the existence of that element. *A fortiori*, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

These instructions had the effect of reversing the burden of proof, since it required the jury to find appellant guilty unless he came forward with evidence explaining the incriminatory evidence put forward by the prosecution. The erroneous instructions were prejudicial with regard to guilt in that they required the jury to convict appellant if he "reasonably appeared" guilty, even if the jurors still entertained a reasonable doubt of his guilt.

The constitutional defects in the circumstantial evidence instructions were likely to have affected the jury's deliberations, given the conflicting nature of the evidence regarding appellant's personal culpability and the questionable reliability of Evans's testimony, especially about the existence of a conspiracy. As a result, the jury, while not unanimously crediting Evans's story of the meeting in the trailer, apparently accepted Willey and LaMarsh's theory that appellant and Beck had violent and criminal propensities, and that it was therefore more reasonable that they would have conspired separately and secretly, even though there was no evidence of such a separate conspiracy and consequently found appellant guilty on each count and the special circumstance to be true, even without being convinced that the prosecution had met its burden of establishing guilt beyond a reasonable doubt.

Moreover, the focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced appellant in another

way – by suggesting that appellant was required to present, at the very least, a "reasonable" defense to the prosecution case. Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.)

For these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant's guilt on a standard that is less than constitutionally required.

B. Other Instructions Also Vitiated The Reasonable Doubt Standard (CALJIC Nos. 1.00, 1.02, 2.21.2, 2.22, 2.27, 2.50, 2.51, 2.52, 8.20, 8.83 and 8.83.1)

The trial court gave eight other standard instructions and one substantially modified – specifically, CALJIC Nos. 1.00, 2.21.2, 2.22, 2.27, 2.50, 2.51, 2.52, 8.20, 8.83 and 8.83.1 – that magnified the harm arising from the erroneous circumstantial evidence instructions and individually and collectively diluted the constitutionally mandated reasonable doubt standard. (8CT:1839-1840, 36RT:6468-6469 [CALJIC No. 1.00]; 8CT:1867, 36RT:6477 [CALJIC No. 2.21.2]; 8CT:1863, 36RT:6479 [CALJIC No. 2.22]; 8CT:1863, 36RT:6479-6480 [CALJIC No. 2.27]; 8CT:1865-1866, 36RT:6480-6481 [CALJIC No. 2.50]; 8CT:1869, 36RT:6482 [CALJIC No. 2.51]; 8CT:1870, 36RT:6482 [CALJIC No. 2.52]; 8CT:1898-1899, 36RT:6493-6494[CALJIC No. 8.20]; 8CT:1951-1952, 36RT:6512-6513 [CALJIC No. 8.83]; 8CT:1953-1954, 36RT:6513-6514 [CALJIC No. 8.83.1].) Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test,

thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)[116]

Several of the instructions violated appellant's constitutional rights by misinforming the jurors that their duty was to decide whether appellant was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. CALJIC No. 1.00 told the jury that pity or prejudice for or against the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." (8CT:1840; 36RT:6469.) CALJIC No. 2.01, discussed previously in subsection A. of this argument, also referred to the jury's choice between "guilt" and "innocence." (8CT:1850; 36RT:6473.) CALJIC No. 2.51, regarding motive, informed the jury that the presence of motive "may tend to establish guilt," while the absence of motive "may tend to establish innocence." (8CT:1869; 36RT:6482.) CALJIC No. 2.52 informed the jury that flight after commission of a crime "may be considered by you in the light of all other proven facts in deciding the question of his guilt or innocence." (8CT:1870, 36RT:6482.) These instructions diminished the prosecution's burden by erroneously telling the jurors they were to decide between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt. They encouraged jurors to find appellant guilty because the evidence did not establish that he was

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[116] Although defense counsel failed to object to these instructions, appellant's claims are still reviewable on appeal. (See fn. 115, *ante* which is incorporated by reference here.)

"innocent."[117]

Further, CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on appellant to show an alternative to the motive advanced by the prosecutor. It also allowed the jury to rely on inferences of motive, from evidence not substantial enough to establish motive beyond a reasonable doubt, as supporting guilt. In this case, the evidence of motive was hardly compelling evidence of conspiracy, malice, premeditation or deliberation. The evidence established hostility between the residents of the Camp and Raper and his cronies, but that hostility did not establish homicidal intent. The prosecution conceded as much in argument to the jury:

> Maybe it doesn't make a lot of sense to you that you would take these masks and take these weapons and go over and kill four people. It hasn't made any sense me for two years, especially when the only motive is the fact that you don't like a couple of these people. I mean, it's not like they ripped you off for drugs or they hurt your family or something like that. It's a twisted mind that thought up this idea, and they all went along with it.

(37RT:6731.) Such evidence was too insubstantial and the inferences too

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[117] As one court has stated:

> We recognize the semantic difference and appreciate the defense argument. We might even speculate that the instruction will be cleaned up eventually by the CALJIC committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect *standing alone.*

(*People v. Han* (2000) 78 Cal.App.4th 797, 809, emphasis original.) *Han* concluded there was no harm because the other standard instructions, particularly CALJIC No. 2.90, made the law on the point clear enough. (*Ibid.*, citing *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739.) The same is not true in this case.

speculative to establish motive sufficient to explain the charged conspiracy and first degree murders. However, bolstered by CALJIC No. 2.51, it is likely that the jury concluded that the evidence and the speculation offered by the prosecution established appellant's guilt.

As used in this case, CALJIC No. 2.51 deprived appellant of his federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].)

Similarly, CALJIC No. 2.21.2 lessened the prosecution's burden of proof. They authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (8CT:1861; 36RT:6477 (emphasis added).) The instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[118] The

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[118] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses which does not convince you as against the testimony of a lesser number or other evidence which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(8CT:1862; 36RT:6479.) This instruction specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." As with CALJIC No. 2.21.2 discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (8CT:1863; 36RT:6479-6480), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact."

Appellant requested a modification of CALJIC No. 2.27 to remedy this flaw, requesting that the jury be instructed that

> Where the prosecution bears the burden of proof, the prosecution's position must be proven beyond a reasonable doubt. If that proof depends on a single witness the testimony of that witness must be believed beyond a reasonable doubt. [¶] If the prosecution's position would be rejected by belief of a single defense witness' testimony, then that single defense witness need only raise a reasonable doubt that [his][her] testimony is credible.

(9CT:2135.) The trial court denied the modification without explanation as to the quoted language. (35RT:6169-6170.)

Finally, CALJIC No. 8.20, defining premeditation and deliberation, misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition *precluding* the idea of deliberation. . . ." (8CT:1898; 36RT:6493 [italics added].) The use of the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation – as opposed to raising a reasonable doubt. (See *People v. Williams* (1969) 71 Cal.2d 614, 631-632, recognizing that "preclude" can be understood to mean "'absolutely prevent'".)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are

being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction upon a lesser showing – that he or she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in section A of this argument.

C. The Court Should Reconsider Its Prior Rulings Upholding The Defective Instructions

Although each one of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [addressing CALJIC Nos 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC Nos. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].) While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and

should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the challenged instructions, as given in this case, explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[119] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

D. Reversal Is Required

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

Here, that showing cannot be made. The prosecution's case was not strong, especially as to the charge of conspiracy, which relied almost entirely upon an accomplice whose credibility was in substantial question, and upon whom the jury did not unanimously rely. While each of the four codefendants, including appellant, admitted being at the scene, the evidence cast substantial doubt upon the existence of any conspiracy, and substantial evidence raised questions about appellant's mental state, i.e., whether he acted with premeditation and deliberation or not, with malice or not, or as an aider and abettor or not. Nor did the jury see the case as clear-cut, as shown

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[119] A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

by the need for at least six days of deliberation.[120] Moreover, the inflammatory evidence and tactics of counsel for Willey and LaMarsh casts substantial doubt upon the reliability of the jury's verdicts as to appellant. (See Args. I, II, *ante*.)

Given such a state of the evidence, the importance of circumstantial evidence, and how the jury is instructed to consider it, is crucial to the jury's evaluation of the credibility, accuracy or reliability of the various codefendants and accomplices and the stories they told. Similarly, the need for strict adherence by the jury to the reasonable doubt burden of proof is crucial. That these instructions distorted the jury's consideration and use of circumstantial evidence, and diluted the reasonable doubt requirement the reliability of jury's findings into substantial question.

The dilution of the reasonable-doubt requirement by the guilt-phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra,* 33 Cal.3d at p. 505.) Accordingly, the judgment on each count and the Special Circumstance allegation must be reversed.

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[120] See fn. 110, *ante*.

XI

APPELLANT WAS DENIED HIS RIGHT TO BE PRESENT AT CRITICAL STAGES OF HIS TRIAL

Appellant's rights under the federal and state constitutions and state statutes were violated by the court's actions in excluding appellant from critical proceedings at trial. Throughout the trial proceedings, the trial court and counsel held "sidebar conferences" in a hallway outside the courtroom. These hearings were, almost without exception, conducted outside the presence of appellant and the codefendants, who remained in the courtroom. No reason was given for the defendants' blanket exclusion other than convenience, and appellant at no time waived his right to be present at the proceedings discussed in this argument. Moreover, appellant's complete exclusion from the many lengthy hallway discussions, which the jurors knew often involved critical rulings by the court, contributed to an overall isolation and marginalization of appellant throughout the trial.

In addition, the trial court failed to take a personal waiver of appellant's right to be present during proceedings conducted after the matter had been submitted to the jury for deliberation, and the purported waiver of appellant's presence given by counsel did not address a number of the proceedings which took place thereafter without appellant being present. During those proceedings, there were numerous requests from the jurors – for exhibits, for exhibit lists, for readback of testimony, for clarification of instructions – and the jury was returned to the courtroom for responses to those questions, which included supplemental instructions given by the trial court. Jurors were also questioned by the trial court as a group, and individually as to some of the jurors, as the trial court conducted inquiries into possible juror misconduct, or exposure to material not admitted into

evidence. In addition, counsel for appellant and for codefendants made motions for mistrial during these proceedings.

The trial court's failure to ensure that appellant was afforded his rights to be present at all critical stages of his capital case violated his right to due process under both state and federal law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7 and 15.)

A. Relevant Law

A criminal defendant has a right to be present at trial under the Due Process Clause of the Fourteenth Amendment. (*Snyder v. Massachusetts* (1933) 291 U.S. 97, 106-107; *United States v. Gagnon* (1985) 470 U.S. 522, 526.) "A leading principle that pervades the entire law of criminal procedure is that after indictment found, nothing shall be done in the absence of the prisoner." (*Lewis v. United States* (1882) 146 U.S. 370, 372; see also *Hopt v. Utah* (1893) 110 U.S. 574.) The defendant's presence is required "at all stages of the trial where his absence might frustrate the fairness of the proceedings." (*Faretta v. California* (1975) 422 U.S. 806, 819 fn. 15, citing *Snyder v. Massachusetts*, *supra*; *Shields v. United States* (1927) 273 U.S. 583, 588-589 [defendant entitled to be present "from the time the jury is impaneled until its discharge after rendering the verdict."]; *United States v. Smith* (6th Cir. 1969) 411 F.2d 733, 736 ["We view the presentation of evidence, the charge to the jury, the return of the jury's verdict and the imposition of the sentence as one continuous proceeding. Each stage interlocks with and is dependent upon the other to make up the complete criminal prosecution."]

While the right to be present does not encompass bench conferences solely involving questions of law or routine procedural discussions on

matters which do not affect the outcome of the trial (*People v. Perry* (2006) 38 Cal.4th 302, 312), it does encompass proceedings which are critical to the outcome of the case where the defendant's presence would contribute to the fairness of the proceeding, including proceedings involving communications to and from the jury during deliberations, such as for further instructions, readback of testimony or any other communication regarding the case. (*Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 814-815, overruled on other grounds by *Tolbert v. Page* (9th Cir.1999) 182 F.3d 677 [readback of testimony outside presence of defendant without personal waiver is constitutional error]; *Hegler v. Borg* (9th Cir. 1995) 50 F.3d 1472, 1473-1478 [same]; *Bustamante v. Eyman* (9th Cir. 1972) 456 F.2d 269, 271-272, overruled on other grounds, *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 672, fn.2 ["The right of a defendant charged with a felony to be personally present in the courtroom at every stage of his trial conducted there is fundamental to our system of justice"; includes right to be present whenever the court communicates with the jury].)

This right is rooted in the confrontation clause of the Sixth Amendment, and the due process clause of the Fifth and Fourteenth Amendments. (*United States v. Gagnon*, *supra*, 470 U.S. at p. 526; *Pointer v. Texas, supra,* 380 U.S. at p. 403; *Bustamante v. Eyman*, *supra*, 456 F.2d at p. 273.)

If a defendant is denied his constitutional right to be present during a critical stage of criminal proceedings, the reviewing court must evaluate the nature of the error. Reversal is automatic if the defendant's absence constitutes a "structural error," that is, an error that permeates "[t]he entire conduct of the trial from beginning to end," or "affect[s] the framework within which the trial proceeds." (*Arizona v. Fulminante* (1991) 499 U.S.

279, 309-10.) On the other hand, harmless error review is appropriate if the defendant's absences constitutes a "trial error," that is, an error which "occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Id.* at pp. 307-08; *Rushen v. Spain* (1983) 464 U.S. 114, 117-18, fn. 2; *see also Campbell v. Rice* (9th Cir. 2002) 302 F.3d 892, 898.)

A defendant also has a right to be present at trial under state statutory (see §§ 977, 1043) and constitutional law (see Cal. Const., art. I, section 15).[121] Section 1043 requires that "the defendant in a felony case shall be personally present at the trial." Section 977 provides for a defendant's absence only in limited circumstances, and then only when "he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present."

This Court has interpreted state law regarding a defendant's presence to mean that "when the presence of the defendant will be useful, or of benefit to him and his counsel, the lack of presence becomes a denial of due process of law." (*People v. Jackson* (1980) 28 Cal.3d 264, 309-310, disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn.3; internal citations omitted.) Absent a valid waiver, defendant must be present at those stages of the trial where his absence would prejudice his case or deny him a fair and impartial trial. (*People v. Douglas* (1990) 50 Cal.3d 468, 517; *People v. Hovey*, *supra*, 44 Cal.3d at p. 585.)

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[121] Article I, section 15 provides in relevant part that, "The defendant in a criminal cause has the right . . . to be personally present with counsel. . . ."

On the other hand, under state law a defendant "is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him, and the burden is upon him to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial." (*People v. Beardslee* (1991) 53 Cal.3d 68, 103.) On appeal, this Court's review is de novo. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 742.)

B. Proceedings Below

1. Sidebar Proceedings During Trial

Sidebar conferences, conducted outside the presence of the defendants, took place in a hallway outside of the courtroom because it was "more convenient for the Court to have these sidebar conferences here than having the jury leave the courtroom each and every time there's a sidebar conference. And the manner in which the courtroom is set up, a sidebar conference in the courtroom would take place absolutely immediately adjacent to the jurors." (22RT:3799-3800.) A number of those conferences involved substantial argument by counsel, including requests for mistrial and severance[122/]

During cross-examination of appellant by counsel for LaMarsh, a sidebar conference was held upon a relevance objection by counsel for appellant to the question of whether appellant had ever lived with Rosemary McLaughlin. (29RT:5143.) The conference extended over 12 pages of transcript (RT:5143-5154), and included allegations of facts which were not in evidence, e.g., that while a McLaughlin was Beck's girlfriend, appellant issued a command that she should marry appellant, and Beck informed McLaughlin that she should do so (29RT:5144), that McLaughlin had made

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[122] See Args. I, II, *ante*.

a police report about them several years before (29RT:5145-5146), and a document purportedly written in code which was claimed to be a communication about the case between appellant, Vieira and Beck. (29RT:5147.) There were explanations of LaMarsh's defense theory concerning the "tightly knit association" of appellant, Vieira and Beck, including allegations that the three operated secretly with each other at the expense of other individuals, and committed violent acts and threatened people who would not go along with their plans (29RT:5144-5147), that appellant had fashioned himself as some type of high priest and gathered a number of people around him to do his bidding, and had made a statement that "the purest thing one could do is sacrifice a newborn baby." (29RT:5149-5150.) Counsel for Willey identified a number of people he claimed were relevant to his theory that appellant, Vieira and Beck and others lived in a communal situation of which Willey had never been part. (29RT:5145, 5148-5149.) There were discussions regarding possible coercion defenses, discussions about whether LaMarsh had joined the group voluntarily and whether he had wanted to join another group called "the Red and White Aryan Brotherhood." (29RT:5150-5151.)

During cross-examination of appellant by counsel for Willey, appellant was asked whether he knew Rosemary McLaughlin. Again an objection was interposed and a sidebar conference conducted. This conference extended over 13 pages of transcript. (30RT:5207-5218.) During this conference, counsel for Willey, joined by counsel for LaMarsh, discussed his intention to ask whether appellant had threatened to kill McLaughlin because she betrayed him, arguing that it would show a propensity towards violent acts on those he feels have betrayed him. (30RT:5207.) The question was based upon allegations discussed at other

proceedings from which appellant had been excluded. (30RT:5208.)[123] Counsel for Willey also indicated that an Officer Cerny would be able to testify to a "series of incidents and reports" McLaughlin had made of Beck and appellant threatening her. (30RT:5209.) He also wanted to ask appellant about three named "former associates" of appellant whom appellant had allegedly threatened. (30RT:5214-5215.) Counsel for both LaMarsh and Willey indicated they would call McLaughlin as a witness to testify about appellant putting a rifle in her mouth and threatening to kill her. (30RT:5216.) The trial court sustained the objection to cross-examination of appellant about these matters, but did not preclude Willey or LaMarsh putting such evidence on in their own cases. (30RT:5211-5212, 5214-5215.)

Soon after that sidebar conference, another was held after a question about where appellant was housed in the Stanislaus County Jail. This conference, which only covered five pages of transcript (30RT:5222-5226), included a motion for mistrial by counsel for Beck, joined by counsel for appellant, based upon inappropriate and prejudicial comments made by counsel for LaMarsh (30RT:5222-5224) and an admonition by the trial court that counsel make legal objections, not direct comments at each other. (30RT:5225.)

During direct examination of LaMarsh, another sidebar, extending over 14 pages (32RT:5602-5615), was held upon objection by counsel for appellant to the line of questioning. Again, counsel for LaMarsh discussed

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[123] During a previous hearing from which all defendants were excluded, there was discussion and testimony taken regarding an alleged threat by appellant against Rosemary McLaughlin, overheard in court by an undisclosed person, and reported to the prosecution by Mr. Tangle, co-counsel for Mr. Willey, who declined to identify the source of his information. (SeeRT:2/27/92: 1403-1428;RT:3/2/92: 1429-1448.)

his theory that appellant, Beck and Vieira were a closely knit group, that one was the enforcer, one the leader, and one the slave, that they were secretive, had a separate agenda, were capable of planning other events, not telling others, then manipulating those others to do their bidding; that appellant manipulated LaMarsh into his involvement with them, that LaMarsh had no prior problems with Raper or the others, that all the problems are manifestations of appellant's deviancy and desire to go down in history. (32RT:5602.) Counsel for appellant argued that if such evidence was relevant to LaMarsh's defense, a joint trial should not continue, and a mistrial should be granted. (32RT:5603-5604.) Counsel for Willey argued that the evidence was necessary to his defense, and argued there was evidence that appellant, Beck and Vieira had a pattern of recruiting people with low self-esteem, befriending them, offering to help them, and requesting small, but increasingly larger, favors until they were demanding total obedience and subservience as the price of their support. (32RT:5606.) Counsel for LaMarsh referred to statements by Vieira regarding planning which were not admitted or admissible in this case. Counsel for Willey argued he was trying to establish appellant's total domination over Beck and Vieira. (32RT:5608-5609.) Counsel for LaMarsh presented a theory that LaMarsh accompanied them to 5223 Elm under duress, not as a member of a conspiracy. (32RT:5610-5612.) The trial court ruled that inquiry could made about whether LaMarsh thought the three constituted a group, whether he joined, and why or why not, but could not address anything like Nazi-ism, White Aryan supremacy or the occult. (32RT:5613.) Counsel for Willey argued that evidence of their racial, political and religious philosophies could be shown through a number of witnesses, and was a key to show the domination of appellant over Beck and Vieira. (32RT:5613-5614.)

During Willey's case, a sidebar conference extending for eight pages (33RT:5941-5948), included a discussion of the witnesses remaining to be called. The prosecutor stated that he anticipated counsel for Willey was "going to try to get into the area of the occult and black magic and so forth again." (33RT:5942-5943.) Counsel for Willey stated that he was going to attempt to show Willey's entire relationship with appellant, Beck and Vieira, as well as with other people, and present other witnesses, such as Rosemary McLaughlin, who had been under appellant's control, broke away from that control, but remained friends, albeit with a certain amount of fear. He stated his contention that appellant "is exactly the evil man that [the prosecutor] has portrayed him to be. . . ." (33RT:5943, 5945-5946.) Counsel for LaMarsh argued that exclusion of this evidence would deny LaMarsh due process and a fair trial. (33RT:5946-5947.) Counsel for Willey stated that if the evidence was excluded, he would move the court for a mistrial and for severance. (33RT:5948.)

2. Jury Questions, Supplemental Instructions and Voir Dire of Jurors During Guilt Deliberations

On May 19, 1992, the guilt phase case was submitted to the jury, with deliberations to begin the next morning. (37RT:6761-6763.) After the jury retired, the trial court requested a stipulation from trial counsel "so far as possible jury questions, . . . that we can deal with those on the record with the reporter present and you're present without your clients being present so they don't have sit around their holding cell all day?" Counsel for appellant stated he had no objection. (37RT:6766.) No personal waiver was taken from any defendant.

Soon after deliberations began, the jurors asked the bailiff if they could have a list of the exhibits. The bailiff informed the trial court, which told him to tell the jurors they could not have the list, and that any further

questions should be in writing. These communications were made without advance notice to defense counsel. (47RT:6771.) Shortly thereafter, the jury sent out three written questions. One asked to hear Evans's testimony again; another asked for a list of the photographic slides in evidence and a description of them; and the third was a request by one juror (Mr. Rall) as to whether or not he could share the contents of a newspaper article regarding eyewitness identification with the rest of the jury. (37RT:6771, 6773, 6776-6777.)

The trial court informed trial counsel of these requests, the initial responses made through the bailiff, and the court's intended response to the written questions that afternoon without appellant or his codefendants present. (37RT:6771 et seq.) As to the first request, the trial court said it would order Evans's testimony, excised of comments by the attorneys or by the court, any questions or answers that were objected to, and sidebar conferences, to be read to the jury, would order the jury not to say anything other than that they had heard what they wanted to hear and that no further reading of particular testimony is necessary, and would order the reporter to mark what was read. Counsel for the prosecution, for appellant, for Beck and for Willey each waived their presence while the testimony was read. Counsel for LaMarsh indicated he would have to discuss it with his client. He later waived LaMarsh's presence. (37RT:6771-6773, 6798.)

As to the second request, the trial court indicated that the clerk had gone through the evidence list and scratched out or obliterated all exhibits that were not admitted, and proposed to provide the jury with the redacted list. The prosecutor had prepared a handwritten list of exhibit numbers for the slides as well as the slot in the carousel corresponding to each slide. The clerk then informed the trial court that the prosecutor's handwritten list had

already gone into the jury, before lunch. No objection was raised. Upon review by counsel of the redacted exhibit list, however, it was discovered that four exhibits which had not been admitted into evidence, i.e., the reports of the autopsies of the four victims, were shown as having been admitted into evidence, and had been sent into the jury room. (37RT:6773-6776.) Counsel for appellant objected to those exhibits being provided to the jury and asked for an inquiry to determine if the jurors had reviewed them. (37RT:6776.)

As to the third request, counsel for appellant objected to the newspaper article being shared with the other jurors and asked for juror Rall to be excused from the jury. (37RT:6776-6777.) Counsel for LaMarsh objected to that request. Counsel for Willey argued that the trial court should allow the article to be shared with the other jurors. (37RT:6778.) The trial court indicated that assuming that Mr. Rall had not discussed the article with any of the other jurors, counsel would be allowed to question Mr. Rall outside the presence of the other jurors. (37RT:6778) Counsel for appellant indicated he did not wish to ask questions himself. (37RT:6778-6779.) The trial court asked defense counsel if any of them wanted their clients present while Mr. Rall was questioned. All defense counsel said no. (37RT:6779.)

The trial court had the jury brought out and, without the defendants being present, informed them that "This is a part of the trial where [the defendant's] presence is not required and they have waived their presence during any questions asked by the jury, unless they specifically wish to be here." (37RT:6780.) The trial court confirmed with the jury's foreperson that they had received the exhibit list and the two-page list of slides. Trial court also informed the jury that Evans's testimony would be read to them,

but instructed them that they were not to talk, ask questions or make comments while the reporter was reading the testimony, with the exception that when they had heard all they wished to hear, they could tell the reporter to stop. Trial court also informed the jury that the presence of the defendants or the attorneys was not required during the readback, but that if they wished to be present the readback would occur in the courtroom. Otherwise it would occur in the jury room. (37RT:6781-6782.)

The trial court also inquired of the jury whether anyone had looked at the autopsy reports. One juror had just looked at them to see what they were, two others had read the autopsy report of Ritchey, particularly looking at the descriptions of the wounds shown in the slides, a fourth juror read the reports of Ritchey, Colwell and Paris, a fifth juror read part of the report of Raper and a description of his wounds, and a sixth juror "specifically noted a weight of a vital organ. I don't even know what it is." (37RT:6782-6784.)

The trial court also asked whether the newspaper article referred to in the third question for the jury had been discussed by the jury. Mr. Rall said that he wanted to run it by the court before doing so, and Mr. Daniels indicated he had not read the article. (37RT:6784.) The trial court then questioned Mr. Rall outside the presence of the other jurors. Mr. Rall indicated the article was about eyewitness testimony. He said it did not influence him in any way, and that he did not learn anything in the article that he didn't know before. He stated "That article pertains to the comments Mr. Amster made about attending a baseball game, more or less, the guy crashed into the fence and someone else says, no, he didn't."[124] (37RT:6785-6786.) None of the attorneys questioned Mr. Rall.

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[124] The reference is to closing argument by counsel for appellant. (See 36RT:6522.)

(37RT:6786.) The trial court instructed Mr. Rall not to discuss the article with other jurors, but said that he could discuss his common sense with other jurors whether it agreed or disagreed with the article. (37RT:6786-6787.)

After Mr. Rall returned to join the other jurors, the trial court provided the four autopsy report exhibits to counsel to review, asking that if there was anything in them the jury had not heard and should not have heard, to inform the trial court. (37RT:6787.) After a five-minute recess, counsel for Willey moved for a mistrial on the grounds that it was totally improper for those exhibits to have gone into the jury room, and he had no idea what the jurors might conclude from the reports as opposed to the photographs and testimony of Dr. Ernoehazy. He indicated he would have to fully review Dr. Ernoehazy's testimony to determine if there was anything in the reports that the jurors did not hear in oral testimony. (37RT:6787-6788.)

Counsel for appellant also moved for a mistrial, although he had only read three of the four autopsy reports at that point, and had not been able to look at all of Dr. Ernoehazy's testimony. He argued that in the autopsy reports of Raper and Colwell, there are references to aspiration of blood on the neck, which would contradict Dr. Ernoehazy's testimony concerning whether either was dead at the time of slicing wounds to the neck. He argued further that "I never had a chance to cross-examine Dr. Ernoehazy on that point" as to Raper, and it was not brought up during testimony concerning Mr. Colwell. "If I had known that these things were being entered into evidence, I would've cross-examined on points that are not in." (37RT:6788-6789.)

Counsel for Beck joined in the comments and motions for mistrial of other counsel. (37RT:6789-6790.) Counsel for LaMarsh objected to the autopsy reports being introduced as evidence, arguing there are a number of

medical terms with which he was not familiar, doesn't know if the jurors are familiar with the terms and thinks they could draw improper conclusions. He stated that there is one particular piece of evidence in Raper's autopsy report inconsistent with Dr. Ernoehazy's testimony and while he didn't recall all the details of Dr. Ernoehazy's testimony, was sure there are other comments he could direct to the court. He thought it was premature to declare a mistrial without further questioning of the jurors. (37RT:6789.) The prosecutor argued that there were no matters of consequence in the autopsy reports, and if there was any error, it was harmless. (37RT:6791.) Counsel for Willey added that numerous medical terms in the reports outside of common knowledge would lead jurors to either consult an outside reference for explanation or guess as to their meanings. (37RT:6791.)

The trial court asked counsel to review the autopsy reports and compare them with Dr. Ernoehazy's testimony, and by Tuesday, point out page and line of any part of the autopsy report that was not presented to the jury through Dr. Ernoehazy 's testimony and which the jury should not hear. The jury would be instructed in the mean time not to discuss the autopsy reports. Trial court stated that unless it was convinced that there is something in the reports that the jurors should not have seen, a mistrial would be denied. Even if there was something the jurors should not have seen, only four jurors had read any detail, and could be replaced with alternate jurors if there had been no discussions with other jurors. (37RT:6791-6793.)

The jury returned to the courtroom, and was instructed not to discuss anything read from the autopsy reports. The trial court inquired as to whether anything had been specifically discussed from the autopsy reports among all the jurors. Juror Lawler responded, "no." The jury then returned

to the jury room to hear readback of Evans's testimony. (37RT:6796-6797.)

On May 29, 1992, the sixth day of deliberations, again outside the presence of the defendants,[125] the trial court indicated it had received two questions from the jury, a request for readback of the prosecutor's opening remarks, and a question regarding instructions:

> If we find the defendant guilty of conspiracy to commit murder and proceed to completing the individual murder counts, does the finding of first, second degree murder need or have to be the same for all four counts?

(38RT:6832-6833.) Counsel all agreed that readback of the prosecutor's opening remarks was improper, and that the answer to the instructional question was, "no." The jury was brought in, and the trial court denied the first request and said the answer to the second question was, "no." In response to a question from the trial court, the jury foreperson indicated that they would not have complete verdicts that afternoon. (38RT:6832-6836.)

On June 1, 1992, again outside the presence of the defendants, the trial court informed counsel that another question had come from the jury the previous session: "Should we turn in completed jury forms, (1), when we complete an individual defendant, (2), when we complete all defendants?" Counsel for appellant, LaMarsh and Willey agreed that all verdicts should be considered before they were returned. The prosecutor thought that completed verdicts could be turned into the court and kept under seal. (38RT:6838-6841.) The trial court indicated that if the jury came out with verdicts as to individual defendants, the verdict would be taken and announced, not sealed. (38RT:6847.) The trial court also informed counsel that the jury had requested a readback of LaMarsh's testimony.

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[125] On May 26, there was an additional proceeding at which the defendants were present. (37RT:6800-6825.)

(38RT:6841.)

When the jury was brought out, the trial court instructed them that they could return completed verdicts before deciding on all defendants and counts, or they could retain completed verdicts until everything was decided. The trial court further instructed them that if they announced any verdicts for one or more defendants, those verdicts would stand and could not be changed, even if jurors had second thoughts while deliberating further on other defendants. (38RT:6847.) The foreperson of the jury informed the trial court that they might not need LaMarsh 's testimony to be read. (38RT:6848.)

After the jurors returned to deliberations, the trial court asked counsel for their position on the presence of defendants when partial verdicts are returned, and suggested the attorneys discuss it with her clients. (38RT:6848-6849.)

Counsel for appellant argued that if partial verdicts were returned only the affected defendants should be present. He expressed a concern of a violent reaction by appellant to a negative verdict, and expressed discomfort of having appellant sitting behind him at such a time. He stated he would like to be behind his client or away from him, and didn't think it made a difference of how it looked to the jury at that point. (38RT:6849-6850.)

Later that afternoon, again outside the presence of the defendants, the trial court informed counsel that the jury had sent a note stating that they were unable to reach an agreement on the charge of conspiracy to commit murder for LaMarsh. The jury was brought out, and the foreperson indicated that the note did not suggest that they arrived at verdicts for the other three defendants on all charges nor that they had arrived at verdicts for LaMarsh as to all other charges. They were still deliberating on guilt or innocence of

other defendants, but not all of them, and had suspended deliberations on other charges as to LaMarsh. (38RT:6853-6854.) The foreperson also asked the court, "if we had not reached an agreement or we are saying that we have not reached an agreement on Defendant LaMarsh on a charge of conspiracy, we are to continue to deliberate on the other four charges?" The trial court instructed them to continue deliberating on all defendants, all charges, but if they arrived at verdicts on all counts for any particular defendant, they could announce that it if they so wished. If they reached a position where they were ready to announce as many verdicts as they believed they could and that on some counts as two or more defendants they were going to be unable to reach a verdict, they could bring that to the court's attention. The trial court also indicated that the jury had requested readback of the testimony of Creekmore and Moyers, which would be done the next morning. (38RT:6855-6857.)

While giving the above instruction, the trial court referred to the possibility of a mistrial if the jury could not reach a verdict. After an objection by counsel for LaMarsh outside the presence of the jury, the trial court instructed the jury that they were not to concern themselves with what would occur if they were unable to reach a verdict as to a particular count. (38RT:6857-6858.)

The next day, again outside the presence of the defendants, the trial court informed the attorneys that, since the court's last contact with the attorneys, the jury had requested that a small portion of LaMarsh 's testimony (dealing with masks) be again reread, and the court reporter reread that portion. (38RT:3862.) The trial court then informed the attorneys of another request for a portion of Willey's testimony, described as "the portion from the time Missy and Jason get out of the car at Elm Street to the time

they leave the area of the house to the car." The trial court then provided the attorneys the page and line numbers of that portion of Willey's testimony for their review, to see if there were any portions that should not be read, or other portions that should be read. (38RT:3863.)

The jury had also sent out a question regarding instructions:

> If we cannot reach an agreement on a conspiracy charge and begin to consider the individual charges of murder, should an individual who feels that a defendant is guilty of conspiracy put that feeling aside and only consider the direct evidence linking the defendant and a specific victim or hold their feeling that if the defendant is guilty of conspiracy the defendant is guilty of the crimes against all the defendants.

(38RT:6863.) After discussion, the jury was brought out and, without the defendants present, were instructed as follows:

> If the jury does not find a particular defendant guilty of conspiracy, neither the jury, nor any individual juror, can find a defendant guilty of a crime based on the theory that it was an act done in the furtherance of the alleged conspiracy. However, the failure to find a defendant guilty of conspiracy does not preclude the juror, any individual juror, from determining whether the defendant is guilty of any crime on any individual victim as an aider and abettor.
>
> I refer you back to CALJIC 3.00 and 3.01, which you have with you in the jury room, which defines aiding and abetting.
>
> Any juror who believes an individual defendant did not aid and abet a particular crime can only consider that defendant's guilt as to that crime based on that defendant's own commission of that crime which can be based on direct or circumstantial evidence.

(38RT:6878.)

The next day, with all defendants present, the jury informed the court that they had reached unanimous verdicts against two of the defendants but had been unable to reach unanimous verdicts on any charge against the other

two defendants, and felt any further deliberation would be unproductive. (38RT:6881.) The verdicts against appellant and Beck were then announced and recorded. (38RT:6882-6894.) The trial court ordered the jury to continue deliberations on the remaining defendants. Appellant and Beck were remanded to custody. (38RT:6894-6895, 6900.) Later in the afternoon, after objection by counsel for LaMarsh and Willey, the jury was returned to court and questioned by the trial court regarding its ability to reach verdicts. The trial court then granted a mistrial as to LaMarsh and Willey, and inquired of the jury foreperson the splits in the vote as to those two defendants. Neither appellant nor his attorney were present during this last proceeding with the jury. (38RT:6898-6906.)

C. The absence of appellant from substantial portions of the proceedings violated his constitutional and statutory rights to be present.

The sidebar conferences described above and the proceedings during guilt deliberations were critical stages of the trial at which appellant had a constitutionally guaranteed right to be present. These were not discussions of strictly "legal" or "procedural" matters, but were proceedings critical to the outcome of the case.

Appellant's presence at each of the proceedings had a substantial relationship to his opportunity to fully defend against not only the charges against him but the additional allegations of wrongdoing, of "evil," pressed by the codefendants with whom he was forced to trial. The sidebar conferences involved lengthy discussions and argument about the defense theories of codefendants LaMarsh and Willey which were antagonistic and prejudicial to appellant, about evidence which the codefendants sought to introduce, and included motions for mistrial and for severance from his codefendants. His presence at those conferences would unquestionably have

been "useful, or of benefit to him and his counsel." (*People v. Jackson*, *supra*, 28 Cal.3d at pp. 309-310.) His absence was prejudicial even under the *Beardslee* test, and denied him due process.

In his discussion of the necessity of having the defendant present to assist the trial court, as well as counsel, Chief Justice George in his dissenting opinion in *Ayala*, gave as an example the following scenario:

> If the prosecution stated that it challenged a juror because the juror was a neighbor of or lived near the defendant, a trial judge unfamiliar with the juror's neighborhood might not be able to determine whether this was so, but defense counsel (possibly assisted by the defendant) might be able to shed light upon the matter.

(*People v. Ayala*, *supra*, 24 Cal.4th at p. 293, fn. 3, disn. opn. of George, C.J.) This reasoning applies equally to a number of proceedings from which appellant was excluded that are discussed here.

The "sidebar conferences" complained of here each initially dealt with the admissibility of evidence, or the propriety of cross-examination, but expanded to discussions of facts as well as law, questions of what evidence may have been admitted already and what evidence might be introduced later in the trial, and some resulted in rulings which were applicable not only to a specific objection made, but to the future conduct of the trial, identifying the scope of evidence or cross-examination which would be allowed, as well as under what circumstances it might be allowed. Certain of the sidebar conferences devolved into arguments between counsel about the relative merits of their respective defenses, and even the relative culpability of the four codefendants. Simply put, these sidebar conferences were critical to the outcome of the trial.

Certainly, appellant's presence was needed during these proceedings to protect his interests, assure himself a fair trial, and assist counsel in

defending the case. In *People v. Holt* (1997) 15 Cal.4th 619, this Court found that the defendant's absence from various trial proceedings – discussions of evidentiary motions, admissibility of defendant's statements and possible objections to an anticipated question by the prosecutor – did not interfere with his Sixth Amendment right to confront and cross-examine the evidence against him. (*Id.* at pp. 707-708.) However, in its decision, this Court relied on the fact that the defendant prevailed in each of the matters discussed – either the trial judge's ruling went his way or the prosecutor offered no objection to the defense request. (*Id.* at p. 707.) In this case, of course, the defense did not prevail in all of the disputed issues.[126]

The arguments at these sidebar conferences generally involved factual issues about which appellant had relevant personal knowledge. Had appellant been present during these discussions with the trial court, it is reasonably probable that he could have assisted his attorney in responding to the factual arguments and allegations of counsel for Willey and LaMarsh made during the conferences, providing his attorney with information needed to marshal the most effective legal argument, and bolstering his attorney's attempts to exclude the prejudicial evidence which Willey and LaMarsh sought to introduce.

In the recent case of *People v. Cole* (2004) 33 Cal.4th 1158, 1230, this Court found the even a defendant's absence from a hearing on a defense motion to continue "require[d] greater discussion," than his absence from other proceedings such as bench conferences. This Court ultimately ruled that his absence from the hearing on the motion to continue was harmless because when the defendant arrived after the proceedings, he was informed

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[126] Rulings adverse to appellant at certain of the hearings are the subject of Argument I and II, *ante*.

of what had happened and because there was nothing the defendant could have done to assist his attorney at the hearing. (*Id.* at p. 1231.) Neither can be said about the circumstances in appellant's case. The hearings in the present case are more akin to a pretrial evidentiary hearing or motion to sever than the routine motion to continue in *Cole*, and mandated appellant's presence.

Similarly, appellant's presence at the proceedings during jury deliberations would have been useful or of benefit to appellant or his counsel. As an example, counsel for appellant indicated that he did not wish to ask any questions himself, and in fact asked no questions, of Mr. Rall regarding the newspaper article Mr. Rall sought to share with the rest of the jury. (37RT:6778-6779.) Had appellant been present, he would have had the opportunity to consult with counsel on the advisability of failing to examine a juror, in whose hands appellant's fate rested, regarding his apparent violation of the trial court's admonition "not to . . .read, listen to, watch anything about this matter, seek any information, read any literature that you might think inappropriate." (See, e.g., 18RT:3217.) Appellant could have, for instance, urged counsel to press for information from Mr. Rall about how he came to read the article, and why he did not stop reading it after recognizing the subject matter. The trial court did not ask such questions of Mr. Rall, and, of course, neither did counsel for appellant.

Appellant's absence from the hearing also denied him the opportunity not only to directly hear Mr. Rall's verbal responses to the questioning of the court, but also to assess his "facial expressions, demeanor and other subliminal responses as well as the manner and tone of [his] replies." (*People v. Sloan, supra*, 592 N.E.2d at p. 787.) He was thus deprived of the opportunity to make his own independent judgment of Mr.

Rall's credibility and the reliability of his responses and to thereby come to a knowing and intelligent decision regarding any appropriate motions to make based thereon.

Even more fundamentally, because of his absence from most of those proceedings, it is not clear that appellant was even aware that there *was* an issue of juror exposure to improper matters that had to be addressed. In short, due to his absence from the proceedings, appellant was denied the opportunity to provide any informed input into matters that plainly impacted his right to a trial by an impartial jury, and to fair and reliable guilt, special circumstance, and penalty determinations. (U.S. Const. 6th, 8th & 14th Amends.)

Had appellant been present when jurors were questioned about the autopsy reports, he would have had an opportunity to observe not only those who responded that they had seen the reports, but those who did not so respond, and to come to his own independent judgment regarding advisability of pursuing further inquiry on the subject, and to consult with counsel with the opportunity to provide informed input into any decisions that might be called for.

Regarding the reading of testimony to the jury, appellant could have urged counsel to object to the trial court's instruction that the jurors could cut off the reading of the testimony without having heard the entirety of the testimony. Allowing the jury to cut off the reading of testimony raises the risk that crucial cross-examination or impeachment might not be heard or fully considered by the jurors, resulting in undue emphasis upon the prosecution's examination of the witness, or the prosecution's version of the

case.[127] Moreover, appellant could have urged counsel, in order that testimony favoring the prosecution not be unduly emphasized, to request that testimony of other witnesses who gave contrary testimony be read as well, e.g., witnesses whose testimony impeached Evans's testimony.[128]

Appellant would also have been able to consult with defense counsel about the advisability of having testimony read to the jurors in the jury room, with no ability on the part of appellant or counsel to observe the proceeding or ensure that it was conducted properly by the court reporter as well as by the jurors. (Cf. *Hegler v. Borg*, *supra*, 50 F.3d at pp. 1474-1475.) Appellant would also have been able to consult with counsel concerning the advisability of refusing the jury's request to have the prosecutor's opening statement read to them (see *People v. Sims* (1993) 5 Cal.4th 405, 453 [trial court's inherent authority and discretion to have argument by counsel read back to jury upon request]), thus depriving the jury of information which

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[127] "In deciding whether to allow the jury to review testimony during deliberations, the court should avoid giving undue emphasis to particular testimony." (*United States v. Binder* (9th Cir.1985) 769 F.2d 595, 600-601 [replay of abridged version of videotaped witness testimony, rather than in its entirety, may place undue emphasis on portions replayed]; cf. *People v. Robinson* (2005) 37 Cal.4th 597, 636 ["The trial court made the decision to grant the jury's request to read back the testimony; *the jury was not given control of what testimony would be read back or how much of it would be read back*, and by no means can it reasonably be said that the record reflects 'a complete abdication of judicial control over the process.'" (emphasis added)]; see also *United States v. Nolan* (9th Cir. 1983) 700 F.2d 479, 486 [reread of testimony disfavored "because of the emphasis it places on specific testimony and the delay it causes in trial."].)

[128] Cf. *Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117, 1121 [referring to the decision to be made upon a jury's request to rehear particular testimony as "a decision whether and what part of the testimony should be read back, [and] *whether in fairness other testimony should also be read. . . .*" (Emphasis added)].

they had indicated was important to their deliberations.

As to each of the supplemental instructions given, appellant would have been able to observe the jurors as they were instructed, and consult with counsel about any concerns such observations might raise about the attitude or understanding of the instructions by the jurors. Additionally, he would have been in a position to recognize that alternate jurors were not present at the delivery of supplemental instructions and to consult with counsel about the advisability of such a circumstance.

However, as to each of these opportunities to be present at a critical stage of his trial, at proceedings which directly affected both the law and the facts the jury was considering in its deliberations, his absence precluded any such participation by appellant.

D. Appellant Did Not Waive His Presence

Appellant was never asked to waive, nor did he waive his right to be present at the sidebar conferences. Nor did he personally waive his right to be present at the proceedings during deliberations. While the trial court sought and obtained a purported waiver of appellant's presence at the latter proceedings from counsel for appellant, even that waiver did not address appellant's presence at proceedings where the trial court conducted inquiries into possible juror misconduct or juror exposure to matters not admitted into evidence. A waiver of appellant's presence must be narrowly construed and read to include only that which was explicitly waived. (*United States v. Berger* (9th Cir. 2007) 473 F.3d 1080, 1095; see also *United States v. Felix-Rodriguez* (9th Cir. 1994) 22 F.3d. 964, 967.) What the trial court solicited was a stipulation "that we can deal with [possible jury questions] on the record with the reporter present and you're present without your clients being present." (37RT:6766.) Nothing in that language remotely contemplates

questioning of jurors, collectively or individually, concerning possible juror misconduct or exposure to information or exhibits not admitted into evidence.

E. The Errors were Prejudicial

Appellant's absence from the most of the proceedings which occurred during deliberations denied him a fair trial because those proceedings were a critical stage of the proceedings, and critical to the outcome of his trial. As shown above, appellant's presence at the sidebar conferences as well as at the proceedings during deliberations would hardly have been "useless" (*Snyder v. Massachusetts, supra*, 291 U.S. at p. 106), "negligible" or as a mere "observer" (*Hegler v. Borg, supra*, 50 F.3d at p. 1477). Thus, as a matter of due process, "a fair and just hearing" obviously was "thwarted by his absence." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745; *Snyder v. Massachusetts, supra*, 291 U.S. at p. 108.) Appellant was excluded from a stage of the criminal proceedings at which he had an "active role to play." (*Rice v. Wood* (9th Cir. 1996) 77 F.3d 1138, 1141 (en banc).)

If a defendant is denied his constitutional right to be present during a critical stage of criminal proceedings, the reviewing court must evaluate the nature of the error. Reversal is automatic if the defendant's absence constitutes a "structural error," that is, an error that permeates "[t]he entire conduct of the trial from beginning to end" or "affect[s] the framework within which the trial proceeds." (*Arizona v. Fulminante, supra,* 499 U.S. at pp. 309-310.) The Ninth Circuit has held that "a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity of the trial process that the error will necessarily fall within that category of cases requiring automatic reversal." (*Hegler v. Borg, supra*, 50 F.3d at p. 1476 .) To merit a finding of structural error, a defendant must have been excluded

from a stage of the criminal proceedings at which he had an "active role to play." (*Rice v. Wood, supra*, 77 F.3d at p. 1141; see also *Hegler, supra*, 50 F.3d at pp. 1476-77 [holding that the "determinative factor" as to whether the defendant's absence constituted a structural error was whether the defendant's ability to "influence the process was negligible"].) In addition, the erroneous exclusion of the defendant must, "like the denial of an impartial judge or the assistance of counsel, affect the trial from beginning to end." (*Rice v. Wood, supra*, 77 F.3d at p. 1141.)

On the other hand, harmless error review is appropriate if the defendant's absences constitutes a "trial error," that is, an error which "occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Id.* at pp. 307-08.)

This case presents a situation where the deprivation, by its very nature, precludes harmless error analysis. Appellant had a fundamental, personal right to be informed of and participate in the proceedings relating to supplemental instructions to the jury during deliberations as well as those involving questioning of deliberating jurors, individually or collectively, by the trial court or counsel. He also had a fundamental, personal right to be present at and participate in proceedings in which substantial discussion of how the trial was to proceed in light of antagonistic defenses of codefendants, in which the admission of evidence was explicitly based upon a balancing of the clear prejudice to appellant against the purported probative value to the codefendants. The exclusion of appellant from these discussions affected the structure of the trial and the error mandates a finding of prejudice per se. If the matters discussed and motions made at the

sidebar conferences did not affect the framework of the trial from the very beginning of the trial, those sidebar conferences were the place where the framework of the trial was determined as the trial went on, given the hostile nature of the codefendants' defense theories and evidence.

However, even if reversal is not automatic, the burden is now on the State to show that the trial court's error was "harmless beyond a reasonable doubt." (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Wright, supra,* 52 Cal.3d at p. 403, cert. den. (1991) 502 U.S. 834 [any violation of a defendant's right to be present at all critical stages of his trial constitutes federal constitutional error, requiring reversal unless the error can be demonstrated to be harmless beyond a reasonable doubt].)[129] This "burden of proving harmless error is a heavy one." (*Bustamante v. Eynman, supra,* 456 F.2d at p. 271.) "The standard by which to determine whether reversible error occurred . . . is not whether the accused was actually prejudiced, but

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[129] Although this Court has stated that the burden is upon the defendant to demonstrate that his absence prejudiced his case or denied him a fair and impartial trial (see e.g., *People v. Jackson, supra,* 28 Cal.3d at pp.309-10; *People v. Duncan* (1991) 53 Cal.3d 955, 975), it is clear that this refers to the defendant's burden of establishing that his due process right to be present has been *implicated.* It is true that an accused has a due process right to be present only when his presence bears a reasonably substantial relation to the fullness of his opportunity to defend against the charge. (*Snyder, supra,* 291 U.S. at pp. 105-08.) However, once the defendant has shown that his presence would be useful or of benefit, and thus his lack of presence is a denial of due process, the burden is then on the State to prove that the constitutional violation was harmless beyond a reasonable doubt. (See *Rushen v. Spain, supra,* 464 U.S. at p. 119; *People v. Whitt* (1990) 51 Cal.3d 620, 671-72 (Broussard, J. conc. and dissenting) ["when the error violates the federal Constitution, the defendant need not show prejudice; rather, the prosecution must establish the absence of prejudice"].) In any event, for the reasons stated above, the burden is clearly on the State to show that the absence of appellant from the proceedings referred to herein was harmless beyond a reasonable doubt.

whether there is 'any reasonable possibility of prejudice.'" (*Wade v. United States* (D.C. Cir. 1971) 441 F.2d 1046, 1050.)

It must be emphasized that, precisely by virtue of a defendant's exclusion from a hearing, it is logically impossible for that defendant to ever show how his presence in fact *would* have--as opposed to *could* have--"changed the course or outcome of a trial." (*United States v. Novaton* (11th Cir. 2001) 271 F.3d 968, 1000.) But a defendant's "right to be present would cease to exist" if he were required to make such a showing in order to establish prejudice. (*Ibid.*) "And, of course, the government's argument would transfer the burden on the prejudice issue from it to the defendant." (*Ibid.*; see *Chapman v. California, supra*, 386 U.S. at p. 24.)

To the extent that this Court nevertheless requires the defendant to prove what would *actually* have happened had he been present, this Court would be violating the federal Constitution and United States Supreme Court precedent. It would also constitute a denial of a defendant's due process right to a full and fair hearing on appeal (U.S. Const., 14th Amend.) because it would effectively insulate from appellate review an asserted denial of a defendant's fundamental right to be present. Such a claim is tantamount to a contention that a defendant can safely be excluded from any proceeding in the trial court, for any or no stated reason, because he can never establish on appeal what he would have said or done had he been present and his claim of prejudicial error must therefore be rejected in every instance. This is not, and cannot be, the law in California; and it most certainly does not comport with an accused's federal constitutional protections.

Any argument that the defendant suffered no prejudice from his absence because his attorney was present and represented his interests similarly must be soundly rejected:

> It cannot be argued that appellant's absence was per se harmless because his counsel was at all times present to guard his interests. In the first place, whether counsel who attempts without the defendant's knowledge to waive his right to be present can be trusted to protect the defendant's other rights is a dubious assumption. More importantly, the presence of counsel is no substitute for the presence of the defendant himself. The right to be present at trial stems in part from the fact that by his physical presence the defendant can hear and see the proceedings, can be seen by the jury, and can participate in the presentation of his rights.

(*Bustamante v. Eyman*, *supra*, 456 F.2d at p. 274 [footnote omitted].)

> Although the presence of counsel is certainly a relevant factor to be considered in determining whether a defendant's absence was harmless, the right to be present at trial--grounded in the Confrontation Clause and the Due Process Clause--is not a gossamer right inevitably swept away simply because a defendant is represented, in his absence, by counsel. The right to be present is distinct from the right to be represented by counsel. The right to be present would be hollow indeed if it was dependent upon the lack of representation by counsel. Furthermore, such a rule would ignore the fact that a client's active assistance at trial may be key to an attorney's effective representation of his interests.

(*United States v. Novaton, supra*, 271 F.3d at p. 1000.)

These violations of the right to be present cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24; see *United States v. Gordon* (D.C. Cir. 1987) 829 F.2d 119, 124-129.) The errors were prejudicial, and the conviction and judgment of death must be reversed.

XII

THE SENTENCE OF DEATH AS TO COUNT V, CONSPIRACY TO COMMIT MURDER, MUST BE VACATED AS AN UNAUTHORIZED SENTENCE FOR THAT CRIME

In Count V, appellant was charged with and found guilty of conspiracy to commit first degree murder, a violation of Penal Code section 182, which criminalizes and punishes criminal conspiracies. The prosecution included in the information an allegation that "the offenses charged in counts I, II, III, IV and V are a special circumstance within the meaning of Penal Code section 190.2(a)(3)." (3CT:824-826.) The jury found the multiple murder special circumstance allegation true. (9CT:2283.) The trial court submitted the issue of penalty on Count V to the jury in the penalty phase, and the jury returned a verdict of death on that count. (41RT:7578; 9CT:2402.) The trial court thereafter imposed a sentence of death as to each of the five counts on which appellant was found guilty, including Count V. (45RT:8426; 10CT:2650.) A sentence of death for conspiracy to commit murder is unauthorized by law, as this Court has recognized, and respondent has acknowledged, in *People v. Lawley* (2002) 27 Cal.4th 102, 171-172 and *People v. Vieira*, *supra*, 35 Cal.4th at p. 293.) Should this Court not reverse the conviction on Count V, the sentence imposed on that count, must be vacated, and the judgment modified accordingly. (*Lawley*, *supra*, at pp. 171-172; *Vieira*, *supra*, 35 Cal.4th at p. 293.)

Moreover, any sentence on Count V must be stayed pursuant to Penal Code section 654. Since there is no evidence of any objective to the conspiracy other than the murders for which appellant was sentenced to death, a separate sentence for the conspiracy violates section 654. (*In re*

Cruz (1966) 64 Cal.2d 178, 180-181.)

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XIII

THE TRIAL COURT'S ERRONEOUS MODIFICATION OF CALJIC NO. 8.77 REQUIRES REVERSAL OF THE PENALTY JUDGMENT

At the penalty phase, the prosecution presented evidence, through Jennifer Starn, relating to alleged "criminal activity involving the use or attempted use of force or violence or the express or implied threat to use force or violence" by appellant, under Penal Code section 190.3, factor (b) (hereafter factor (b)). Certain of that evidence was insufficient to establish beyond a reasonable doubt that the alleged activity violated any penal statute or involved the requisite use, attempted use, or threat of force or violence. Additional evidence was presented both at the guilt phase[130/] and by appellant during the penalty phase which, in the absence of an adequate instruction to the jurors was reasonably likely to be improperly considered by the jurors as evidence in aggravation under factor (b). The trial court's instruction to the jury relating to factor (b) was an erroneous modification of CALJIC No. 8.87 which failed to limit the jurors' deliberations under factor (b) to evidence properly admissible under that factor, and failed to provide sufficient or adequate guidance to the jurors in their evaluation of the evidence presented. The erroneous instruction allowed the jurors to consider as aggravation under factor (b) evidence which did not meet the requirements of the statute, thus violating the statute as well as violating appellant's federal constitutional rights to a fair jury trial, reliable penalty determination and due process. (U.S. Const., 6th, 8th & 14th Amends.; see also Cal. Const., art. I, §§ 7, 16 and 17.)

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[130] See Arg. II, *ante*, incorporated herein by reference.

A. Only Evidence Establishing Beyond a Reasonable Doubt That Appellant Violated a Penal Statute Using, Attempting to Use, or Threatening to Use Force or Violence May Be Considered by the Jury as Aggravation under Factor (b)

At the penalty phase of a capital case, one factor the jury is to consider in reaching its penalty decision is evidence "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." (Pen. Code, § 190.3, subd. (b).) This Court has consistently held "that evidence of other criminal activity introduced in the penalty phase pursuant to . . . section 190.3, subdivision (b), must be limited to evidence of conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute." (*People v. Phillips*, *supra*, 41 Cal.3d at p. 72; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1259; *People v. Grant* (1988) 45 Cal.3d 829, 850.) Moreover, by the terms of factor (b) itself, only activity involving the use, attempted use, or threat of force or violence may be considered as aggravation under this factor. Criminal activity which affects only property does not qualify as aggravation under factor (b). (*People v. Boyd* (1985) 38 Cal.3d 762, 776.)

Over 35 years ago, this Court stated that "[i]t is now settled that a defendant during the penalty phase of a trial is entitled to an instruction to the effect that the jury may consider evidence of other crimes only when the commission of such other crimes is proved beyond a reasonable doubt. [Citations.]" (*People v. Stanworth* (1969) 71 Cal.2d 820, 840.) *Stanworth* makes clear that such an instruction is "vital to a proper consideration of the evidence, and the court should so instruct *sua sponte*." (*Id.* at p. 841 (italics in original); *People v. Polk* (1965) 63 Cal.2d 443, 452; see also *People v. Robertson* (1982) 33 Cal.3d 21, 53.) This Court adopted the reasonable-

doubt standard for other crimes evidence presented in a capital case because of "the overriding importance of 'other crimes' evidence to the jury's life-or-death determination." (*Id.* at p. 54.)

Moreover, this Court has stated that

> In order to avoid potential confusion over which "other crimes" - if any - the prosecution is relying on as aggravating circumstances in a given case, the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty. The reasonable doubt instruction required by the *Polk-Stanworth* line of cases can then be directly addressed to these designated other crimes, and the jury should be instructed not to consider any additional other crimes in fixing the penalty. *Without such a limiting instruction, there is no assurance that the jury will confine its consideration of other crimes to the crimes that the prosecution had in mind,* because - as already noted - the jury is instructed at the penalty phase that in arriving at its penalty determination it may generally consider evidence admitted at all phases of the trial proceedings. (See former § 190.4, subd. (d).)

(*People v. Robertson, supra*, 33 Cal.3d at p. 55 (emphasis added).)

B. Proceedings Below

At the penalty phase, the prosecution presented the testimony of Jennifer Starn concerning various prior, purportedly criminal or violent, acts by appellant, including punching Ricky Vieira and Steve Perkins (39RT:6983-6984, 6986-6987, 6998); putting a possibly loaded rifle in the mouths of Starn, Vieira, and Rosemary McLaughlin while telling them that he didn't think they were doing as well as he thought they should (39RT:6987-6988, 6999); shocking Vieira and Starn with a Scorpion "stun gun"[131] (39RT:6985-6986; Exhibit 192); putting an unloaded rifle in Starn's

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[131] No evidence was presented to establish that the "stun gun" was (continued...)

mouth and threatening to kill her, kicking Starn and hitting her with various objects (39RT:6989-6992, 7002, 7008-7009); attaching jars containing water to his daughter Alexandra's legs while she sat in a halter, to strengthen her legs (39RT:6994-6995); "clapping" Alexandra on her ears with his hands (39RT:6990-6992); putting Alexandra in cold water or spraying her with water to make her lungs strong (39RT:6995-6997); and instructing Starn, when Alexandra was about six-months old, to leave her alone in her room for six hours at a time as discipline for misbehaving. (39RT:7016, 7018.)

Beyond Starn's testimony at the penalty phase, extensive evidence had been introduced at the guilt phase,[132] over appellant's objections, that appellant owned a number of firearms, described as assault weapons, as well as other weapons.[133] The prosecution made no claim at either the guilt or penalty phase that any of the firearms or other materials were possessed

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[131] (...continued)
"capable of temporarily immobilizing a person by the infliction of an electrical charge." (Pen. Code §244.5 [assault with stun gun or taser].) Rather, the only evidence was to the contrary, that the shock startled and hurt the recipient and may have left a transient mark on the skin. (39RT:6985-6986.) The most that could be legally found under the evidence presented is a simple battery, a misdemeanor. (Pen. Code §§ 242, 243.) No instructions identifying or defining either offense were given to the jurors.

[132] The jury was instructed at the penalty phase that "You must determine what the facts are from the evidence received during the entire trial" (41RT:7494), and that "In determining which penalty is to be imposed on the defendant, you *shall* consider all of the evidence which has been received during any part of the trial of this case" (41RT:7501 (emphasis added)).

[133] See Arg. II, sections B.1 and C.1, *ante*.

illegally.[134] Neither, however, were the jurors instructed that the firearms were possessed lawfully, or that the jurors could not use the evidence of the firearms as evidence of criminal activity under factor (b).

Evidence was also introduced at the guilt phase, over numerous objections by appellant, of specific acts of appellant and Beck involving appellant, Beck and Vieira, including alleged mistreatment of Vieira by appellant and Beck, and descriptions of the relationship of appellant, Beck and Vieira as that of master, enforcer and slave.[135] This evidence, erroneously admitted by the trial court (see Arg. II, *ante*), constituted prejudicial and inflammatory character evidence, intended to portray appellant as having a criminal and violent disposition. The jurors were given no instruction at the penalty phase that excluded any of this evidence from their deliberations regarding factor (b) or gave them any guidance on how to determine if any of the evidence was appropriately considered under factor (b).

Evidence was also presented, as part of the mitigation case by appellant, that, as a minor, appellant had been given probation by the juvenile court on a charge of malicious injury to property. (40RT:7187-7188.) The jury was given no instruction that excluded that evidence from their deliberations regarding factor (b).

The prosecution did not identify any criminal statute which it claimed was shown to have been violated by any of this evidence. However, when

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[134] The officer who testified as to the search of appellant's residence testified that one of the firearms might have been reported as possibly stolen in Texas, but that this was never confirmed. (15RT:2767.)

[135] See Arg. II, sections B.2 and C.2, *ante*.

the defense requested that CALJIC No. 8.87[136] be given, the prosecution noted the need to specify the criminal acts or activity. (39RT:7145.) The trial court, without responding directly to the prosecution's point or allowing the prosecution to specify either the activity to which the instruction applied or any criminal statute claimed to have been violated, stated that it would modify CALJIC No. 8.87 as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed criminal activity which involved the express or implied use of force or violence or the threat of force or violence. Before a juror may consider any such

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[136] Appellant submitted a proposed instruction (9CT:2394) substantially tracking the language of CALJIC No. 8.87 (1989 Revision), which stated at the time of appellant's trial:

> Evidence has been introduced for the purpose of showing that the defendant [(name of defendant)] has committed the following criminal [act[s]] [activity]: [(*describe criminal [act[s]] [activity]*) which involved [the express or implied use of force or violence] [or] [the threat of force or violence]. Before a juror may consider any criminal [act[s]] [activity] as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant [(name of defendant)] did in fact commit such criminal [act[s]] [activity]. A juror may not consider any evidence of any other criminal [act[s]] [activity] as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(Emphasis added.)

> criminal activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal activity. A juror may not consider any evidence of any other criminal activity as an aggravating circumstance. And then the last paragraph.

(*Ibid.*) The trial court subsequently instructed the jury accordingly. (41RT:7507-7508.) No instruction was given identifying specific activity which might be considered under factor (b), explaining what penal statutes might have been violated or explaining the elements necessary to a finding of any crimes allegedly committed in the course of such activity.

In argument to the jury, the prosecutor argued as aggravation under factor (b) the incident of the rifle being put in the mouths of Starn, Vieira and McLaughlin as appellant "threatened to kill them if they didn't accede to his wishes or they didn't, I think in her words, get their shit together" (41RT:7516); "beatings" of Vieira and Perkins requiring hospitalization of Perkins on one occasion (*ibid.*); "clapping" Alexandra, "the hanging of water bottles from her legs while she's suspended in some kind of harness, supposedly to make her legs strong. Make her cry so her lungs would be strong" (*ibid.*), and kicking Starn while she was pregnant. (41RT:7517.)

C. Evidence Before the Jury Did Not Qualify As Aggravation under Factor (b)

1. Evidence Regarding Appellant's Treatment of Alexandra Did Not Establish Force or Violence or Violation of a Penal Statute

The prosecution did not identify any particular penal statute shown to have been violated by the evidence of appellant's actions regarding his attempts to strengthen Alexandra's legs, attempting discipline by leaving her alone in her room, or putting her under cold water or spraying her with water in an attempt to strengthen her lungs. Nor is any such criminal violation apparent. As such, this evidence was insufficient to be considered by the

jurors as aggravation under factor (b).

Moreover, this evidence suffered from another deficiency: those actions do not constitute the use or threat of use of force or violence, a necessary element of factor (b) evidence. In fact, Starn's testimony established that these activities did not involve force or violence, nor violation of any criminal statute.[137]

2. Evidence of Appellant's Possession of Firearms or Other Weapons Did Not Establish the Violation of a Penal Statute or Any Use or Threat of Force or Violence

The evidence concerning appellant's possession of assault weapons, knives and grenades, as argued above (see Arg. II, *ante*), constituted inadmissible, irrelevant, inflammatory and prejudicial character evidence at the guilt phase. That inflammatory and prejudicial effect was likely to have been improperly compounded at the penalty phase by the trial court's erroneous modification of CALJIC No.8.77. While no evidence of any criminal violation arising from the possession of those items was identified

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[137] While appellant made no objection to this evidence on the grounds that it was insufficient to establish either a criminal violation or the use or threat of use of force or violence, appellant does not here challenge the testimony itself, but the instruction which allowed the jury to consider the evidence as aggravation. The instructional error is cognizable on appeal. Not only did appellant request an instruction which would have prevented the jurors' use of this evidence as aggravation (see fn. 128, *ante*), but the prosecution noted the need to specify the criminal acts or activity to which the instruction might apply. The trial court nevertheless determined that it would give the instruction which was given, and which was erroneous. That appellant did not thereafter object to the trial court's instruction changes nothing. Instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (§ 1259; see *People v. Flood*, *supra*, 18 Cal.4th at p. 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

or argued, nothing in the instructions given the jury prevented any juror from considering appellant's possession of such weapons to be evidence of "criminal activity" involving a threat of violence, and considering such evidence as aggravation, supporting a death verdict.

This Court has recognized that mere possession of guns is not a crime of violence. (*People v. Cox* (2003) 30 Cal.4th 916, 973.) Nor was there any evidence on this record that appellant's possession of weapons was in violation of any criminal statute. Neither the prosecution nor appellant's codefendants identified any such criminal violation, although Willey's repeated focus on the question of whether the semi-automatic weapons could be converted to automatic fire did raise, through innuendo, a question of whether appellant might have violated the law in that regard. No evidence that appellant did so, or had an intent to do so, was presented. Yet the inflammatory innuendo was left for the jury. Similarly, the evidence that one gun might have been reported stolen previously in Texas did not establish a violation of a penal statute, but left suspicion and conjecture of such a violation. The inflammatory character evidence regarding possession of weapons was thus combined with improper and unsupported innuendo of criminal activity regarding those firearms. Yet even such suspected "criminal activity" did not establish any use or threat of force or violence.

The evidence of possession of the weapons was not contested by appellant at the guilt phase,[138] and appellant acknowledged his possession of the assault weapons and knives when questioned by counsel for Willey. Thus the jurors would have had no difficulty determining beyond a

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[138] Appellant did contest the admissibility of this evidence during the guilt phase. (See Arg. II, *ante*.) However, after his objections were overruled, he did not contest the fact of his possession of the weapons.

reasonable doubt that appellant had possessed them, as the trial court's instruction required, if the evidence was considered by them, or any of them, as criminal activity involving a threat of violence. The danger that the jurors, or any of them, would so consider the evidence made it incumbent on the trial court to identify for the jurors the evidence or alleged criminal violations which the jurors could properly consider under factor (b), thereby excluding this evidence from their consideration. In the absence of such identification, the admonition to consider no evidence of criminal activity not found beyond a reasonable doubt was rendered essentially meaningless.

3. Malicious Injury to Property Is Not Admissible As Aggravation under Factor (b)

The only evidence concerning appellant's juvenile misconduct was that it involved only injury to property. This Court has held that criminal activity which affects only property is not admissible as aggravation under factor (b). (*People v. Boyd*, *supra*, 38 Cal.3d at p. 776.) However, the jurors were given no instruction that informed them of that rule of law, or excluding that evidence from their deliberations regarding factor (b). In the absence of instructions which either listed the alleged criminal activity which could be considered by the jurors, or specifically excluded the evidence which could not be so considered, it is reasonably likely that the jurors, or some of them, erroneously considered the juvenile "malicious injury to property" as aggravation under factor (b).

D. The Trial Court's Modification of CALJIC No. 8.87 Erroneously Allowed the Jurors to Consider as Aggravation Evidence Not Admissible As Such

The evidence before the jury included evidence of acts portrayed as criminal which were not criminal or violent. The instruction allowing that evidence to be considered by the jurors as aggravation under factor (b) was

erroneous, under the terms of the statute and according to this Court's interpretations of the statute.

The improper consideration of this evidence by the jurors was in violation of section 190.3, factor (b), as well as appellant's federal constitutional rights to a fair jury trial, reliable penalty determination and due process. (U.S. Const., 6th, 8th & 14th Amends.; see also Cal. Const., art. I, §§ 7, 16 and 17.)

Appellant requested that the trial court instruct the jury according to CALJIC No. 8.87 which provides for specifying, and limiting, the alleged criminal activity which the jury may consider under factor (b).[139] (39RT:7145; 9CT:2394.) Despite the prosecutor's reminder of the need to so specify the alleged criminal activity, the trial court inexplicably determined that it would modify CALJIC No. 8.87, deleting any specification of the alleged criminal activity to which the jury was to confine its deliberations. (*Ibid.*)

Here, the evidence before the jury included both evidence of legitimate factor (b) evidence and evidence which an uninformed jury might consider as "criminal activity" within the meaning of factor (b), but which does not qualify as such according to this Court's interpretations of the statutory language. In the absence of an instruction identifying the legitimate evidence or activity and excluding the improper evidence or activity "there is no assurance that the jury will confine its consideration of other crimes to the crimes that the prosecution had in mind." (*People v. Robertson, supra*, 33 Cal.3d at p. 55.)

This Court has recognized the need for instruction "enumerating the particular other crimes which the jury may consider as aggravating

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[139] See fn. 136, *ante*.

circumstances in determining penalty" to give proper effect to the required reasonable-doubt instruction and to effectively instruct the jurors not to consider other activity under factor (b). (*People v. Robertson, supra,* 33 Cal.3d at p. 55, fn. 19.)

This Court has long recognized that because of the overriding importance of "other crimes" evidence to the jury's life-or-death determination (*People v. McClellan* (1969) 71 Cal.2d 793, 804, fn. 2), the most exacting standard of proof is required to establish the truth and nature of such evidence, and the trial court is obliged to so inform the jury sua sponte. (*People v. Robertson, supra,* 33 Cal.3d at pp. 53-54, citing *People v. Stanworth, supra,* 71 Cal.2d at p. 840.) Where the jury is given no instruction specifying a violation of a particular penal statute, or specifying the evidence which could properly be considered, as here, the reasonable-doubt instruction mandated by *Polk, Stanworth* and *Robertson* becomes meaningless. That is, the jury is unable to determine beyond a reasonable doubt if the evidence has established the commission of an actual crime or not. In such a situation, the reasonable-doubt standard cannot be applied validly and any resulting finding is fatally flawed.

The jurors deliberating over appellant's fate were left with no legal basis to guide their determination of what evidence demonstrated legitimate "criminal activity" under factor (b). Rather, that determination was effectively left to each juror's unguided discretion.

> A jury cannot fulfill its central role in our criminal justice system if it does not follow the law. It is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally-mandated purpose, *a jury must be properly instructed as to the relevant law as to its function in the fact-finding process*, and it must assiduously follow these instructions.

(*McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 836 (emphasis added).)

As one court has aptly observed, "one can legitimately argue that the primary function of the judge in a jury trial is to explain the applicable legal principles *in such a way as to focus and define the factual issues which the jury must resolve*." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250 (emphasis added).).

Instead of following this Court's direction from *Robertson*, and fulfilling its duty to instruct the jury properly concerning its consideration of factor (b) evidence, the trial court gave the jurors instructions which left them free to consider as aggravation any evidence which they determined to be evidence of criminal activity involving the use or threat of force or violence. (See *People* v. *Phillips*, *supra*, 41 Cal.3d at p. 72, fn. 25; Evid. Code, § 403.)

Because evidence of other crimes, other "criminal activity" or innuendo or suspicion attached to otherwise legal activity, is so prejudicial in the penalty phase of a capital trial, the instruction which allowed the jury to consider evidence which was not legally relevant under factor (b), violated appellant's rights to due process and a fair trial. (*McKinney v. Rees*, *supra*, 993 F.2d at pp. 1385-1386.) The instruction also violated appellant's Eighth Amendment right to a reliable penalty determination. (*Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-585.) Moreover, it is clear that section 190.3 implements a decision by the state limiting the prosecution to presenting evidence of specific, limited aggravating factors. The instruction here, which allowed the jurors to consider as aggravation evidence outside those specific limits, violated appellant's state-created liberty interest requiring such evidence to meet the mandate of section 190.3, factor (b).

(*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346[140]; *People v. Boyd*, *supra*, 38 Cal.3d at p. 773.)

While appellant did not object to the instruction given by the trial court, he did request an instruction specifying the evidence which could be properly considered under factor (b). The trial court denied the requested instruction, giving the flawed instruction instead. Moreover, instructional error is reviewable on appeal even in the absence of an objection where the substantial rights of the defendant are affected. (Pen. Code § 1259.) An instruction which erroneously allows the jury to consider legally irrelevant evidence as aggravation supporting the imposition of the death penalty unquestionably affects the substantial rights of the defendant in violation of the Eighth Amendment. (See, e.g., *Johnson v. Mississippi*, *supra*, 486 U.S. 578.)

In this case, the failure of the trial court to specify particular criminal violations or to instruct on the elements which must be found beyond a

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[140] Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, cf. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. See *Vitek v. Jones*, 445 U.S. 480, 488-489, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552, citing *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935; *Greenholtz v. Nebraska Penal Inmates*, *supra*; *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484.

(*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

reasonable doubt before considering the evidence as aggravation rendered the instruction erroneous, and the jurors' consideration of factor (b) aggravation fatally flawed. The jury was given no instruction to determine whether or not appellant's various activities which were the subject of testimony constituted crimes of violence, nor any instruction as to how to determine such an issue. (See *Beck v. Alabama*, *supra*, 447 U.S. 625; *Lockett v. Ohio*, *supra*, 438 U.S. 586.) Even assuming proper admission of the evidence,[141] the instructional error resulted in an unreliable penalty determination.

The instruction, therefore, renders the jury's verdict unreliable and constitutionally flawed. (U.S. Const., 5th, 6th, 8th and 14th Amends.; see *McCleskey v. Kemp* (1987) 481 U.S. 279, 313, fn. 37; *Johnson v. Mississippi*, *supra*, 486 U.S. 578.)

E. The Instructional Error Resulted in Prejudice to Appellant, Requiring Reversal of the Penalty Judgment

This Court must determine whether the jury's consideration of legally irrelevant evidence as aggravation, as part of the weighing process, constituted harmless error. (See *Sochor* v. *Florida* (1992) 504 U.S. 527, 532.) Adding invalid aggravation to "death's side of the scale" may render the penalty determination unreliable in violation of the Eighth Amendment. (See *Stringer* v. *Black* (1992) 503 U.S. 222, 232.)

Such unreliability is particularly likely when the improperly-considered factor relates to other-crimes evidence, a type of evidence which this Court long ago recognized "may have a particularly damaging impact on the jury's determination whether the defendant should be executed." (*People v. Polk, supra*, 63 Cal.2d at p. 450; *People v. Robertson, supra,* 33 Cal.3d at

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[141] But see Arg. II, *ante*.

p. 54.)

In appellant's case, improper evidence was made available to the jury in support of a death verdict. The prosecutor explicitly relied upon the improper evidence concerning appellant's attempts to strengthen Alexandra's legs and lungs. (41RT:7516.) While the prosecutor did not argue to the jury that the firearms evidence or the malicious injury to property constituted factor (b) evidence, neither did he clarify that it was not to be considered as such. (41RT:7516-7517.)

The harm flowing from this error is not negated by the fact that the jurors were instructed that they could consider other-crimes evidence only if they were satisfied beyond a reasonable doubt that appellant committed the crime, since that limitation gave the jury no guidance on what activity did qualify for consideration under factor (b).

Appellant was entitled under state law to have aggravating evidence considered by jurors in determining penalty limited to the factors enumerated in section 190.3. (*People v. Boyd, supra,* 38 Cal.3d at p. 775.) The instruction given allowed the jurors' consideration of this improper and inflammatory evidence which was not admissible for that purpose. The instructions therefore violated an important state procedural protection and liberty interest (the right to not be sentenced to death except on the basis of statutory aggravating factors) that is protected as a matter of federal due process under the Fifth and Fourteenth Amendments. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346; *Fetterly v. Paskett* (1993) 997 F.2d 1295, 1300-1301.) This error further violated appellant's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16, and 17 of the California Constitution, to a fundamentally fair and reliable penalty trial, based on a

proper consideration of relevant sentencing factors, and undistorted by improper, nonstatutory aggravation. (See *Johnson v. Mississippi, supra,* 486 U.S. at pp. 584-585, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 884-885.)

Under all of these circumstances, there is a reasonable possibility that the trial court's instruction led to at least one juror improperly considering this evidence as aggravation, affecting the jury's penalty verdict. (*Wiggins v. Smith* (2003) 593 U.S. 510, 537; *People v. Brown, supra,* 46 Cal.3d at p. 447; *People v. Ashmus, supra,* 54 Cal.3d at p. 965.) The error cannot be considered harmless beyond a reasonable doubt. (*Sochor v. Florida, supra,* 504 U.S. at p. 540; *Chapman v. California, supra,* 386 U.S. at p. 24.) Therefore, whether considered as error under state law, or as error affecting federal constitutional interests, the judgment of death must be reversed.

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XIV

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck*, *supra*, 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. The Broad Application Of Section 190.3 Subdivision (a) Violated Appellant's Constitutional Rights

Section 190.3 subdivision (a) directs the jury to consider in aggravation the "circumstances of the crime." CALJIC No. 8.85; 9CT:2386-2392.) 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. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts

such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. In the instant case, the prosecutor emphasized that the manner in which the killings were planned and carried out (41RT:7515, 7524-7526, 7532-7533) and appellant's alleged motivation for the killings (41RT:7527) were aggravating factors.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California*, *supra*, U.S. at pp. 987-988 [factor (a) survived facial challenge at time of decision].) This Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

B. The Death Penalty Statute and Accompanying Jury Instructions Deprived Appellant of His Right to a Jury Determination of Each Factual Prerequisite to a Sentence of Death, Violating the Sixth, Eighth And Fourteenth Amendments.

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson, supra*, 25 Cal.4th at p. 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (41RT:7501-7507, 7562-7563.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478; *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) – U.S. – [127 S.Ct. 856, 2007 WL 135687] now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: the jury had to determine whether any mitigating or aggravating factors were present; the jury had to decide whether the aggravating factors outweighed the mitigating factors; and the jury had to decide whether the aggravating factors were so substantial in comparison with the mitigating circumstances as to make

death an appropriate punishment. (CALJIC No. 8.88; 41RT:7563; 9CT:2400.) Because these additional findings were required before the jury could impose the death sentence, *Ring*, *Apprendi*, *Blakely* and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson*, *supra*, 25 Cal.4th at p. 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) However, in *Cunningham*, the high court rejected this Court's interpretation of *Apprendi* in holding 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. (*Cunningham*, *supra*, 127 S.Ct. at pp. 868-871.) In so doing, it rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

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. Demetroulias* (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*, *supra*, 30

Cal.4th at p. 275.). It has applied precisely the same analysis to fend off *Apprendi* and *Blakely* in non-capital cases. (See, e.g., *People v. Black* (2005) 35 Cal.4th 1238, 1254 [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."]

The United States Supreme Court explicitly rejected this reasoning in *Cunningham.*[142] 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.)

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.*

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[142] *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.)

This Court has also held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), neither *Apprendi* nor *Ring* applies. (*People v. Anderson, supra*, 25 Cal.4th at p. 589; *People v. Prieto, supra*, 30 Cal.4th at p. 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings."].)

This holding is simply wrong. As section 190, subdivision (a)[143] 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

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[143] Section 190, subdivision (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."

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 punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 124 S.Ct. at 2431.)

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*, 530 U.S. at 604.) Section 190, subdivision (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 be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) "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 604.) 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." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth

Amendment's applicability is concerned. California's failure to require the requisite factfinding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution. Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected the claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346 [defendant constitutionally entitled to procedural sentencing protections afforded by state law].) Accordingly, appellant's jury should have been instructed that

the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (9CT:2386-2392, 2399-2400), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias*, *supra*, 13 Cal.4th at p. 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even assuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the

death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) Nonetheless, 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.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.) As shown above, the analysis underlying this Court's holdings on this subject has been rejected by the Supreme Court in *Cunningham*.

Appellant asserts that *Prieto* and subsequent cases rejecting this argument were incorrectly decided. Application of the reasoning mandated by *Apprendi*, *Blakely*, *Ring* and *Cunningham* compels the conclusion that jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." *McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection

to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the Fourteenth Amendment and by its irrationality violate both the due process clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment to the federal constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 9CT:2394.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3 subdivision (b), violates due process and the Sixth, Eighth, and Fourteenth Amendments to the federal constitution, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi*, *supra*, 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson*, *supra*, 25

Cal.4th at pp. 584-585.) Here, the prosecution presented evidence at the penalty phase as well as relying upon evidence from the guilt phase regarding unadjudicated criminal activity allegedly committed by appellant (see Args. II, XII) and devoted a considerable portion of its closing argument to arguing these alleged offenses. (41RT:7516-7517.)

The United States Supreme Court's decisions in *Cunningham v. California*, *supra*, 127 S.Ct. 856, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury. Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (9CT:2400; 41RT:7563; CALJIC No. 8.88.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and

directionless. (See *Maynard v. Cartwright, supra*, 486 U.S. at p. 362.)

The vagueness of the term is illustrated in the trial court's reason for denying appellant's proposed instruction 10, which stated, "The jury must reject death if mitigating factors outweighed aggravating and are free to do so even if aggravating factors outweighed mitigating." (9CT:2358.) The trial court, denying the instruction, stated, "8.88 tells them more than that, even more than this does. It tells them that to return a judgment of death, they must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating ones that it warrants death." (39RT:7144:15-19.)

While it may be argued that CALJIC No. 8.88 can be construed to include the possibility that even where aggravating circumstances outweigh mitigating circumstances, they are not so substantial in comparison that the death penalty is appropriate, it can be equally construed to include the possibility that even if mitigation outweighs aggravation, the aggravation might still be found so substantial in comparison that death is appropriate. Describing that ambiguity as "better" for a defendant than an instruction which mandates life in the latter circumstance is unsupportable.

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant asks this Court to reconsider that opinion.

5. The Instructions Failed to Inform the Jury That the Central Determination Is Whether Death Is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating

evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

This Court previously has rejected this claim (*People v. Arias*, *supra*, 13 Cal.4th at p. 171), but appellant urges this Court to reconsider those rulings.

6. The Instructions Failed to Inform the Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence Of Life Without the Possibility of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

Appellant requested an instruction informing the jury that it "must

reject death if mitigating circumstances outweighed aggravating and are free to do so even if aggravating factors outweigh mitigating." (9CT:2358; Defendant's Proposed Instruction 10.) The trial court refused the instruction, noting, "8.88 even better for [defendant]." (*Ibid.*) As shown above[144], the vagueness of the language in CALJIC No. 8.88 cannot be reasonably interpreted as "better" for a defendant than a plain statement of the law governing a circumstance which mandates a verdict of life rather than death.

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan*, *supra*, 53 Cal.3d at p. 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore*, *supra*, 43 Cal.2dat pp. 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon*, *supra*, 412 U.S. at pp. 473-474.) In this case, the trial court erred in failing to give appellant's Proposed Instruction 10.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn*, *supra*, 229 Cal.App.3d at p. 1465; *United States v. Lesina* (9th Cir. 1987)

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[144] See section B. 4 of this argument, *ante*.

833 F.2d 156, 158.) The denial of this 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, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States*, *supra*, 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

7. The Instructions Failed to Inform the Jurors that Even If They Determined That Aggravation Outweighed Mitigation, They Still Could Return a Sentence of Life Without the Possibility of Parole

Pursuant to CALJIC No. 8.88, the jury was directed that a death

judgment cannot be returned unless the jury unanimously finds "that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." Although this finding is a prerequisite for a death sentence, it does not preclude a sentence of life without possibility of parole. Under *People v. Brown* (1985) 40 Cal.3d 512, 541, the jury retains the discretion to return a sentence of life without the possibility of parole even when it concludes that the aggravating circumstances are "so substantial" in comparison with the mitigating circumstances. Indeed, under California law, a jury may return a sentence of life without the possibility of parole even in the complete absence of mitigation. (*People v. Duncan*, *supra*, 53 Cal.3d at p. 979.) The instructions failed to inform the jury of this option and thereby arbitrarily deprived appellant of a state-created liberty and life interest in violation of the due process clause of the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346).

The decisions in *Boyde v. California*, *supra*, 494 U.S. at pp. 376-377 and *Blystone v. Pennsylvania*, *supra*, 494 U.S. at p. 307 do not foreclose this claim. In those cases, the High Court upheld, over Eighth Amendment challenges, capital-sentencing schemes that mandate death upon a finding that the aggravating circumstances outweigh the mitigating circumstances. That, however, is *not* the 1978 California capital-sentencing standard under which appellant was condemned. Rather, this Court in *People v. Brown*, *supra*, 40 Cal.3d at p. 541, held that the ultimate standard in California is the appropriateness of the penalty. After *Boyde*, this Court has continued to apply, and has refused to revisit, the *Brown* capital-sentencing standard. (See, e.g., *People v. Champion*, *supra*, 9 Cal.4th at p. 949, fn. 33; *People v. Hardy*, *supra*, 2 Cal.4th 86, 203; *People v. Sanders* (1990) 51 Cal.3d 471,

524, fn. 21.)

This Court has repeatedly rejected this claim. (See *People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Arias*, *supra*, 13 Cal.4th at p. 170.) Appellant urges the Court to reconsider these rulings.

Appellant requested an instruction which informed the jurors of their option to return a verdict of life even if they found aggravating circumstances to outweigh mitigation. (9CT:2358; Defendant's Proposed Instruction 10.) The trial court refused the instruction, noting, "8.88 even better for [defendant]." (*Ibid.*) As shown above, the vagueness of the language in CALJIC No. 8.88 cannot be reasonably interpreted as "better" for a defendant than a plain statement of the law governing a circumstance which clarifies that a verdict of death is not mandatory under any circumstances.

As shown above[145], the refusal of this requested instruction, as well as giving the defective CALJIC 8.88, violated due process (see *Evitts v. Lucey*, *supra*, 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; see *People v. Glenn*, *supra*, 229 Cal.App.3d at p.1465; *United States v. Lesina* , *supra*, 833 F.2d at p. 158), the equal protection clause of the Fourteenth Amendment (see U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe*, *supra*, 457 U.S. at pp. 216-217) and appellant's Sixth Amendment rights. (See *Zemina v. Solem*, *supra*, 438 F.Supp. at pp. 469-470; cf. *Cool v. United States*, *supra* 409 U.S. 100.) Reversal of his death sentence is required.

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[145] See section B. 6 of this argument, *ante*.

8. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments By Failing to Inform the Jury Regarding the Standard of Proof and Lack of Need for Unanimity As to Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*, *supra*, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required

here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

9. The Penalty Jury Should Have Been Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th & 14th Amends.), and his right to the equal protection of the laws. (U.S. Const., 14th Amend.)

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death

penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

C. Failing To Require That the Jury Make Written Findings Violates Appellant's Right To Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

D. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

Appellant objected to use of the words "extreme" in factor (d) and "substantial domination" in factor (g), but was overruled by the trial court. (39RT:7147-7149.) The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85, factors (d) and (g); 9CT:2386-2387) acted as barriers to the consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal constitution. (*Mills v. Maryland*, *supra*, 486 U.S. at p. 384; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604.) The Court has rejected this very

argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but appellant urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Certain of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. Appellant requested the omission of factor (e), the reference to "substantial domination by another person" in factor (g), the reference to "the effects of intoxication" in factor (h), and factors (i) and (j), arguing that it would be error to instruct jurors on mitigating factors known not to exist. (39RT:7148-7150, 7156.) The trial court refused to omit those factors from the jury instructions (39RT:7156-7157; 9CT:2386-2387), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the first ten sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (9CT:2386-2392.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – 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. Davenport* (1985) 41

Cal.3d 247, 288-289). Appellant's 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. The likelihood of such a conclusion was enhanced by the trial court's explicit instruction that mitigating factors in the expanded factor (k) instruction given could not, if found not to exist, be considered in aggravation. Since no such limitation was stated as to factors (d) through (h) and (j), the jury was reasonably likely to consider that they were to consider the absence of those factors to be aggravating. Moreover, the trial court's modification to the expanded factor (k) instruction presented a reasonable likelihood that the jurors, upon finding specific items identified in factor (k) not to exist, would consider them as aggravation.

Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. As such, appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

E. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme 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 failure to conduct inter-case proportionality review violates the Sixth, Eighth, and Fourteenth Amendment prohibitions against

proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

F. The California Capital Sentencing Scheme Violates The Equal Protection Clause

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 in violation of the equal protection clause of the Fourteenth Amendment to the federal constitution. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; California Rules of Court, rule 4.42, subds. (b), (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. This Court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but appellant asks the Court to reconsider that ruling.

G. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms

This Court numerous times has rejected the claim that the use of the

death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments to the federal constitution, or "evolving standards of decency." (*People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow*, *supra*, 30 Cal.4th at p. 127; *People v. Ghent*, *supra*, 43 Cal.3d at pp. 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

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XV

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

Assuming arguendo that none of the errors in this case requires reversal by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Mak v. Blodgett*, *supra*, 970 F.2d at p. 622 [errors that might not be so prejudicial as to amount to a deprivation of due process, when considered alone, may cumulatively produce a trial that is fundamentally unfair] *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.)[146] Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22

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

Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The jurors in this case did not view the evidence in this case as clear-cut. They took at least six days of deliberation to reach their verdicts as to appellant and Beck, and an additional four days of deliberation before they were willing to deliver those verdicts to the trial court.[147]

The prosecution's case against appellant was not strong, especially as to the charge of conspiracy, which relied almost entirely upon Evans, an accomplice whose credibility was in substantial question, whose lies about what happened at 5223 Elm Street that night and at the Camp beforehand, and about her own involvement and culpability are manifest on this record, and upon whom the jury did not unanimously rely. While each of the four codefendants, including appellant, admitted being at the scene, they all denied any conspiracy as well as denying that there was any meeting in the small trailer or any map of the layout of 5223 Elm Street.

No other evidence established, or even strongly suggested, a conspiracy. No one but Evans gave direct testimony inculpating appellant in a conspiracy with any of the other defendants. There was no evidence directly corroborating her tale of the meeting in the trailer or of the map of the house she had supposedly drawn. The evidence of a conspiracy was based primarily upon "overt acts" fully consistent with the conclusion that there was no conspiracy to commit murder.

The evidence of who was at 5223 Elm Street that night is clear, but the evidence of what each person's intention was, and what each person did after Evans and LaMarsh went into the house, is conflicting. There were

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147 See fn. 110, *ante*.

conflicts in the evidence as to the responsibility for each of the four homicides. Appellant denied killing anybody. In the prosecution's case, appellant was linked only with the homicide of Ritchey, and only by the testimony of Earl Creekmore and Kathy Moyers, whose identifications of the person who cut Ritchey's throat were subject to serious question. The prosecution presented no evidence or argument that appellant was the actual killer of any of the other victims, laying responsibility for Raper's death on LaMarsh and for Colwell's and Paris's death on either Beck or Vieira.

Willey, otherwise hostile to appellant, clarified the questionable identifications by Creekmore and Moyers by identifying Beck as the person who cut Ritchey's throat. While LaMarsh testified that appellant, rather than he, delivered the fatal blows to Raper's skull, the conflicting testimony of Doctors Ernoehazy and Rogers left that question open, subject to the jury's evaluation of the evidence.

The question of what was planned – to pick up clothes or furniture, to beat people up, or to murder them – and who, if anyone, planned it, were among the central issues of the case, yet the jury's task of determining the answers became inextricably entwined with side issues – e.g., whether appellant's firearms could be converted to full automatic fire, although not a single shot was fired that night; whether evidence elicited by the codefendants demonstrated that appellant, Beck and Vieira had a relationship which made it more likely that they had a separate, secret agreement to commit murder that night, or whether that evidence merely served to portray appellant as, in the words of Willey's counsel, "an evil man" and thus the person most likely to have planned the events of that night. These side issues were raised repeatedly by counsel for LaMarsh and Willey, who acted throughout the trial as second and third prosecutors

against appellant, intent on defending their clients by attacking the character of appellant. That tactic apparently succeeded, with verdicts which appeared to track the codefendants' theory – unsupported by an actual evidence – of a separate secret conspiracy by appellant, Beck and Vieira. Despite Evans's testimony which placed all the defendants at the supposed meeting in the small trailer at which the conspiracy was formed, only appellant and Beck were convicted of four counts of first degree murder, one count of conspiracy to commit murder and a multiple murder special circumstance, while the jury was unable to reach any verdict on La Marsh or Willey.

Each of the errors demonstrated in this brief – the unlawful search of appellant's residence, the fruits of which were relied upon by both the prosecution and the codefendants against appellant; the repeated erroneous denials of appellant's motions for a trial separate from the antagonistic and hostile codefendants who were acting as third and fourth prosecutors against him, basing their defense largely on improper attacks on appellant and his counsel which would not have been raised or allowed in a separate trial; the tremendously prejudicial admission of highly inflammatory character/propensity/disposition evidence which had no relevance to appellant's guilt or innocence of the homicides and the charged conspiracy; the numerous instructional errors at the guilt phase which distorted the fact-finding process and the reliability of the ultimate verdicts, and lightened the burden of the prosecution; the exclusion of appellant from substantial and important portions of the court proceedings; the instructional errors at the penalty phase which distorted the reliability of the jurors' judgment of death – contributed to an unfair trial and a fundamentally unreliable guilt verdict, and denied appellant due process, a fair trial and a reliable determination of both guilt and penalty. As set forth in each argument, each of the errors, if

considered separately, constitutes reversible error. Considered together, the fundamentally flawed nature of the trial and the unreliability of the resulting verdict is stark.

The most serious errors in this case stemmed from the trial court's erroneous denial of appellant's numerous motions to sever and for mistrial. The joint trial with Lamarsh and Willey led not only to the hostile conduct of counsel for LaMarsh and Willey during trial, but to witnesses testifying to inflammatory and prejudicial evidence, including LaMarsh's accusation that appellant, rather than LaMarsh, was the actual killer of Raper. The inflammatory and prejudicial character evidence ultimately led to, and was distorted by, seriously flawed instructions which lightened the burden of the prosecution and allowed appellant's conviction to be based, in large part, upon issues of character which were not properly before the jury.

The trial court's insistence on a joint trial, even despite the court's acknowledgment of the prejudice to appellant from some of the evidence elicited by counsel for LaMarsh and Willey, resulted in a trial in which the prosecution's case for conspiracy and first degree murder against appellant was not strong, the jury did not unanimously rely upon the testimony of the prosecution's star witness, and the jury's ultimate verdicts appear to reflect its acceptance of the arguments and innuendo about appellant's character by LaMarsh and Willey and their counsel, as well as of their outright fabrication of a "separate, secret conspiracy."

The serious credibility problems with Evans's testimony made the accuracy and fairness of the jury instructions regarding the remaining evidence crucial, yet the instructions further distorted the fact-finding function and lightening the burden of the prosecution, allowing the jury to base its verdicts on evidence and inferences both legally and logically

irrelevant to the question of appellant's guilt or innocence.

In the absence of the fruits of the unlawful search, the hostile and inflammatory attacks by LaMarsh and Willey, the prejudicial weapons evidence, the inflammatory and prejudicial evidence of appellant's "relationships" with Beck and Vieira, it is reasonably probable that an outcome more favorable to appellant would have resulted. The distortions and unfairness introduced by that evidence were compounded by the numerous instructional errors.

Other than the testimony of Evans, which some of the jurors did not believe, the only evidence of any conspiracy was purely circumstantial, and fundamentally consistent with the absence of any agreement to commit murder. The flawed instructions on circumstantial evidence and consciousness of guilt served to lighten the burden on the prosecution, directing the jurors to questionable interpretations of the circumstantial evidence, and focusing on interpretations of the evidence which were unfavorable to appellant while ignoring interpretations of similar evidence which were unfavorable to the prosecution.

Finally, the fundamental unreliability of the guilt phase verdicts, and the prejudicial and inflammatory evidence and tactics of Willey and LaMarsh were compounded by the instructional errors and procedural failings in the penalty phase, rendering that verdict similarly flawed and unreliable and requiring that it be reversed.

Any of the errors, standing alone, was sufficient to undermine the prosecution's case and the reliability of the jury's ultimate verdict, and none can be found harmless beyond a reasonable doubt. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Chapman*, *supra*., 386 U.S. at p. 24.) Taken separately, or in combination, the errors and violations of appellant's

constitutional rights deprived appellant of a fair trial, due process and a reliable determination both of guilt, and ultimately, of penalty. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Gardner v. Florida*, *supra*, 430 U.S. 349; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

The fundamentally flawed verdicts and findings by the jury further contributed to an unreliable determination of penalty by the jury. (See, e.g., Args. VI - IX, XII - XIII; U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Stringer v. Black, supra,* 503 U.S. at pp. 230-232; *Beck v. Alabama*, *supra*, 447 U.S. 625, 638; *Gardner v. Florida*, *supra*, 430 U.S. 349; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849; *People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

The cumulative effect of the errors in this case so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 893 -894 [holding cumulative effect of trial court errors and deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [cumulative effect of deficiencies in trial counsel's representation requires habeas relief as to

the conviction]; *Mak v. Blodgett*, *supra*, 970 F.2d at p. 622 [errors that might not be so prejudicial as to amount to a deprivation of due process, when considered alone, may cumulatively produce a trial that is fundamentally unfair] *United States v. Wallace*, *supra*, 848 F.2d at pp. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

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

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

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown*, *supra*, 46 Cal.3d at p. 466 [error occurring at the guilt phase requires

reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

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

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

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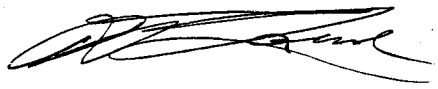
CONCLUSION

For all the reasons stated above, the guilt and penalty verdicts in this case must be reversed. Should the entire judgment not be reversed, still Count V, the special circumstance finding, and the penalty judgment must be reversed. Should Count V not be reversed, the sentence of death on that count must be vacated and the judgment modified accordingly.

DATED: July 20, 2007

Respectfully submitted,

MICHAEL HERSEK
State Public Defender



WILLIAM T. LOWE
Deputy State Public Defender

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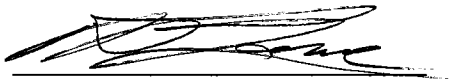
CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.630(b)(2)

I, William T. Lowe, am the Deputy State Public Defender assigned to represent appellant Gerald Dean Cruz in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 118,257 words in length.



WILLIAM T. LOWE
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Cruz and Beck* Calif. Supreme Ct. No. S029843

I, Glenice Fuller, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

PEGGY RUFFRA
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Each said envelope was then, on July 20, 2007, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on July 20, 2007, at San Francisco, California.

Glenice Fuller
DECLARANT