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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. CHRISTOPHER CHARLES LIGHTSEY Defendant and Appellant.	Supreme Court No. S048440 [Capital Case] Kern County Superior Court No. 56801

APPELLANT'S OPENING BRIEF

Automatic Appeal

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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. CHRISTOPHER CHARLES LIGHTSEY Defendant and Appellant.	Supreme Court No. S048440 [Capital Case] Kern County Superior Court No. 56801

STATEMENT OF APPEALABILITY

This is an automatic appeal from a final judgment that disposes of the issues between the parties on appeal and is authorized by Penal Code § 1239 (Cal. Rules of Court, Rule 14(a)(2)(B)).

STATEMENT OF THE CASE

A. Introduction

On the morning of July 7, 1993, William Compton was murdered in his home in Bakersfield, California. On October 21, 1993, appellant Christopher Lightsey was arrested for Compton's murder, after two men arrested with guns belonging to Mr. Compton told police they had gotten

the guns from Mr. Lightsey. At the time of his arrest, Mr. Lightsey was serving a term in state prison on an unrelated conviction.

On the morning William Compton was killed, Mr. Lightsey was in court in Bakersfield. The prosecutor argued that Mr. Lightsey had killed Mr. Compton and stolen his large gun collection at around 11 in the morning, after leaving the courthouse. Despite strong evidence that Mr. Compton had in fact been killed earlier that morning, the jury convicted Mr. Lightsey of murder and several special circumstances and sentenced him to death.

The procedural history of this case was complicated by Mr. Lightsey's severe mental illness. Several appointed attorneys withdrew from representing him, along with their investigators, because of his paranoia and delusional thinking and his inability to control his behavior and cooperate in his defense. Competency proceedings were initiated twice and sought unsuccessfully by defense counsel on several other occasions. Mr. Lightsey opposed all attempts to find him incompetent and insisted that he was sane.

B. Municipal Court Proceedings

1. Complaint and Appointment of Initial Defense Counsel

On October 21, 1993, a criminal complaint was filed in this matter against Mr. Lightsey. (2 CT 463.)[1] Count 1 charged Mr. Lightsey with

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[1] The Volume Numbers are cited in all references to the Clerk's Transcript and Reporter's Transcript when contained in a numbered volume. (While appellate counsel moved the trial court to number all volumes, this request was denied.)
When a volume of the Clerk's Transcript or Reporter's Transcript is unnumbered, it is identified by the date of the hearing. When more than two hearings were held on the same day before different judges in an unnumbered volume, the citation is identified by both the date and the judge overseeing the proceeding.

first-degree murder (PC 187), with robbery and burglary special circumstances (PC 190.2, subds. (A)(17)(I) & (A)(17)(VII) alleged. (2 CT 463.) Count 2 charged Mr. Lightsey with first-degree robbery (PC 212.5), which was alleged to be a serious felony. (PC 1192.7, subd. (C)(19.) Count 3 charged Mr. Lightsey with first-degree burglary (PC 460(a), which was also alleged to be a serious felony. (PC 1192.7, subd. (C)(18.) An arrest warrant was issued that same day. (3 CT 673.) On November 30, 1993, defense counsel Stan Simrin was appointed to represent Mr. Lightsey, and Mr. Lightsey pled not guilty to all the charges and allegations. (1 Supp CT 4.)

2. Motion to Recuse Original Prosecutor Somers

On December 21, 1993, Mr. Simrin filed a motion to recuse the prosecutor, Deputy District Attorney John Somers, on, among other grounds, that he was a likely material witness because he had seen Mr. Lightsey in court on the morning of July 7, 1993. (3 CT 669-672.) The district attorney opposed the motion. On January 5, 1994, after an evidentiary hearing, the court recused Somers from the case. (1 CT 277; 2 CT 622; 1 Supp. CT 10.)

3. Preliminary Examination and First *Faretta* Motion

The preliminary examination in this matter began on January 20, 1994, and was completed on January 24, 1994. (2 CT 324-462.) At the conclusion of the preliminary hearing, Mr. Lightsey was held to answer on all charges and allegations and the matter was transferred to the Kern County Superior Court. (1 CT 320-321; 2 CT 463.) On January 24, 1994, prior to the transfer to Superior Court, Mr. Lightsey moved to represent himself[2], with counsel Simrin remaining as co-counsel, but the request was denied. (1 CT 289-290; see also 1/24/94 Conf. RT 1/24/94.)

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[2] *Faretta v. California* (1975) 422 U.S. 806.

B. Superior Court Proceedings

1. Information

On February 2, 1994, the Information in this matter was filed as follows:

> Count 1, first-degree murder (Pen. Code § 187) against William Compton; murder during the commission of robbery and burglary [Pen. Code § 190.2, subds. (a)(17)(A) and (a)(17)(G)]; personal use of a sharp instrument [Pen. Code § 12022, subd. (b); commission of crime while on bail and out of custody (Pen. Code § 12022.1); and commission of crime with three prior prison terms (Pen. Code § 667.7, subd. (b);
> Count 2, first-degree robbery (Pen. Code § 212.5, subd. (a)) against William Compton; personal use of a sharp instrument [Pen. Code § 12022, subd. (b); commission of crime while on bail and out of custody (Pen. Code § 12022.1); and commission of crime with three prior prison terms (Pen. Code § 667.7, subd. (b);
> Count 3, first-degree burglary (Pen. Code § 460, subd. (a)) against William Compton; personal use of a sharp instrument [Pen. Code § 12022, subd. (b); commission of crime while on bail and out of custody (Pen. Code § 12022.1); and commission of crime with three prior prison terms (Pen. Code § 667.7, subd. (b);
> Count 4, felon in charge of a firearm (Pen. Code § 12021.1, subd. (a)), and commission of crime with three prior prison terms. (Pen. Code § 667.5, subd, (b).) (3 CT 649.)

2. Withdrawal of Defense Counsel Simrin and Replacement With Defense Counsel Huffman, Not Guilty Plea to Information, Withdrawal of Defense Counsel Huffman, Appointment of Trial Counsel Brown and Sorena, Motion to Recuse First Trial Judge, and First Round of Competency and *Marsden* Hearings.

On February 7, 1994, defense counsel Stan Simrin moved to withdraw from the case, on the grounds that Mr. Lightsey refused to allow him to seek a continuance to properly prepare for trial. (3 CT 681.) On February 8, 1994, substitute defense counsel Donna Lee Huffman was appointed to represent Mr. Lightsey. (3 CT 684.) On the same date, Mr.

Lightsey entered a plea of not guilty to all charges and allegations in the information. (3 CT 682.) Two days later, on February 10, 1994, defense counsel Huffman, like Simrin before her, moved to withdraw from the case, because Mr. Lightsey also refused to permit her to seek a continuance to properly prepare for trial. (3 CT 684.)

On February 22, 1994, Huffman was allowed to withdraw, and Ed Brown was appointed as defense counsel on the case. (3 CT 684.) On March 3, 1994, defense counsel Brown moved to halt the proceedings on the grounds that Mr. Lightsey was mentally incompetent. (3 CT 711.) On March 7, 1994, Judge Felice suspended proceedings in the case and appointed Dr. Richard Burdick to examine Mr. Lightsey. (3 CT 712.) Mr. Lightsey objected to the competency examination and moved to represent himself. (3 CT 791.)

On March 17, 1994, defense counsel Brown filed a motion to continue the criminal trial, stating that Mr. Lightsey refused to waive time, just as he had refused with his first two attorneys. (3 CT 719.) On the morning of March 28, again while proceedings were still suspended, a hearing was held before a different judge, Judge Oberholzer, on the defense motion to continue the trial. (3 CT 764.) At that hearing, Mr. Lightsey made a *Marsden*[3] motion against defense counsel Brown, which was denied. (3 CT 764.)

Some time on March 28, also, a hearing of sorts was held before Judge Felice on the issue of Mr. Lightsey's competence to stand trial. No testimony was presented; instead, counsel stipulated that the judge could decide the issue on the basis of Dr. Burdick's report, which stated, in essence, that no formal psychiatric evaluation was possible because Mr. Lightsey had refused to be interviewed, but that he appeared competent to

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[3] *People v. Marsden* (1970) 2 Cal.3d 118.

Dr. Burdick based on the doctor's brief interaction with him. Judge Felice found Mr. Lightsey competent, and the criminal proceedings resumed. (3 CT 766.) At Brown's request, James Sorena was appointed as his co-counsel on the case. (3 CT 763-764.) On the basis of Mr. Lightsey's peremptory challenge, Judge Felice then recused himself. (RT 766.)

3. Second *Faretta* Motion, Recusal of Judge Stewart, Second *Marsden* Motion, and Proceedings Seeking to Appoint Avery and Moore as Trial Counsel.

On April 5, 1994, Mr. Lightsey, while still represented by defense counsel Brown and Sorena, filed a *Faretta* motion. (3 CT 798.) On April 7, 1994, Judge Stuart was assigned to replace Judge Felice. (3 CT 814.) On April 7, 1994, two attorneys, Kevin Avery and Richard Moore, were present in the courtroom, apparently at the request of Mr. Lightsey, who again expressed dissatisfaction with Brown and Sorena, his appointed counsel. Moore and Avery, never formally moved to be assigned as counsel and eventually left the courtroom. (3 CT 815.)

The judge then attempted to hold a hearing on Mr. Lightsey's *Faretta* motion, but Mr. Lightsey made a confused argument that the motion had been fraudulently filed by Brown and Sorena and that he really wanted to make a *Marsden* motion. The court denied Mr. Lightsey's *Marsden* motion and did not rule on the *Faretta* motion. (3 CT 815.) At the close of the hearing, Judge Stuart recused himself from the case, citing a potential conflict because he was related to one of the witness who would be testifying at Mr. Lightsey's trial. (3 CT 814.)

4. Appointment of Judge Kelly, Denial of Third *Marsden* Motion, and Second Competency Motion

After Judge Stewart recused himself, Judge John Kelly was assigned and presided over the remainder of the case, through the trial. (3 CT 817.) On April 7 and 8, 1994, after Judge Kelly's assignment, a hearing was held on Mr. Lightsey's third *Marsden* motion against defense counsel Brown

and Sorena. Judge Kelly denied the motion. (3 CT 817, 818; Sealed 4/8/94 RT 50-76.)

On April 8, 1994, after the conclusion of the *Marsden* hearing, defense counsel Brown and Sorena asked Judge Kelly to reinitiate 1368 proceedings, arguing that the first proceeding was inadequate because only one expert, Dr. Burdick, was appointed to examine Mr. Lightsey and Mr. Lightsey had refused to be interviewed by Dr. Burdick. Counsel also argued that Mr. Lightsey was seriously mentally ill and delusional. Judge Kelly refused to reinitiate the proceedings or to declare a doubt of Mr. Lightsey's competence. (3 CT 818.)

5. Hearing on *Faretta* Motion, Filing of Amended Information, and Appointment of Advisory Counsel McKnight.

On April 11, 1994, Judge Kelly heard and granted Mr. Lightsey's *Faretta* motion of April 5, 1994, and the appointments of defense counsel Brown and Sorena were vacated. (3 CT 819.) On April 12, an amended information was filed. (3 CT 822.) In this pleading, a new torture special circumstance (PC 190.2, subd. (a)(18)) was added to the murder charge in count 1. (3 CT 822.)

On April 13, 1994, Ralph McKnight, Jr. was appointed as advisory counsel. (3 RT 823.)

6. Motion to Strike Preliminary Hearing Transcript, Filing of Two In Pro Per Interlocutory Petitions in Fifth District Court of Appeal, Motion to Terminate In Pro Per Status Due to Mental Incompetence, Dismissal of Advisory Counsel McKnight, Appointment of Advisory Counsel Sprague, and Renewed Competency Hearings.

On May 31, 1994, Mr. Lightsey filed a motion in propria persona (in pro per) motion to strike the preliminary hearing transcript as fraudulent and inaccurate. (1 Supp CT 24.) On June 15, 1994, the prosecution filed their opposition. (3 CT 891.) On January 17, 1995, the motion was denied.

(6 CT 1602.) On June 21, 1994, Mr. Lightsey filed a rambling and incoherent "Petition for Writ of Mandate" in the Fifth Appellate District. (4 CT 996-1023; 21 Supp. CT 6218-6266.) On June 24, 1994, Mr. Lightsey filed an equally rambling Petition for Writ of Habeas Corpus in the Fifth Appellate District. (22 Supp. CT 6318-6449.)

On June 29, 1994, advisory counsel McKnight filed a motion to terminate Mr. Lightsey's pro per status on the grounds that he was mentally incompetent. (3 CT 906; see also 2 Supp. Conf. CT 428.) McKnight's motion was heard on July 7. After a hearing at which Mr. Lightsey repeated arguments about fraud in the proceedings against him, accused McKnight of being a spy for the prosecution, and asserted that he was sane because he could use a telephone, Judge Kelly declared a doubt of his competence to stand trial and suspended proceedings. (CT 920-976.)

After the hearing, Judge Kelly appointed an expert, Dr. Velosa, to evaluate Mr. Lightsey for the competency proceedings. He invited Mr. Lightsey to designate a second expert and eventually appointed Dr. Manohara, a psychologist whom Mr. Lightsey had picked from the telephone book by "instinct." (4 CT 980; 7/7/94 RT 65.)

On July 28, 1994, the date set for the competency trial, Judge Kelly reviewed the reports of the experts and advised Mr. Lightsey that if he were willing to waive further trial, the court would find him competent. With Mr. Lightsey's concurrence, the judge found him competent to stand trial. (4 CT 1024: 7/28/94 RT 100-109.)

Later in the hearing, the judge announced that he was reconsidering the order granting Mr. Lightsey's *Faretta* waiver, because of concerns that he was not competent to represent himself. (4 CT 1024; 7/28/94 RT 110-132.)[4] The court set a date the following week for an evidentiary hearing

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[4] The judge noted that both experts who had examined Mr. Lightsey had

on the issue of Mr. Lightsey's competence to continue to represent himself. (4 CT 1024; 7/28/94 RT 129-132.)

Finally, the court relieved advisory counsel McKnight at both McKnight's and Mr. Lightsey's request and appointed Michael Sprague as advisory counsel. (4 CT 1024; 7/28/94 RT 129-130.)

7. Dismissal of Advisory Counsel Sprague, Renewed Competency Proceedings, and Appointment of Advisory Counsel Gillis.

On August 2, 1994, advisory counsel Sprague declared a conflict and was relieved. (4 CT 1110.) That same day, an evidentiary hearing was held on the issue whether Mr. Lightsey was competent to represent himself. Mr. Lightsey represented himself at the hearing as to whether he was competent to represent himself.

The two experts who had evaluated him for the section 1368 proceedings, Dr. Manohara and Dr. Velosa, testified and were cross-examined by Mr. Lightsey. (4 CT 1110; 8/2/94 RT 146-196, 206-265.) Dr. Burdick, who had also given an opinion, but had never examined Mr. Lightsey, also testified and was cross-examined. (4 CT 1110; 8/2/94 RT 195-206.) At the conclusion of the hearing, the trial court found Mr. Lightsey competent to knowingly waive his right to counsel and represent himself. (4 CT 1110; 8/2/94 RT 279-280.) The court then appointed Richard Gillis as advisory counsel. (4 CT 1110; 8/2/94 RT 282.)

8. Proceedings to Terminate In Pro Per Status and Appoint Counsel Over Objection of Mr. Lightsey, and Appointment of Trial Counsel Gillis and Dougherty.

On September 12, 1994, advisory counsel Gillis filed a written motion, supported by declarations from himself, former advisory counsel

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expressed the opinion that he was not competent to represent himself. Yet Dr. Velosa had also given an opinion that Mr. Lightsey was incompetent to stand trial, even with counsel, but the judge had misinterpreted his conclusion. (4 CT 1024; 7/28/94 RT 104-106; 8/2/94 RT 239)

McKnight, and a former defense investigator, Jon Purcell, to terminate Mr. Lightsey's in pro per status on the grounds that he was mentally incompetent. (4 CT 1129.) On September 22, the hearing was continued because a witness was not available; William Dougherty, an attorney contacted by Mr. Lightsey's family, was in court that day and expressed willingness to accept appointment as Mr. Lightsey's counsel if his right of self-representation was revoked. (4 CT 115; 9/22/94 RT 1-11.)

On September 27, 1994, the new date for the hearing on Mr. Lightsey's competence to represent himself, Mr. Lightsey agreed to give up his right to self-representation if the court appointed Dougherty as his counsel. (4 CT 1113; 9/27/94 RT 13-15, 27.) The court agreed and appointed Dougherty and Gillis to represent Mr. Lightsey. (4 CT 1198; 9/27/94 RT 27-28.)

9. Pre-trial Proceedings Following Appointment of Trial Counsel Gillis and Dougherty

On November 14, 1994 Mr. Lightsey filed (1) a motion to quash and traverse search warrants and suppress evidence, and (2) a motion to suppress. (5 CT 1419, 1436.) These related to a total of six searches. (5 CT 1419, 1436.) On April 4 and April 5, 1995, the court held hearings on the two motions and denied both. (6 CT 1714, 1718, 1722.) On November 17, 1994, defense counsel filed a motion to dismiss, pursuant to Penal Code section 995, which was denied. (5 CT 1471.)

On March 24, 1995, the prosecution filed an amended notice of intention to introduce evidence in aggravation, pursuant to Penal Code section 190.3. (6 CT 1693.) On April 12, 1995, Mr. Lightsey filed a *Marsden* motion against defense counsel Gillis, which was denied. On April 14, 1995, the prosecution filed a motion to amend the information, seeking to delete two out of three of the prior prison term allegations and correct the dates alleged as to count 4. (6 CT 1740.) On April 24, 1995,

the prosecution motion to amend the information was granted. (7 CT 1880.)

On April 20, 1995, defense counsel filed several motions, including a motion to sever count 4 of the information. (6 CT 1805, 1808, 1820; 1 Supp. CT 46, 74, 77, 83.) On April 24, 1995, the motion to sever was denied. (7 CT 1880.)

On April 24, 1995, at the request of defense counsel the court ruled that the prosecution was limited to saying Mr. Lightsey was "in custody" and could not say he was in prison as a convicted felon. (7 CT 1880.) On April 25, 1995, the court granted a defense motion to bar any references to the nature of Mr. Lightsey's prior felony conviction, and Mr. Lightsey pled guilty to count 4, and admitted the prior prison term enhancement allegation. (7 CT 1882, 1947.)

15. Trial Proceedings

a. Voir Dire

On April 25, 1995, voir dire proceedings began. (7 CT 1882.) Voir dire proceedings were held over sixteen court days. (7 CT 1882, 1941, 1944, 1947, 1949, 1953, 1955, 1957, 1959, 1961, 1963, 1965, 1967, 1969, 1971, 1973.) On May 18, 1995, a jury of 12 regular jurors and 4 alternates was empanelled. (7 CT 1973, 1976.)

b. Guilt Phase

The evidentiary portion of the trial began on May 22, 1995. On May 31, 1995, defense counsel made a motion for mistrial based on the prosecution's violation of the court's order not to mention that he was in prison as a convicted felon. (7 CT 2024.) On June 1, 1995, defense counsel made a second motion for mistrial on the same grounds. (7 CT 2044.)

On June 8, 1995 the prosecution completed its case-in-chief. (7 CT 2054.) That same day, the defense began their case. (7 CT 2054) On June

15, 1995, Mr. Lightsey completed his defense case-in-chief, followed by the prosecution's rebuttal. (7 CT 2085.) On June 19, 1995, the prosecution rested, Mr. Lightsey conducted his surrebuttal, and prosecution and defense closing arguments were made that same day. (7 CT 2108.)

On July 20, 1995, the jury received their instructions and began their deliberations. (8 CT 2219.) During deliberations, the jury submitted two notes to the judge. (8 CT 2196.) Mr. Lightsey was subsequently found guilty on all counts and allegations. (8 CT 2219.)

c. Penalty Phase

At the beginning of the penalty phase, on June 26, 1995, defense counsel asked the court to declare a doubt regarding Mr. Lightsey's competence, but the court refused to do so. (8 CT 2227.) The prosecution completed its penalty phase case-in-chief that day. (8 CT 2227.) The defense presented its penalty phase case-in-chief on June 26, June 28, and June 29, 1995. (8 CT 2227, 2251, 2253.) On June 29, 1995, closing arguments were made, the jury was instructed and deliberations began. (8 CT 2253.) The jury filed a note requesting additional evidence. (8 CT 2328.)

On June 30, 1995, while the jury was deliberating, defense counsel again asked the court to declare a doubt as to Mr. Lightsey's competence that was denied, and also moved for a directed verdict for Life Without Possibility of Parole (LWPP), which was equally denied. (8 CT 2333.) Later that day, the jury returned a verdict of death. (8 CT 2333.)

d. Post-Trial Motions

Defense counsel filed a motion to modify the death penalty, as well as a motion for new trial. (8 CT 2357, 2369.) The prosecution filed oppositions to both motions. (8 CT 2335.) Both motions were heard on August 15, 1995. During the hearings, Mr. Lightsey was bound and gagged with duct-tape, at the court's order, in order to quell his verbal outbursts. (8

CT 2379; 8/15/95 RT 6964.) The court denied the defense motions to modify the death sentence and for a new trial, but failed to rule on two of the grounds raised in the motion for new trial. (8 CT 2379.) Mr. Lightsey was then sentenced to death, with various other sentences stayed until imposition of the capital sentence. (8 CT 2424, 2429, 2379.)

This appeal is automatic and timely filed.

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STATEMENT OF FACTS
GUILT PHASE

A. The Death of William Compton

On the morning of July 7, 1993, appellant Christopher Lightsey was at the Kern County Superior Court for a hearing regarding refund of a bail bond premium. On the same morning, William Compton was killed in his home at 428 Holtby Street, in Bakersfield. Compton's neighbor, Elva Atkins, saw him watering plants outside his house at about 7:45 that morning. (15 RT 3304, 3319.)[5] Another neighbor, Alice Toole, saw someone she assumed was Compton standing outside his house near his motor home at around 9:30 or 10:00 that morning. (15 RT 3391-3394.)

Compton was suffering from advanced colon cancer and had a chemotherapy appointment at Campbell Radiation at 11:30 a.m. on the date of his death. (15 RT 3427.) Campbell Radiation was about ten minutes drive from Compton's home. (15 RT 3439.) It was his custom to get to the clinic at least fifteen minutes prior before his appointment. (15 RT 3427.)

Kathy and George Miller had recently become acquainted with Mr. Compton through a local ham radio club and had driven him to a couple of his medical appointments. (RT 3442, 3467, 3469.) On the morning of July 7, they telephoned Compton several times between eight and eleven o'clock, but were connected with his answering machine. (15 RT 3400, 3403, 3411-3412, 3428.)[6] Late in the morning, George Miller called

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[5] Ms. Atkins (who at the time of trial had retaken her maiden name, Elsa Cantu) told police soon after the homicide that she had seen Compton at around 8:30, but changed her mind after finding out that the sign-in sheets at her son's day-care center that day showed that she had arrived there with him at around 8:10. (15 RT 3307-3309.)

[6] Yolanda Harrison, a home health care aide from West Health Care also called and left a message on Mr. Compton's answering machine at 12:58 p.m. (15 RT 3446.)

Campbell Radiation and discovered Compton hadn't made his appointment. (15 RT 3428, 3449-51.) The Millers also called Compton's relatives in Victorville, Margaret and Anthony Compton. (16 RT 3543.)

In the early afternoon, the Millers, with another friend, Jerry Johnson, drove to Compton's house. (15 RT 3411-3412.) They arrived at around 1:45. (15 RT 3451; 16 RT 3454, 3501.) The doors to the house were locked. Johnson and George Miller hoisted Kathy Miller up to a partly open bedroom window, where, she later told the police, she saw Compton's body on the floor. (15 RT 3414-3416; 16 RT 3455-3456, 3504.) They called 911. (15 RT 3417; 16 RT 3456.)

Bakersfield Fire Department (hereinafter "B.F.D.") Captain Jim Lucas, B.F.D. Engineer Jim Estrada, and B.F.D. Firefighter Jeff Heinle were the first to arrive at Compton's house in response to the 911 call. (15 RT 3327-3331.) They arrived at 2:07. (15 RT 3341.) Heinle reached Compton's body by climbing through the bedroom window through which the Millers said Kathy had seen the body. (15 RT 3349-3351, 19 RT 4165.) The window was completely closed, and blocked by a computer, boxes, and miscellaneous clutter. Heinle could not see Mr. Compton's body through that window. (15 RT 3333-3336.)

It was a hot afternoon; the temperature was over 100 degrees. (16 RT 3642.) Compton's body was in full rigor mortis. (15 RT 3340.) Heinle could see wounds on it. Heinle also saw guns lying around the room, and his initial thought was that Compton, being terminally ill, had committed suicide. Captain Lucas called the Bakersfield Police Department (hereinafter "B.P.D."). (15 RT 3342.)

Sgt. Wes Vanderpool of the Bakersfield Police Department was the first police officer to arrive at the scene. He began photographing the scene. (16 RT 3618.) Shortly after his arrival, Officer Toby Paulson joined

him, followed by Detective Randy Boggs. (16 RT 3615-3618, 3639.)

When Detective Boggs saw Compton's body, it was lying in the walkway between the bedroom and bathroom. Compton was dressed only in undershorts. (16 RT 3645-3646.) He was wearing a colostomy bag, and had what looked like superficial wounds to his chest and stomach, and apparent self-inflicted 'hesitation wounds.' (16 RT 3645-3646; 17 RT 3701, 3704-3705; 18 RT 3891.) Hesitation wounds are usually caused by half-hearted attempts at suicide. (18 RT 3895.) There were no defensive wounds on the body. (18 RT 3951-3953.) A purge or vomiting of blood from Compton's mouth covered his chin, neck, and part of his right side. (16 RT 3649-3651; 17 RT 3702.) There was also vomitus with apparent blood spots on the door next to Mr. Compton. (17 RT 3712-3713.)

Compton had two scratches on his forehead above his nose. (16 RT 3652.) There also appeared to be older wounds on his chest and abdomen. (16 RT 3659.) He was not wearing eyeglasses, and Boggs did not see any glasses at the scene. (17 RT 3709-3711.)

The house was very cluttered and messy, with many stacked boxes, and with books and papers strewn on the floor. (16 RT 3644-3645, 3684.) One of the three bedrooms had been converted into a ham radio room. (16 RT 3647-3648.) In the bedroom near where Compton's body was found, Boggs saw a rifle leaning against a bed, and there was a TV and electronic equipment in the room. (16 RT 3655-3657.) Boggs also noticed at least one other rifle. (17 RT 3686.) He also saw a sword box and a brown box for a Leopold rifle scope. He did not look inside the boxes. (17 RT 3686, 3699-3700.)

The police saw no signs of forced entry in the house. A screen door on the front porch was locked with a hook on the inside, and the other doors to the outside were also locked. (17 RT 3678-3679.) The house did not

appear to be ransacked, and valuable electronic equipment such as ham radio gear was undisturbed. (18 RT 3981-3982.)

Compton's truck and motor home were parked in front of the home. (17 RT 3677, 3688.) The motor home was full of C.B. and ham radio gear. (17 RT 3688.)

Because of the unusual wounds and lack of signs of forced entry or theft, the police treated the death as a possible suicide. (16 RT 3656-3658, 18 RT 3879.) (17 RT 3716.)

Coroner's Assistant Vicki Fennell arrived at about 3:00. (19 RT 4159-4160.) (19 RT 4162-4163.)[7] Fennell did a walk-through of the house and noted it was much cluttered. (19 RT 4165-4166.) She also examined the body. (19 RT 4161-4181.) Based on the appearance of post-mortem lividity on Compton's body she concluded he had not been moved after death. (19 RT 4167-4168.) The body was in full rigor mortis with no blanching. (19 RT 4169-4171.) Fennell agreed with Boggs that Compton's death looked like a suicide, because of the hesitation wounds and the fact that Compton was dying of cancer.

Detective Boggs instructed Officer Paulson to contact Mr. Compton's neighbors. (16 RT 3621, 3634.) Paulson took a statement from one neighbor, Elva Atkins, and tried two other houses without finding anyone home.

The police did not search the residence. (16 RT 3624-3625.)

After they left, the home was taped off and the doors locked. (17 RT 3671-3673.) Because Mr. Compton's home was in a high-crime neighbourhood, Vicki Fennell called Anthony and Margaret Compton, the victim's nephew and sister, who lived in Victorville, and told them they should secure Mr. Compton's vehicles and belongings before they were

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[7] Fennell's initial death certificate, later amended, showed the cause of

stolen. (19 RT 4186-4187.)[8]

On July 8, 1993, Margaret and Anthony Compton drove to Bakersfield and met with someone from the coroner's office. (16 RT 3513, 3517.) They were given Mr. Compton's wallet and the keys to his house and vehicles. (16 RT 3519, 3563-3566.)

Margaret Compton took several items from the home, including an address-book/notebook apparently listing guns bought and sold by Compton. (16 RT 3522; 17 RT 3700; Exh. 68.) Several of the guns listed in the book were still in the house, and some were not. (16 RT 3525-3530.) She and Anthony Compton took guns, a ceremonial sword, and Mr. Compton's answering machine, TV, VCR, computer, ham radio equipment, locksmith equipment, and power tools. (16 RT 3534, 3569-3590.) They also found and took two empty video camera boxes, but the cameras themselves were missing. (16 RT 3587-3599.) They claimed they took a total of four weapons from Mr. Compton's home. (18 RT 3903-3904.)

On July 9, 1993, Dr. Gary Walter, a contract physician filling in for the county's regular pathologist, did an autopsy of Compton's body. (17 RT 3729-3735.) Detective Boggs attended the autopsy and briefed Dr. Walter beforehand about the facts of the case. (17 RT 3732-3734.)

Dr. Walter found 42 stab wounds in three clusters around Mr. Compton's (a) neck, chin, and upper chest, (b) face, and (c) abdomen. (19 RT 4224.) They ranged from three to five inches deep, and most were superficial. (19 RT 4234-4237.) Some of the stab wounds were revealed only after the body was cleaned as part of the autopsy procedure. (17 RT 3734; 19 RT 4232; see also Exh. 89-91.) they appeared to have been made by a blade about one-half inches wide, at least five inches long, and

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death as suicide. (19 RT 4201.)

[8] Mr. Compton's home was in fact burglarized on several occasions after his death. (18 RT 3898.)

probably fairly blunt. (19 RT 4238-4240.) At trial, Dr. Walter testified that it was unclear if Mr. Compton was conscious through all stabbings, but if he were it would have been very painful. (19 RT 4241-4243.)

Dr. Walter also noted abrasions to Compton's upper nose and forehead that could have been caused by a fall. (19 RT 4227-4228.) In addition, there was a bruise to the chin, probably caused by falling down or being punched. (19 RT 4230.) The chin and forehead injuries were older than the stab wounds. (19 RT 4231.) There were no defensive wounds to the body. (19 RT 4260.)

Dr. Walter also found internal bleeding from the stab wounds. (19 RT 4247.) In his opinion, the cause of Mr. Compton's death was exsanguination, i.e., loss of blood. (19 RT 4250-4252, 4272.) Dr. Walter opined that Compton's death was a homicide, primarily based on the number of stab wounds. (17 RT 3734; 19 RT 4232-4234.) Dr. Walter told Detective Boggs that the estimated time of death was between 9:00 and 11:00 a.m. on July 7, 1993. (17 RT 3736; 19 RT 4261, 26 RT 5668.)[9]

After the autopsy, Detective Boggs began a homicide investigation into Compton's death. (17 RT 3734-3735.)

Boggs called Anthony and Margaret Compton and found that the coroner's office had given them the keys to the house and that they had removed items from the crime scene and contaminated the site. (17 RT 3738-3742.) On July 10, 1993, Anthony and Margaret Compton drove back to Kern County and returned most of the items they had taken from

[9] At trial, Dr. Walter did not mention time of death on direct examination. On cross examination, he was impeached with his testimony at the preliminary examination, which he claimed not to remember, in which he had given the time of death as between 9 and 11 a.m. (19 RT 4262-4264, citing PX 73.) At trial, Dr. Walter also claimed, for the first time, that rigor mortis could be fully established as little as two hours after death if the body were lying in a very hot room. (19 RT 4257.)

the house. The police fingerprinted those items. (16 RT 3569; 17 RT 3740.) One item taken by the Comptons and not returned was a ceremonial sword (16 RT 3569; 17 RT 3751-3752), whose blunt tip was consistent with the type of weapon used to kill Mr. Compton. (19 RT 4238-4240.)

The Comptons met Boggs at Mr. Compton's home. (17 RT 3740.) Boggs's partner Detective Vincent and a laboratory technician, Terry Buss, also came that day, and did additional investigations at the scene, including dusting the home for fingerprints. (17 RT 3740-3743.) Buss also fingerprinted Anthony and Margaret Compton. (18 RT 4000.) The Comptons told them about Mr. Compton's gun collection, and for first time Boggs and Buss thoroughly searched the house for weapons. (17 RT 3741-3745.)

That day, they seized many items for evidence, including the empty sword box, an empty SKS assault rifle box, an empty Marlin rifle box, and an empty medicine box. (17 RT 3742-3740; see also Exhs. 92A, 92B, 92C, 92D, and 92E.) They did not find the murder weapon or Mr. Compton's glasses. (18 RT 4000-4002.)

Because of the passage of time and the contamination of the crime scene, the police did not perform most standard forensic procedures, such as searching for hair fibers, cloth fibers, and other trace evidence. (18 RT 3910, 4004-4006.) Buss, the crime scene technician, did not process the motor home at all, even though that should have been standard procedure. (18 RT 4040-4041.) He also did not process the blood at the crime scene. (18 RT 4045-4046.) Neither Boggs nor his partner Vincent wore gloves during their investigation, and Buss only fingerprinted a few areas. (18 RT 3919-3923, 4006-4019.) They did not check for tire tracks in the backyard, which was sufficiently overgrown that a car could have parked in it without being obvious to the neighbors. (17 RT 3673-3697; 18 RT 3929.) They

also failed to interview many of the neighbors, including some elderly neighbors who were most likely to be home when the homicide occurred that morning. (18 RT 3942-3943.)

The possibility was never eliminated that property, including guns, was stolen from Compton's house after his death. (15 RT 3265-3266.) Because the police initially treated Compton's death as a suicide, the house was not thoroughly searched, and places that could have contained the guns later determined to be missing, including a closet, a large suitcase, and a room in an enclosed porch, were not searched by Boggs the day he initially responded. (17 RT 3714; 18 RT 3890-3891; see also Exh. 79.)

The house was in a high crime area; both the responding officers and the staff of the coroner's office were convinced that the home would be burglarized once word got out on the street that Mr. Compton was dead. (15 RT 3266; 16 RT 3517.) Mr. Compton's home was, in fact, repeatedly burglarized after his death. (23 RT 5074.) Margaret Compton did not report any guns as missing until July 10, 1993, three days after Compton's death. (15 RT 3268.)

B. The Evidence Against Mr. Lightsey

Ms. Compton eventually created two lists of guns that were not listed as sold in the notebook and not found by her and Anthony at Compton's house, and faxed them to Detective Boggs on July 26 and 28, 1993. (16 RT 3536-3537; 2 CT 559.) She had no direct knowledge of what guns Mr. Compton had other than from her conversations with Mr. Compton and the entries in his notebook. (16 RT 3547.)

On August 9, 1993, after Margaret Compton faxed Detective Boggs the two lists of missing guns from Compton's notebook, Boggs listed all the supposedly missing weapons on the California Department of Justice's DOJ-SPS (Stolen Property System) computer. (17 RT 3755-3757.)

A few weeks later, the Bakersfield police's pawnshop detail learned

that some of the missing guns had been pawned at Ace Jewelry and Loan, a local pawnshop. (17 RT 3765-3770, 3777-3778, 22 RT 4786-4791, 22 RT 4796-4822.) On August 27, Boggs got a search warrant for Ace Jewelry and Loan and recovered two of the missing weapons, a Winchester rifle and a Ruger Blackhawk .44 caliber revolver. (17 RT 3779, 3826-3838; Exh. 21.) The seller of the guns was Jeff Mahan, who gave his address as 1113 Tangerine Street, in Bakersfield.

Detective Boggs obtained a search warrant for 1113 Tangerine Street and served it on August 30. (17 RT 3779-3782.) The police found some expended cartridges consistent with ammunition missing from Mr. Compton's home, but no other missing property. (17 RT 3783-3785.)

Boggs arrested Jeff Mahan for possession of stolen property. (17 RT 3782-3784.) Mahan told Boggs he had got the guns he pawned from Brian Ray. (17 RT 3789.)

Boggs obtained a search warrant for Brian Ray's residence at 520 Denison, and on August 30, he raided the house with a team of police officers. (17 RT 3789-3791.) Ray, his wife Stacy, their small child, and a visitor named Dane Palmer were all at the scene. (17 RT 3791-3792.) The home was searched and 24 weapons, including of 15 of the guns identified as missing from Mr. Compton's house, were seized. (17 RT 3792-3876.) Brian Ray was arrested.

Buss, the police crime scene technician, processed the seized weapons for fingerprints. Brian Ray's fingerprints were found on many of the weapons.[10] (18 RT 4026-4030.) Ray was charged with murder and possession of stolen property. (17 RT 3824-3832.)

Ray told Detective Boggs he had received the weapons from a man named "Chris." (17 RT 3826.) Ray had been introduced to Chris by Ray's

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[10] None of the prints found on the guns matched Mr. Lightsey's. (18 RT

sister, Karen Lehman, who was dating Chris at the time. (21 RT 4636-4642.) Ray said he and Chris had met about six or seven times in July and August of 1993. (21 RT 4642.) They shared a common interest in guns, and Chris had earlier shown him some of his guns. (21 RT 4643-4650.) Ray, Chris, and Palmer met to clean Chris's guns at Palmer's house before Chris went into custody on a criminal conviction, so that the guns could be placed in storage. (21 RT 4651-4665.) Chris told him he had obtained the guns from his family. (21 RT 4654.) Ray was storing guns as a favor for Chris and because Chris trusted him. (22 RT 4665-4670.)

Chris called Ray about seven times from prison to ask about the guns, which he referred to as "books." (22 RT 4671-4675.) At first Ray stored the guns at his father's storage unit, but then he got sick of them and all the phone calls from Chris, so he brought them home to give them to Beverly Westervelt, who was Chris's girlfriend. Ray was arrested before he could do so. (22 RT 4674-4677.) By mistake, he also took home three of his father's shotguns, which were also seized by the police when he was arrested. (22 RT 4706-4708.)

Prior to this, Ray had his buddy Jeff Mahan pawn one of the guns, because Ray did not have an ID so he could not do it himself. He felt that Chris owed him money for all the collect phone calls. (22 RT 4677-4681.) Dane Palmer then pawned a second gun. (22 RT 4680-4683.) They also took some of the guns out for shooting up in the Breckenridge Ranch area of Bakersfield. (22 RT 4684.) At trial, Ray also identified some of the guns and paraphernalia that he had received from Chris. (22 RT 4684-4703.)

After Ray agreed to cooperate with the prosecution, the murder and robbery charges against him were dropped, and Ray pled guilty to the

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4020, 4027.)

charge of possession of stolen property charge and received a grant of probation.[11] Ray claimed at Mr. Lightsey's trial that he had not made any promise to testify for the prosecution. (22 RT 4710-4711.)

At Mr. Lightsey's trial, Ray was impeached with the many conflicting statements he had made about the guns in the past. (22 RT 4711.) He denied telling Mahan that he had obtained the guns from his father, and could not recall if he first told Detective Boggs that Mr. Lightsey had brought the weapons to his house, rather than Palmer's as he actually testified. (22 RT 4711-4713.) He also denied telling Mahan that he had bought the Winchester gun at an auction. (22 RT 4717.)

Ray denied knowing the guns were stolen when he received them from Mr. Lightsey, claiming that he would not have pawned a stolen gun because he knew they would be in the Department of Justice computer system. He testified that he only pled guilty to possession of stolen property due to fear of other charges. (22 RT 4715-4721.)

At Mr. Lightsey's trial, Jeff Mahan confirmed that he knew Brian Ray, but denied knowing Mr. Lightsey. (23 RT 4950-4952.) He also confirmed that he pawned a gun for Ray, had gone shooting with him with some of the guns, and had been arrested for receiving stolen property because of his contacts with the guns. (23 RT 4953-4960.) The charges were dismissed, but he claimed he had made no agreement to testify for the prosecution in exchange for the dismissal. (23 RT 4960-4962.) Mahan testified that Ray told him two different stories about the guns, that he was holding them for a friend in prison, and alternatively that either Ray or Ray's father had gotten them in the military. (23 RT 4962-4963.)

On September 1, 1993, Boggs went to home of Rita Lightsey, Mr. Lightsey's mother, and received permission to search her home. (17 RT

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[11] His probation was later revoked, and was sentenced to prison. (22 RT

3832-3833.) He did not find any property linked to Mr. Compton. (17 RT 3834.)

On September 14, 1993, Boggs contacted Mr. Lightsey's former live-in girlfriend, Beverly Westervelt, and went to her home on Dana Street. Ms. Westervelt gave him two video cameras, an NRA belt buckle and two letter openers. (17 RT 3840-3842.) All were from a storage closet storing Mr. Lightsey's things. (17 RT 3844.) The cameras were later identified as Mr. Compton's. (17 RT 3835-3837; Exhs. 63, 64.) At a later meeting, Ms. Westervelt gave Boggs several letters Mr. Lightsey had written to her. (17 RT 3843-3844.)

Ms. Westervelt told the police, and testified at trial, that she and Mr. Lightsey had lived together, with her two children, for several months, sharing the rent for her apartment. (20 RT 4313-4316.) Because their apartment was too small, Mr. Lightsey eventually began looking for a home to buy, preferably near his mother, who lived on Holtby Street, several blocks from Mr. Compton. (20 RT 4317-4329.) They looked at three or four houses in the area of Holtby Street. (21 RT 4596-4598.)

During their house search, a neighbour of Mr. Compton's told them she thought Mr. Compton might be interested in selling his house. (20 RT 4329-4347.) They drove to his home, and Mr. Compton invited them in. He told Mr. Lightsey he was not currently interested in selling, but they conversed for awhile about their mutual interest in collecting guns, a common hobby in Kern County. (20 RT 4347-4371.) Westervelt knew that Mr. Lightsey also owned and collected guns as a hobby and an investment. (20 RT 4371-4373.) As they were leaving, Compton said he might be interested in selling his home at a later date. Westervelt remembered driving past his home with Mr. Lightsey once after that. (20

4709-4710.)

RT 4373-4381.) Mr. Lightsey never told her that he had any other contact with Compton or any other old men. (21 RT 4615-4618.)

Eventually, Mr. Lightsey bought a home in a different neighbourhood, on Oak Tree Street. (20 RT 4381-4385.) The Oak Tree house was a big house, with an alarm system. (20 RT 4388-4399.) They lived there together with her children until April of 1993, when Mr. Lightsey was charged with molesting the daughter of a neighbour. (3/23/95 RT 191-194; 20 RT 4385-4387.)[12]

After moving away, Westervelt had little contact with Mr. Lightsey at first, but they began talking on a regular basis by telephone beginning in June 1993, and she stopped by their old Oak Tree home on at least a couple of occasions before Mr. Lightsey moved out of that house on July 30, 1993. (20 RT 4400, 4406-4407.) She met Karen Lehman during some of these visits. (20 RT 4407-4408.)

In late July of 1993, Judge Kelly, who would later be the trial judge in Mr. Lightsey's capital trial, issued a restraining order which essentially evicted Mr. Lightsey from his own home, on the basis of a complaint by the neighbor who had accused him of molesting her daughter. (21 RT 4522) Westervelt went to the Oak Tree house for him, to move some of his personal belongings. (21 RT 4533.) Mr. Lightsey told her to leave a sliding door unlocked and the alarm turned off when she left, which she did. (21 RT 4534.)

From July 30 to August 12, Mr. Lightsey lived in a cottage behind the home of a friend, Dutler "Dut" Dauwalder. (19 RT 4116; 20 RT 4409, 4442; Exh. 131.) The molest charge was resolved by a plea bargain, and on August 12, 1993, Mr. Lightsey went into custody on that charge. (20 RT

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[12] Evidence of the nature of the charge was ordered excluded at the guilt phase of Mr. Lightsey's capital trial, as was evidence that he was in state prison at the time of his arrest in the capital case.

4408-4413; 3/23/95 RT 208, 212, 218.) Westervelt stated that Mr. Lightsey rented a car on August 10, 1993, and took her target shooting with him. (20 RT 4418-4421.) She saw several weapons in the trunk of the car. (20 RT 4421-4424.) She thought Mr. Lightsey told her he had bought guns through want ads in the newspaper. (20 RT 4424-4426.)

The first time Westervelt saw Mr. Lightsey with a large number of guns was on August 11, 1993, the day before he went into custody, when he took them to some people and cleaned them. (20 RT 4427-4431.) He had asked her to store the weapons, but she refused, and suggested that he call his friend Brian Ray. (20 RT 4430-4431.) She went with Mr. Lightsey to Ray's house, where they met Ray and Dane Palmer. (20 RT 4432-4434.) Mr. Lightsey backed his car into the driveway and they unloaded the weapons in Ray's garage and then cleaned them. (20 RT 4434-4442.) At trial, Westervelt was unable to definitively identify the guns seized from Ray's house as those which she saw on that evening. (20 RT 4444-4449.)

Mr. Lightsey had a file cabinet at the Oak Tree house, for which she believed only he had the key. (20 RT 4470-4476.) His file cabinet was later moved to Mr. Lightsey's mother's house. After being contacted by Boggs, Westervelt visited Mr. Lightsey's mother and looked through the cabinet and brought Boggs several items which she found there. (20 RT 4476-4478.) She also saw a Masonic ring in the cabinet, but did not give it to Boggs. (20 RT 4488.)

Mr. Lightsey was imprisoned at Wasco State Prison. From there, he frequently wrote to Westervelt and called her. (20 RT 4490-4496.) In his letters, he referred to his gun collection as "books" and indicated he was afraid the Rays would not take care of them properly. He feared Westervelt was jealous of Karen Lehman. (20 RT 4496-4509.) He warned her to keep his secrets, or she could "kill us forever." (20 RT 4510.) Mr. Lightsey repeatedly wrote Westervelt expressing concern about his "books," and that

his "book-keeper," whom she believed to mean Brian Ray, could not be trusted. (20 RT 4511-21 RT 4535.)
He suggested that she take one of the "books" for her own self-defense. (21 RT 4535-4562.) In another letter, Mr. Lightsey told her that he had heard that someone had been asking his mother about video cameras, and that he did not own any video cameras or guns other than a pellet gun. (21 RT 4563-4570.) He also asked her to burn all his letters, and told her that he had never looked for homes in his mother's neighborhood when he had been looking for a house. (21 RT 4570-4573, 4583.) In the same letter, he also proposed marriage. (21 RT 4573-4580.)

Sometime after she began cooperating with the police, Westervelt stopped visiting Mr. Lightsey or writing him. Mr. Lightsey, unaware of her activities, repeatedly complained about this lack of contact. (21 RT 4580-4594.) Detective Boggs ordered her not to tell Mr. Lightsey she was cooperating with the police. (21 RT 4618.)

On September 14, 1993, Boggs contacted Karen Lehman. (17 RT 3845.) At trial, Lehman testified that she had known Mr. Lightsey for 10 years, and became intimate with him in 1993. She was Brian Ray's sister, and she often stayed at Ray's home, as she had no home of her own. (19 RT 4063-4081.) She testified that she had met Mr. Lightsey at the home of her brother, Brian Ray, and, (more or less contradicting that statement), that she had introduced Mr. Lightsey to Ray. (19 RT 4063-4081, 4121-4122.)

Around June of 1993, Mr. Lightsey asked her to housesit at his old house on Oak Tree, and stop by during the day at least three times a week, as he had trouble with it being vandalized. (19 RT 4071, 19 RT 4083.)[13] She stayed with Mr. Lightsey during the nights she stayed overnight, and they had sexual intercourse on numerous occasions. (19 RT 4076-4081.)

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[13] She could not recall any exact dates during her trial testimony, and

She considered herself his girlfriend. (19 RT 4085-4087.)

Sometime near end of June, Mr. Lightsey was arrested on a bail revocation matter. (19 RT 4083-4084.) He called her at her brother Brian Ray's house, asking for assistance. (19 RT 4085-4087.) They found a bailbondsman and had Mr. Lightsey bailed out on the night of July 2, 1993. (19 RT 4087-4089.)

Shortly after this, maybe July 4, 1993, she called Mr. Lightsey, but he said he was busy helping out an old person who was an invalid. (19 RT 4091.) She thought this was a nice thing for Mr. Lightsey to do, and recalled he had said the person was around 72 or 76. (19 RT 4092-4096.)[14]

After his release on his other case on July 2, 1993, Mr. Lightsey asked her to store some things in her car. (19 RT 4096-4097.) This was after the Fourth of July holiday, maybe around July 8 or 9, 1993, though she may have told Boggs it was in mid-July 1993. (19 RT 4098-4099.) He put some stuff in her trunk, she did not see what. (1 RT 4097-4099.)

Mr. Lightsey had his own car at this time, so she asked why he didn't store the items in his own car, and he said he was being discriminated against. (19 RT 4101) They then moved the car to Mr. Lightsey's old house on Wilson near the Valley Plaza, and locked it in a garage. (19 RT 4102.)

A few days later she told Mr. Lightsey she needed her car back. (19 RT 4105.) They returned, and Mr. Lightsey moved whatever had been in the trunk, she didn't know what, into the master bedroom of the home. (19 RT 4107-4108.) She later saw over 20 guns in this room. (19 RT 4108-4110.) Mr. Lightsey told her he collected guns, and she believed him, as

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conceded that she generally has trouble recalling dates. (9 RT 4075.)

[14] Detective Boggs testified at trial that Lehman told him on August 31, 1993 that Mr. Lightsey had never mentioned Holtby Road other than that his mother lived there, and that she came up with the story about the old

guns are common in Bakersfield and she grew up with guns herself. (19 RT 4111-4112.) He said he had bought them from others from want ads and the like. (19 RT 4112.)

Lehman testified that Mr. Lightsey was never belligerent when sober, but could become so when drunk. (19 RT 4110-4113.) On one occasion while Mr. Lightsey was very, very drunk, he put her in a chokehold, put a knife to her neck, and warned her never to discuss the guns with anyone, threatening that he could harm her through third parties if necessary. (19 RT 4113-4115, 4130-4131.) She told both Mr. Lightsey and Boggs that she just thought it was the alcohol talking and did not take it very seriously. (19 RT 4130-4131.)

During her testimony, she could not recall many details and conceded she had a very bad memory. (19 RT 4127-4130.) She did recall telling Boggs that Mr. Lightsey said he had got some of the weapons from his father. (19 RT 4132-4133.) She was very upset when her brother Brian Ray was arrested and spoke with Boggs about the case. (19 RT 4132-4134.) Her brother had been very good to her, allowing her to stay with him for free, and she was angry that he was arrested for murder when the guns were found at his home. (19 RT 4151.) She knew he had actually received the guns from Mr. Lightsey. (19 RT 4152.)

At time she spoke to Boggs, she also admitted that she was angry with Mr. Lightsey for maintaining a relationship with Westervelt, and that she had broken up with him over this. (19 RT 4133-4134.) She denied that any past use of drugs had affected her memory. (19 RT 4134-4135.)

She never saw an NRA belt buckle, Freemason ring, jar of coins, or video cameras in Mr. Lightsey's possession. (19 RT 4117-4119.)

Evidence that Lehman had been convicted of assault with a deadly

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man at another interview a couple of weeks later. (26 RT 5672-5673.)

weapon against her former husband was excluded from Mr. Lightsey's trial. (25 RT 5314-5321.)

Vaughn Lehman, Karen Lehman's former husband and a reserve deputy sheriff, testified that he was married to Karen for 22 years, and had known Brian Ray for 25-26 years. (27 RT 5729-5731.) He stated that both Karen Lehman and Brian Ray had a reputation for dishonesty. (27 RT 5731.)

Mr. Lightsey's sister, Janell Catron, called Detective Boggs on October 7, 1993, and met with him on October 10, 1993. (17 RT 3846.) Catron gave Boggs a Masonic ring she said had received from Mr. Lightsey. (17 RT 3847; Exh. 65.) On October 22, 1993, Catron also gave Boggs a jar of coins. (17 RT 3850.) Catron had gone to Mr. Lightsey's house on Oak Tree several times to help remove Mr. Lightsey's belongings. At some point, the house was vandalized. (22 RT 4749-4752.)

Boggs later contacted the secretary of the local Masonic temple, Irene Bower, and several jewellers about the ring. (17 RT 3849.) Irene Bower confirmed that Mr. Compton was a 32nd degree Mason and that the recovered ring was for such a Mason. (23 RT 4965-4978.)

Kevin Clerico, an investigator with the district attorney's office, testified at trial that Mr. Compton's home and Mr. Lightsey's mother's home were only half a mile apart, and that fact was stipulated by the defense. (22 RT 4759-4763.) Cheryl Gottesman, another prosecutor's investigator, performed some forensic tests and opined that the handwriting on some of the cardboard boxes recovered from Ray's house was similar to the handwriting of Mr. Compton. (22 RT 4823-4857.)

David Wells, a gunsmith and gun dealer, testified that he sold many of the guns to Mr. Compton, after meeting him at a gun show in April or May of 1993. (23 RT 4866-4896.) He visited Mr. Compton at this home, as they had a shared interest in both guns and ham radios. (23 RT 4893-

4899.) Mr. Compton's home was in very bad shape, with holes in floor and boxes piled everywhere. (23 RT 4900-4903.) He also saw many of the other guns while visiting at the home. (23 RT 4904-4947.)

Kitty Warner, the Office Manager for Bakersfield Community Radiation Clinic, testified that Mr. Compton was one of their patients. (23 RT 4979-4984.) Compton had had three previous appointments, on July 1, 2, and 6, 1993, and usually came early, at least some of the times accompanied by his friend Mr. Miller. (23 RT 4985-4992.) He never made it to his July 7, 1993 appointment. (23 RT 4992-4993.)

Robert Herman, a bailbondsman from Lancaster, arranged bail for Mr. Lightsey on the night of July 1, 1993, and met Karen Lehman at the jail to pick up his $2,000 fee for issuing the $20,000 bond. (24 RT 5157-5165.) Herman received several calls from Mr. Lightsey about the case. 24 (RT 5165-5167.) A check for Mr. Lightsey's bail bond premium, perhaps from Stacy Ray, was reported as returned from bank on July 2, 1993. (24 RT 5168.) Mr. Lightsey later came in to cover the amount. (24 RT 5169-5170.) Of the calls he received from Mr. Lightsey, one was on the day of the homicide at 11:50 a.m. (24 RT 5172.) Telephone records showed that it came from Mr. Lightsey's home.

Robert Rowland, an inmate at Wasco, the prison where Mr. Lightsey was serving his sentence on the molestation charge, testified at Mr. Lightsey's trial that Mr. Lightsey spontaneously confessed to him in the yard that he had killed an old man for his guns, and said that he would beat the charges. (24 RT 5207-5209.) According to Rowland, Mr. Lightsey also told him the case involved many different guns, including an Ithaca. (24 RT 5209-5210.) Mr. Lightsey told him that he had been caught because the person who had been storing the guns for cleaning informed on him and said he had earlier been shooting in the hills with this gun-storer. (24 RT 5211-5212.)

Rowland told CDC staff about this purported confession, and was interviewed by Investigator Mireles from the district attorney's office, perhaps on January 13, 1994, before the preliminary hearing in Mr. Lightsey's case. (24 RT 5213-5214.) He was not called as a witness at the preliminary hearing.

On March 17, 1995, he was interviewed again by D.A. Investigator Clerico. After this second interview, on April 23, 1995, Rowland had his throat slit by another inmate. (24 RT 5219-5221.) He then wrote Clerico, demanding assistance in getting a transfer to the Nevada prison system for his own protection in exchange for his testimony, and prosecutor Green agreed. (24 RT 5221-5225, 5247-5249.)

Rowland claimed that he was never offered a deal by the prosecution in exchange for his testimony. (24 RT 5214-5215, 5217-5219.)

At the time Mr. Lightsey supposedly confessed the murder to him Rowland was serving a 13-year sentence for two assaults with a deadly weapon and a grand theft auto charge, and was due for parole in July of 1999. (24 RT 5177.) He had prior convictions for armed robbery, sodomy, oral copulation, two escapes, possession of a weapon by a prisoner, and maybe a few more he may have forgotten. (24 RT 5177.) He had spent much of his adult life in the prison system. (24 RT 5225-5228.) He joined the Aryan Brotherhood while in prison in 1984 or 1985 and dropped out in 1987. (24 RT 5182.) He was placed in protective custody and embarked on a career as an informant.

In 1987, he testified for the prosecution in two Sacramento cases, involving alleged Aryan Brotherhood plots to kill prison guards and in a search warrant hearing on a third case. For his cooperation he was maintained in protective custody. (24 RT 5182.) When he was housed with Mr. Lightsey, Rowland was a trustee or "tier tender," and he had access to Mr. Lightsey's cell. (24 RT 2505.) He denied that he had read

police reports from Mr. Lightsey's case. (24 RT 5211.)

Mr. Lightsey's defense was that he had spent the morning of Compton's death in court, and his attorneys presented court records and witnesses to show this. The prosecution did not dispute that Mr. Lightsey had appeared for a court hearing that morning. Instead, the prosecutor tried various means of convincing the jury that the morning's proceedings had not lasted as long as they had, that the hearing had ended earlier than the defense contended, and even that Mr. Lightsey had left between calendar calls, murdered Mr. Compton and returned to court.

The prosecution successfully kept from the jury the entire transcript of the morning's proceedings in the department in which Mr. Lightsey's hearing took place on July 7, 1993, convincing the court to allow into evidence only the transcripts of the hearing itself and two previous moments when the case was called and put over.

The prosecution also presented the testimony of the court reporter in the department where the hearing was held. The reporter, Diane Daulong, testified that on the morning of July 7 she had seen Mr. Lightsey in court wearing a silky black shirt and that later he had reappeared wearing a white sweatshirt. (23 RT 5036-5037, 5047-5048.) She claimed she had first remembered this fact in November of 1993 but had not told anyone about it until a few weeks before trial. (23 RT 5051-5052, 5066.) Evidence was presented that the distance between Mr. Compton's home to Mr. Lightsey's attorney's office on his other case was 1.9 miles and that it took five minutes to drive between them. (22 RT 4763-4766.)

No physical evidence from Compton's house linked Mr. Lightsey to the crimes. (18 RT 3953.) None of Mr. Lightsey's fingerprints were found at the scene, or on any of the items taken by the police from Mr. Compton's house, (18 RT 3953, 4017) and none of the forensic evidence connected Mr. Lightsey to the crime scene. (18 RT 3954.)

C. The Evidence in Mr. Lightsey's Defense

Mr. Lightsey's attorneys presented evidence showing that he was with his attorney, in court, or driving from the courthouse to his mother's home, from about 8:00 until at least 11:00, on the morning of Compton's death. They also attempted to present evidence that Mr. Lightsey had bought the guns and other items which turned out to be Compton's from a man in his mother's neighborhood.

On the morning of July 7, Mr. Lightsey and his attorney, Dominic Eyherabide, were scheduled to appear in the Kern County Superior Court on a hearing regarding the return of a bail bond premium. (25 RT 5377-5379, 5391-5392.) Mr. Lightsey and his mother met Mr. Eyherabide at his office at around 8:00 in the morning. (26 RT 5530.) From there, they walked to the courthouse with another of Mr. Eyherabide's clients, Robin Lorenz, who also had a court hearing that morning on a misdemeanor case. (25 RT 5343-5346.)

Eyherabide told Mr. Lightsey he would meet them in Superior Court, and then he and Lorenz went to take care of a matter in Municipal Court. (25 RT 5346-5347.)

Lorenz testified that Mr. Lightsey was wearing dark slacks, a white shirt, and no tie. (25 RT 5346.) Lorenz's case was completed by 9:30 a.m., or a bit earlier, and he walked back to Eyherabide's office, where he saw Mr. Lightsey's mother's Volvo parked in the same spot where it had been when they left for court. (25 RT 5355-5357-5362.) He recalled the day clearly, because of the court appearance and because his home was burglarized while he was out. (25 RT 5346-5347.)

In addition to the hearings for Mr. Lightsey and Robin Lorenz, Dominic Eyherabide was also in trial in a capital case, *People v. Emdy*. (25 RT 5392-5395; Exh. H.) The Emdy trial was in Department 4 of the superior court, and Mr. Lightsey's bail bond hearing was set in Department

10.

Mr. Lightsey's hearing in Department 10 was called for the first time soon after 9:00. Because Mr. Eyherabide was in trial, the hearing was put over until later in the morning, on the understanding that Eyherabide would return to Department 10 during the midmorning recess in the Emdy trial. (25 RT 5409-5411.)

Eyherabide returned to Department 10 during a recess in the Emdy trial, and Mr. Lightsey's case was called for the second time. Mr. Eyherabide's notes for July 7 show that the Emdy trial recessed at 10:30, which would have placed the time of the second calling of Mr. Lightsey's case shortly after 10:30. (25 RT 5398, 5401.)[15] Mr. Lightsey was not in the courtroom then, but the bailiff found him and his mother in the coffee shop. All were present when the case was called for the third time. Mr. Eyherabide's notes for July 7 showed that he returned to the Emdy trial in Department 4, at 10:55 a.m. (25 RT 5401-5403.)

Fred, McAtee, another attorney and a long-time acquaintance of Mr. Lightsey, was in the courthouse on July 7, 1993 working on one of his cases. According to his notes, he was in the courthouse cafeteria between 9:30 a.m. and 10:15 a.m. when he returned to his office for a meeting. (25 RT 5431.) He recalled meeting Mr. Lightsey and his mother in the cafeteria, though he was not positive that this was on July 7, 1993. (25 RT 5431-5432, 5442-5447.)

Deputy Michael Forse, the bailiff in Dept. 10, saw Mr. Lightsey in court on the morning of July 7. (25 RT 5448-5450.) He recalled going to the coffee shop to get Mr. Lightsey some time between 9:00 and 10:35. (25

[15] This time was confirmed by the preliminary hearing of the opposing party at the hearing, bail bondsman Brian Epps. (PX 29.) However, at Mr. Lightsey's trial, Epps changed his testimony and stated that he thought the second calling of the case had occurred between 10:15 and 10:30.

RT 5455.)

John Somers, a Kern County prosecutor, appeared specially for the prosecution at Mr. Lightsey's hearing on July 7, 1993, because the prosecutor assigned to the case was in trial in the Emdy case. (25 RT 5459-5461.) At Mr. Lightsey's trial, he testified that he believed Mr. Lightsey's case was probably called for the first time at around 9:05 a.m. (25 RT 5465.) Somers recalled that Eyherabide had been in Department 10 earlier but had told Somers he needed to leave for Department 4. (25 RT 5467.) When the case called for the first time that day, the court told Somers to come back at 10:30 a.m., when Eyherabide would be available. (25 RT 5467-5469.) Somers did not recall whether Mr. Lightsey was in the courtroom at the time, but he must have been, because a bench warrant would have been issued had he been absent. (25 RT 5469-5470.)

At the preliminary hearing, Somers had testified that Eyherabide came to Department 10 at around 10:45 a.m. for the second calling of the case. At trial, he changed his testimony and said he believed the case was called shortly after 10:30 a.m. (25 RT 5479-5481.) Mr. Lightsey was not there at that time, but he was quickly found in the coffee shop while only one other case was handled. (25 RT 5470-5473.) Somers believed the third calling of the case was around 10:35 a.m. (25 RT 5482-5484.) They spent only a few minutes on their matter during the third calling of the case, and he could not recall where Mr. Lightsey went after that. (25 RT 5473-5475.)

Rita Lightsey, Mr. Lightsey's mother, confirmed she went to court with Mr. Lightsey and his attorney Dominic Eyherabide on July 7, 1993. (26 RT 5527-5528.) Mr. Lightsey arrived at her home around 7:15 a.m. or 7:30 in the morning, and they left at around 7:45 or 7:50 a.m. in her Volvo. They arrived at Mr. Eyherabide's office at 8:00 a.m. (26 RT 5528-5529.)

Rita Lightsey testified that as he always did at his court appearances,

Mr. Lightsey was wearing a white shirt with tie, dark slacks, and dress shoes. He did not own a black silk shirt and would not have, because he was prone to sweating in such dark shirts in the hot Bakersfield weather. (26 RT 5543-5544.) When she testified at Mr. Lightsey's trial, she was in possession of all of Mr. Lightsey's clothes and had inspected them to confirm that Mr. Lightsey owned no black silk shirts. (26 RT 5544.)

After briefly going to Dept. 10, Mrs. Lightsey went with Mr. Lightsey, at Eyherabide's suggestion, to the coffee shop to wait for the case to be called again. (26 RT 5532-5534.) While they waited they spoke to Fred McAtee, an old High School acquaintance of Mr. Lightsey. (26 RT 5534.)

Sometime after 10:00, Mrs. Lightsey recalled, Mr. Lightsey was summoned back to the courtroom by the bailiff, and she waited in the coffee shop for him for about 20-30 minutes. (26 RT 5534-5537, 5654.) After Mr. Lightsey's return, they then left the courthouse, walked to Eyherabide's office, and drove back to her house. (26 RT 5539-5542.) She entered her garage through the back streets, as she did not like her shady neighbors across the street see her come and go from the house. (26 RT 5544.)

As part of Mr. Lightsey's trial preparation, she reconstructed their walk back from the courthouse to Eyherabide's office: it took 9 minutes, 30 seconds at a regular pace. (26 RT 5546-5547.) It then took an additional 7 minutes, 45 seconds to drive back to her home. (26 RT 5548.)

As was his custom, when they got home Mr. Lightsey had a snack consisting of a sandwich and a drink at her house. (26 RT 5542, 5568.) After about a half hour, at 11:30 a.m. or 12:00 p.m., Mr. Lightsey left and she did not see him again that day. (26 RT 5543, 5638-5640.)

On cross examination, Mrs. Lightsey was impeached with statements in prior interviews indicating that she was confused about the

date when the events she recalled occurred, but she also testified that she remembered at one point that July 7, 1993 was her other son Richard's birthday, and she did clearly recall going to court on the morning of the day of Richard's birthday. (26 RT 5554.) She also later confirmed that she had written Richard a birthday check that day, which further jogged her memory. (26 RT 5564.) Richard reminded her of this a year later when they were driving to court together to another of Mr. Lightsey's hearings on the instant case, and she then gave this correction to original defense counsel Stan Simrin that same day. (26 RT 5619-5620, 5628-5629, 5664.)

Two witnesses, Darren Howard and Alfred Stone, identified guns seized from Brian Ray as guns which Mr. Lightsey had bought from them in through an ad in a local paper. (26 RT 5496-5508 5509-5525.)

During the prosecution's case in chief, defense counsel elicited from Detective Boggs that a man named John Ruby lived across the street from Mr. Lightsey's mother Rita Lightsey, with several other people. (18 RT 3939-3940.) Janell Catron, Mr. Lightsey's sister, also confirmed that Ruby lived across the street, and that a lot of transients floated in and out of the house. (22 RT 4756.)

Boggs stated that he had tried unsuccessfully on several occasions to contact people at that house. (18 RT 3940.) He stopped trying after Rita Lightsey told him she was afraid for her safety if Boggs kept going to their home. (18 RT 3940) Notwithstanding warnings that these men were potentially violent, Boggs never placed their home under surveillance. (18 RT 3941.)

The court sustained the prosecutor's objection when the defense attempted to present evidence that Mr. Lightsey had told Beverly Westervelt and his friend Dutler Dauwalder that he bought the guns and other items identified as Compton's for cash from a man staying at the John Ruby house. (21 RT 4603-4612.) However, Westervelt was permitted to

testify that Mr. Lightsey routinely kept thousands of dollars in cash at his mother's house, had bought his car with cash for $5,000, and had a habit of buying things with cash. (21 RT 4602, 4626.)

PENALTY PHASE

A. Evidence in Aggravation.

1. Turner Assault

John Turner testified that he went to "Roxanne's" nightclub in Bakersfield on the evening of December 5, 1991 with some co-workers. (29 RT 6237-6238.) As he was heading to the bar, Mr. Lightsey was in his way. Turner told Mr. Lightsey to move, but he refused. (29 RT 6238-6240.) Turner stepped up to within a foot of Mr. Lightsey and touched him on the upper part of his body. (29 RT 6240-6241.)

Later, as Turner was leaving the bar, he was punched so hard by someone that he lost consciousness; he did not see who punched him. (29 RT 6241-6242.)

Turner got a bloody lip from the punch to his mouth, and still has a small scar, though he never got stitches. (29 RT 6242.) Pictures of his injuries were taken at Roxanne's and were introduced into evidence at trial. (29 RT 6243-6246.)

About two or three weeks later, Mr. Lightsey showed up at Turner's home with a girlfriend and her two children. (29 RT 6247.) Mr. Lightsey apologized and asked for help, saying he had already received a DUI and did not need any additional legal trouble over the fight. (29 RT 6247-6248.) Turner did not want to get involved in Mr. Lightsey's case, though he did think that Mr. Lightsey appeared genuinely remorseful during this meeting. (29 RT 6250.)

2. Westervelt Assault

Beverly Westervelt testified that sometime around Christmas in 1990, 1991, or 1992, Mr. Lightsey came home late. (29 RT 6252-6254,

6255.) She confronted him about where he had been, and, angry about being confronted, Mr. Lightsey smashed an ironing board over her as she lay in bed, punched some closet doors, picked her up by the throat, punched her in the chest, and then left. (29 RT 6253-6254.) The next day he apologized. (29 RT 6254, 6256-6257.) A week later, because her chest still hurt, she went to the hospital for an x-ray, but there were apparently no injuries. (29 RT 6256-6257.).

3. Fight at Folsom

California Department of Corrections Lieutenant Donald Kimbrell testified that on November 12, 1993, when he was working at Folsom Prison, Mr. Lightsey and an inmate named Quintera got into a mutual fistfight. (29 RT 6258-6259, 6260-6262.) Disciplinary action was taken against Mr. Lightsey, and not Quintera, likely indicating that the CDC staff thought Quintera was defending himself. (29 RT 6263-6265.) Mr. Lightsey never contested the charges, so no witnesses were interviewed, and this disciplinary decision was just made on a review of initial reports, resulting in a loss of 90 days' credit for Mr. Lightsey. (29 RT 6265-6267.)

4. Lerdo Detention Facility Incident

Deputy Sheriff Cristobal Juarez testified that he was working at the pre-trial detention unit for Bakersfield County on April 2, 1995. (29 RT 6268-6270.) While inspecting Mr. Lightsey's cell, Juarez found an extra set of inmate clothing, so he ordered Mr. Lightsey to get out of bed and face the wall. (29 RT 6271-6273.) Mr. Lightsey was slow to respond, and "squared off" against Deputy Juarez by clenching his fists at his sides. (29 RT 6274, 6278-6279.) Mr. Lightsey never actually raised his fists to strike Juarez, but was nevertheless hand-cuffed and then taken to the infirmary to deal with any potential injuries caused by the hand-cuffing, as such examinations are standard operating procedure at the jail whenever a wrist-locking and hand-cuffing occurred. (29 RT 6275-6276.)

Juarez could not recall if it was a 2-man cell, or whether Mr. Lightsey told him that the extra clothes belonged to another inmate. Juarez denied kicking Mr. Lightsey after he was handcuffed. (29 RT 6279.) Juarez was not aware that Mr. Lightsey's ribs were x-rayed for injuries, or that Mr. Lightsey was put on sick call after this incident to check out injuries to his ribs. (29 RT 6280.)

5. Victim Impact Evidence From Family of William Compton

Nephew Anthony Compton testified that William Compton had good times with Anthony's family, with shared interests in guns and ham radio activities. Compton would often visit them in Barstow attending gun shows or rocks shows, as he collected both. (29 RT 6282-6283, 6289-6290) He would go shooting with Anthony and shared other activities, even bringing down a metal detector to look for gold when he visited last Thanksgiving. (29 RT 6284.)

Even though Compton had been depressed about his terminal cancer, he never gave up hope. (29 RT 6284-6285.) Anthony never believed that his uncle committed suicide, even when Anthony's mother told him that suicide was the conclusion by the Bakersfield authorities. (29 RT 6284-6286.) The pressures caused by Compton's death were rough for him: he had a new job with long hours, and also had to deal with Mr. Compton's death and help his mother deal with it. (29 RT 6286-6287.) His sister Carrie was so emotional about Compton's death that she couldn't testify at the trial. (29 RT 6286.) Anthony had spoken with Compton's doctor a year or two after the initial diagnosis of cancer. (29 RT 6287-6288.) The doctor said that Compton was looking good considering he had terminal cancer. (29 RT 6288.) However, Compton did have a colostomy bag due to his cancer. (29 RT 6289.)

6. Stipulation to Prior Convictions

It was stipulated that Mr. Lightsey had two earlier drug cases resulting in felony convictions. (29 RT 6291-6292; see also Exhs. 185 and 186.) One was for possession of marijuana for sale and simple possession of methamphetamines, and the other was for possession of cocaine. (Ibid.)

B. Evidence in Mitigation.

1. Mr. Lightsey's Testimony

Mr. Lightsey testified at great length at the penalty phase, responding to the evidence in aggravation, explaining why he was innocent of the murder charge, and recounting his own, eccentric version of his life history.

a. Response to Aggravating Evidence

i. Turner Incident

Mr. Lightsey testified that while he was talking to two women at Roxanne's, Turner came up, bumped into him, asked him to move even though there was plenty of room, and then poked him in the chest. (29 RT 6339-6341.) At the time, Mr. Lightsey was up against a wall and had no way to move out of the way. (30 RT 6509.)

Turner then called Mr. Lightsey out, inviting him to step outside. (29 RT 6340-6341.) When they got outside, Turner made a move towards Mr. Lightsey, and Mr. Lightsey punched him once in self-defense. (29 RT 6340.) The fact that Turner's scar was on the front of his face proves he saw Mr. Lightsey strike him and that he was not hit from behind as he claimed. (30 RT 6501-6502.) Mr. Lightsey left the scene of the incident because seven people were chasing him and because he feared police would blame him, as Turner was the one who lost the fight. (30 RT 6501-6503.)

ii. Westervelt Incident

The incident happened near the Christmas of 1990, while they were living together in an apartment on Real Road. (29 RT 6341-6342.) Mr. Lightsey had been out drinking at "John Bryan's" with his friend Mike

Rossica, who was staying on their couch at the time. (29 RT 6342-6343.) However, Westervelt jealously accused him of actually being at a strip bar called "Club Deja Vu." (29 RT 6343-6344.)

Mr. Lightsey tried to go to bed, putting ear plugs in his ears, as was his custom. (29 RT 6344, 6346.) A still-jealous Westervelt wanted to continue to the argument, however, and was all over him, even pulling out his ear plugs. (29 RT 6345-6346.) Mr. Lightsey was angry, but didn't want to hurt Westervelt, so he instead took out his aggressions on the ironing board and closet doors. (29 RT 6345-6346.) Then, he just pushed Westervelt once with an open hand to her chest, left the scene voluntarily, and went to his mother's house to sleep. (29 RT 6346-6347.) He did not punch Westervelt in the sternum, but instead only pushed her with his open hand. (30 RT 6468, 6499-6500.) They made up the next day. (29 RT 6347; 30 RT 6501.) Lingering anger over this incident, though, may have caused Westervelt to later perjure herself against Mr. Lightsey. (30 RT 6500.)

iii. Folsom Incident

Mr. Lightsey was in a very long line to get a medical slip to obtain his medications. (29 RT 6348.) A day or two earlier, he had an argument with inmate Quintera, the clerk in this line, because Quintera wouldn't give Mr. Lightsey a canteen slip for his cell mate. (29 RT 6348-6349.) Quintera was a prison gang member, a "Madero Buster." (29 RT 6349.)

This day, Quintera again started arguing with Mr. Lightsey, but Mr. Lightsey ignored him, and instead just grabbed the medical slip from Quintera's hand, and went into a second line for his medications. (29 RT 6348-6351.) Quintera illegally left his work station to follow Mr. Lightsey, came up to him, and said something, but Mr. Lightsey continued to ignore him. (29 RT 6351-6352.) Quintera then grabbed Mr. Lightsey by his shoulder and swung him around. (29 RT 6351.)

A mutual fight then broke out, but it only lasted a few minutes before being broken up. (29 RT 6351-6352.) Mr. Lightsey did not initiate the incident. (30 RT 6505.) Mr. Lightsey has documents to prove this, but his incompetent defense counsel never asked him to bring them to this trial. (29 RT 6351.) Quintera may have attacked him because as a trustee clerk he had access to records and may have known Mr. Lightsey was in prison for child molestation. (30 RT 6505-6506.) Mr. Lightsey never got an administrative hearing on this incident, as he was in the interim transferred up to Tehachapi Prison on these current wrongful charges of murder. (30 RT 6506.) Any paperwork that says he waived his right to hearing is forged. (30 RT 6506-6507.)

iv. Lerdo Detention Facility Incident

On that day, Mr. Lightsey was taking a nap after dinner. (29 RT 6352-6354.) A few hours earlier, his cell mate "Namo" had moved out, leaving behind one set of inmate clothes. (29 RT 6354.) Officer Juarez came in, got aggressive, started kicking clothes around, and telling Mr. Lightsey that he was in trouble. (RT 6353-6354.) Mr. Lightsey used the intercom to call another Officer, Johnson, to get permission to report Juarez's misconduct to his attorneys, but Johnson wouldn't let him. (29 RT 6353-6354.)

Juarez ordered all the other inmates into their cells, and then came into Mr. Lightsey's cell to beat him. (29 RT 6355-6356.) Juarez got rough with Mr. Lightsey, and then hand-cuffed him, asking him if he hated cops. (29 RT 6356.) Mr. Lightsey's hand was fractured and some ribs were broken during the beating, but the records brought by defense attorney today were forged not to show this, and different from what he earlier gave them. (29 RT 6356-6357.)

v. Drug Priors

His 1976 conviction for possession of marijuana for sale was

legitimate. (30 RT 6442, 6470.) But he was only a small-time dealer who would buy small amounts and split between himself and friends. (30 RT 6470.) He was young at the time, only 22. (30 RT 6471.) He also possessed a small amount of methamphetamine pills for personal use and was properly convicted of that charge at same time. (30 RT 6531-6532.) However, the investigating officer on that case was corrupt and stole thousands of dollars in Mr. Lightsey's cash, as well as his coin collection, sticker collection, and swimming medals. (30 RT 6473.) Mr. Lightsey later had both drug convictions expunged. (30 RT 6443-6444.)

His cocaine possession conviction was not legitimate. (30 RT 6442.) Mr. Lightsey had been driving home from a bar with friends around Christmas 1985. (29 RT 6363-6364.) His friend Mark Granchetta had .082 grams of cocaine, not even a usable amount. (29 RT 6363-6366.) However, Mr. Lightsey was found guilty of constructive possession of the drug. (29 RT 6364-6365.) He got probation on this case. (29 RT 6366-6368.) Eventually, however, his probation was revoked, and he sentenced to two years in prison; the probation revocation was based on trumped-up molestation charges at Guadalupe High School where he was teaching at the time. (29 RT 6367.) Though acquitted of all the molestation charges, he still had his probation revoked and was sent to prison, primarily because he refused to falsely admit that he was a sex offender. (29 RT 6367-6369.)

2. Personal History and Background.

Mr. Lightsey testified that he was a college graduate with a degree in public and business administration from California State University at Bakersfield. (29 RT 6357-6358.) He earlier attended St. Francis grammar school, then Garces Memorial High for freshman year only, where he played baseball, then South High. (29 RT 6357-6358.) He both swam and played baseball from 7th grade through college. (29 RT 6358.) He also played water polo at Bakersfield College, where he first attended college,

and also where he double-lettered in both swimming and water polo. (29 RT 6359.) By the vote of his teammates, he earned the "Harry Coffee" award for his water polo skills while a sophomore at Bakersfield College. (29 RT 6360.) Mr. Lightsey was also one of Judge Kelly's business law students at Bakersfield College. (29 RT 6360.) He had to take four years off for money reasons prior to graduating and worked for Chevron during those years, but later came back and got his degree from Cal State Bakersfield. (29 RT 6360.)

After graduating, he worked as a substitute teacher and then worked for Sun Exploration, the Fire Department, and Marathon Oil. (29 RT 6361-6363.) After his release from prison after his revocation of probation on his drug prior, Mr. Lightsey went to work for Unibar as a centrifuge operator, both locally and in Huntington Beach. (29 RT 6372.) He did similar work for both the Moore and Taber companies, and then went to work for Texaco. (29 RT 6372.) He worked for Texaco from December 1990 until April 1993, when his neighbors falsely reported him for another offense that resulted in his name being in the papers, which got him fired. (29 RT 6372.)

While at Texaco, he worked in production and operations and had a stable living-together relationship with Beverly Westervelt. (29 RT 6373-6374.) Prior to living with Westervelt, he had shared an apartment with his friend Mike Rossica. (29 RT 6374.) He met Westervelt at a club, and shortly thereafter he and Westervelt moved in together, first into an apartment, and then later into a home Mr. Lightsey bought for them to live in. (29 RT 6374-6375; 30 RT 6427.) Other than the one incident, they never had physical altercations. (29 RT 6376.) Mr. Lightsey paid for most of the rent, bought the groceries, and helped support Westervelt's two children from her previous marriage. (30 RT 6428-6430.)

Mr. Lightsey testified that his father had been great man, a

successful electrician, even though he never completed school past the 8th grade. (29 RT 6376.) However, his father was a strict disciplinarian who beat his children with his belt. (29 RT 6376-6377.) Mr. Lightsey was beaten more than other kids. (29 RT 6377.)

His father killed himself in 1978 with a shotgun, and Mr. Lightsey discovered the body, when he stopped by his father's house to visit. (29 RT 6378-6379.) His father's death was a great loss; he was Mr. Lightsey's best friend. (29 RT 6389.) They were both hunting and dog enthusiasts, owned many dogs, and frequently went hunting together. (29 RT 6389.) They also shared an enthusiasm for guns. (29 RT 6390.)

At the time of the suicide, his mother and father had been separated for two years. (29 RT 6379-6380; 30 RT 6422.) After his mother first left his father, his father went on a hunger strike, got scurvy, and was hospitalized. (30 RT 6422.) His father was very religious and was cured through his faith. (30 RT 6422-6423.) His father also suffered from Meniere's disease, which affects the inner ear and balance. (30 RT 6424.) He got this from being hit in the head with a baseball from a home run while Mr. Lightsey was pitching baseball in High School. (30 RT 6424.) His father was eventually placed on full disability due to this loss of equilibrium. (30 RT 6425.) Before his civilian employments, his father had been a military policeman, and was a very strong individual. (30 RT 6423.)

Mr. Lightsey had five siblings, two older brothers, two younger brothers, and a younger sister. (29 RT 6380.) They all finished college. (29 RT 6380; 30 RT 6426.) John Lightsey had a PhD in physical and organic chemistry. (30 RT 6426.) Richard Lightsey was an Episcopal Minister at the local First Episcopalian Church. (30 RT 6426.) His mother spent a career as a local school teacher, though she was now retired. (30 RT 6426-6427.)

Mr. Lightsey stated that he was falsely accused of molesting a neighbor's child, M.B. (29 RT 6380-6381.) His neighbors, who went to Guadalupe Church, were prejudiced against him based on earlier false molestation accusations at the Church-owned Guadalupe High School, even though Mr. Lightsey had been acquitted at trial. (29 RT 6381.) Mr. Lightsey's home was covered in graffiti after these false charges. (29 RT 6381-6382.)

His lawyer on that case was Dominic Eyherabide, who pressured him into falsely pleading 'no contest' to get a 3 year sentence rather than a 21 year sentence. (29 RT 6384-6386.) He had no choice but to plead guilty in the case, even though he was not guilty. (30 RT 6469.) At the last minute, the court insisted that he also plead guilty to a second count of molestation of Westervelt's daughter, H.W. (29 RT 6385.)

His defense attorney was secretly working with prosecutors Somers and Humphreys, feeding them information on this molestation case. (29 RT 6386.) Mr. Lightsey pled guilty on July 15, 1993. (9 RT 6388.) However, he never molested either of the two children. (30 RT 6506.)

Beyond the false charges against him discussed above, John Somers, the original prosecutor in this instant case, was also biased against Mr. Lightsey because, as jury foreman in the Barrelhouse case, Mr. Lightsey had led the jury to acquit the defendant. (29 RT 6369-6372, 6386.)

The court and prosecution were also biased against Mr. Lightsey for revealing that prosecutor Colette Humphreys had bought marijuana from Mr. Lightsey. (29 RT 6386; 30 RT 6471-6473.) Humphreys came to Mr. Lightsey's house with his girlfriend Shanda Shelton to buy marijuana back when Mr. Lightsey was a small-time marijuana dealer. (30 RT 6472.) Humphreys later showed up to Mr. Lightsey's court proceedings, apparently to ensure he got convicted. (30 RT 6473-6474.)

Mr. Lightsey complained about his oppression by the local

prosecution and courts over the years, and wrote letters to U.S. Supreme Court Chief Justice Rehnquist, Malcolm Lucas on the California Supreme Court, Liz Pearlman of the California State Bar, Eugene Primo at the Commission on Judicial Performance, the State Attorney General, the American Civil Liberty Union, and many others. (30 RT 6446-6448.) These letters primarily related to judicial cover-up of forged transcripts and documents in the case at bar. (30 RT 6447-6448.)

Mr. Lightsey stated that he didn't kill Mr. Compton or steal his guns. He bought the guns on July 17, 1993, from a neighbor of his mother living at the John Ruby house. (29 RT 6391.) The man who sold him the guns hung out at the house, which was a notorious drug house. (29 RT 6391; 30 RT 6541.) Mr. Lightsey's parole officer saw drug sales activity from that house. (30 RT 6474.)

On the day he bought the guns, Mr. Lightsey and this man drove to an alley behind his mother's house and transferred everything from the trunk of the man's car to the trunk of Mr. Lightsey's car. (30 RT 6543.)

Mr. Lightsey took all the items he had bought straight to his home with Westervelt, cleaning some items, throwing away some no-value items, and storing the camcorders next to the wall of their bedroom. (30 RT 6544.) Later, he moved the camcorders and guns into Karen Lehman's trunk, probably on July 19 or 20, 1993. (30 RT 6545.) As Lehman needed to use her car, he then moved the guns and camcorders back to his own car's trunk at his home with Westervelt. (30 RT 6546.) But after the incident with his neighbors who alleged he molested their daughter, sometime around July 30, 1993, he moved the camcorders and weapons back to Lehman's trunk. (30 RT 6548-6549.)

Mr. Lightsey later became concerned that the goods might have been linked to the robbery-homicide of Compton, because he found camcorders with pictures of Compton on the film and some of Compton's cancelled

checks in the basket of goods that he had bought from the third party from the John Ruby house. (29 RT 6392; 30 RT 6430-6431, 6433-6436.) However, Mr. Lightsey had no idea they came from Mr. Compton's house when he bought them. (30 RT 6482-6484.)

It was because he had heard about Compton's death and was worried about being linked to the guns that he was so concerned in his letters to Westervelt from prison. (29 RT 6391-6393.) He was especially concerned about his decision to store them with the untrustworthy Brian Ray, and regretted that he had not put them in storage. (30 RT 6481-6482.) Even after he suspected that the weapons were linked to Compton's murder, he could not go to the police, as it was illegal for him to own guns as a felon, and more importantly he was afraid that the killer might harm him or his mother. (30 RT 6436-6437, 6486-6488.) He became even more concerned about the guns when he found out that Ray had been using them. (30 RT 6438.)

Mr. Lightsey told many people before his arrest that he had bought guns from a third party. (30 RT 6439.) Specifically, he told Dutler Dauwalder, Beverly Westervelt, and Brian Ray. (30 RT 6438-6439.) In addition to the guns bought from that third party, three of the weapons seized were actually bought from other people via want-ads in local newspapers. (30 RT 6440.)

Mr. Lightsey met William Compton while looking to buy a home in his mother's neighborhood. (30 RT 6431-6435.) He had gone there on at least two occasions with either Lehman or Westervelt. (30 RT 6478-6480.) He saw at least one rifle in home while there, but denied talking with Compton about his extensive gun collection. (30 RT 6479-6480.)

After Compton's death, Mr. Lightsey realized that he was the man whose home he had been in earlier. (30 RT 6434.) Mr. Lightsey reviewed old newspapers at his mother's house, and confirmed that he was same man

by reading an obituary from July 15, 1993, a week after his death. (30 RT 6434-6435, 6477.)

Mr. Lightsey testified that he was forced to go in pro per without benefit of defense counsel for five months of pre-trial proceedings in 1994, after being abandoned by his first trial counsel in this case, Stan Simrin. (30 RT 6395-6399.) The reporter's transcripts of the so-called *Faretta* hearing that caused the abandonment were forged, as was the reporter's transcript of his preliminary examination. (30 RT 6400.) Prosecutor Green was behind the forgery of the preliminary examination transcripts, and also solicited perjury from many witnesses both at the preliminary examination and at trial. (30 RT 6484.) She also pressured Westervelt into perjuring herself at trial. (30 RT 6484.)

Though normally a good defense attorney, Simrin was secretly working with prosecutor Green to convict Mr. Lightsey. (30 RT 6455-6457.) Detective Boggs was the one who recruited Simrin, and Boggs also wrote many false reports against Mr. Lightsey. (30 RT 6485-6486.) Simrin intentionally sabotaged Mr. Lightsey's defense at the preliminary examination by failing to call key defense witnesses such as Mrs. Epps, the wife of the bailbondsman present at his July 7, 1993 hearing in the other case that gave him his alibi, who could have been a key witness in Mr. Lightsey's defense. (30 RT 6455.)

The first motion to declare him incompetent was filed in order to allow the prosecution time to make forgeries of court documents. (30 RT 6401.) For that reason, Mr. Lightsey refused to allow court-appointed Dr. Burdick to examine him. (30 RT 6417-6419.) He consented to a mental health examination by a certain Dr. Manohara during one of his competency proceedings. (30 RT 6418-6420.) He was also examined by another man named Dr. Velosa on two other occasions. (30 RT 6420.)

The records from his July 7, 1993 hearing on his child molest case

that gave him an alibi as it occurred on the same day as the murder, were also forged. (30 RT 6448.) Deputy District Attorney Carbone was there, not Deputy District Attorney Somers, as was falsely reflected in the records. (30 RT 6448.) Mr. Lightsey was in court all day, not just in the morning. (30 RT 6448-6449.) There were many people involved in the conspiracy to cover up what really happened at the July 7, 1993 hearing that should have given him an alibi, including Detective Boggs, defense counsel Simrin, his defense investigator Susan Penninger, and Judge Klein. (30 RT 6485.)

His brother Richard Lightsey wasn't part of the conspiracy to cover up the real facts of his 'long day' of full hearings, but he did make a mistake when he said they were all at their mother's birthday party the afternoon of July 7, 1993. (30 RT 6488, 6493.) The afternoon hearings he recalled were not actually held on July 9, 1993, but instead on July 7, 1993, and were incorrectly shown in the reporter's transcripts from July 9, 2003. (30 RT 6490-6491.)

The fact that he was at court all that day can be proved by talking to attorney McAtee who saw Mr. Lightsey and his mother in the court coffee shop. (30 RT 6495.) The phone bills showing he made calls from home that afternoon were also forged, perhaps not by Pacific Bell, but instead by FBI agents secretly conspiring against him or perhaps directly by prosecutor Green. (30 RT 6495-6498.)

After Simrin, his next defense counsel was Donnalee Huffman, but she never even met him before abandoning his case. (30 RT 6459-6460.) After Huffman came Ed Brown and his partner Jim Sorena. (30 RT 6460-6462.) He filed two *Marsden* motions against Brown, but they were denied so he had to go in pro per. (30 RT 6460.) Brown refused to give him reporter's transcripts of his earlier hearings, probably to give time to fellow conspirators to have the transcripts forged. (30 RT 6460.) While Mr.

Lightsey was in pro per, Ralph McKnight was appointed as his advisory counsel. (30 RT 6461.) McKnight did nothing on the case except becoming involved in the fraudulent concealment of the truth. (30 RT 6461-6462.)

McKnight was replaced by advisory counsel Jim Gillis, who later served as trial counsel. (30 RT 6462.) Trial counsel William Dougherty was also co-appointed to case as lead counsel at Mr. Lightsey's request, but even Dougherty cheated him and took funds from him, even though he was court-appointed and government paid. (30 RT 6462-6463.)

Mr. Lightsey was equally misserved by his defense counsel on his priors. (30 RT 6463-6466.) He hired defense counsel Eyherabide on his child molest prior, but was fooled by him. (30 RT 6463-6464.) Likewise, his defense attorney Mitts on his cocaine possession did a horrible job, and he never should have received that false conviction, as he didn't have a usable amount of cocaine in his car. (30 RT 6464-6465.) The California Highway Patrol report saying he dumped most of the cocaine on the car floor was false. (30 RT 6465.)

Prosecutor Green got many people to lie at trial. (30 RT 6552-6563.) Westervelt lied about many things, as did Elva Atkins and Karen Lehman. (30 RT 6465; 6651-6655) Prosecutor Green is very evil and suborned a great deal of perjury in this case. (30 RT 6553.)

Mr. Lightsey testified that he did not threaten to stab Karen Lehman, nor did he murder William Compton, but was instead in court all day when the murder occurred. (30 RT 6510.) Westervelt was the one who recovered the stored weapons from their home, and Mr. Lightsey did not violate the court order to stay away from their shared home. (30 RT 6511-6512, 6541.)

3. Testimony of Reverend Richard Lightsey

Reverend Richard Lightsey was Mr. Lightsey's older brother and

had been a minister at Bakersfield's All Saints Episcopal Church since 1993. (31 RT 6661.) Prior to that, he was a Minister at Bakersfield's First Baptist Church, Christian Life Center. (31 RT 6661.)

He stated that there were four Lightsey brothers, Joe, Christopher, David, and Richard, and one sister, Janell. (31 RT 6661-6662.)

In 1969 or 1970, their father physically attacked their mother. (31 RT 6662.) Afterward, their father moved into a separate room in the house, and began starving himself. (31 RT 6663.) He lost around 100 pounds, going from the mid-200s to mid-100s, and had to be hospitalized for malnutrition and scurvy. (31 RT 6662-6664.) Before this incident, their father had been a strict disciplinarian, but he became much more permissive after his hospitalization. (31 RT 6664.)

After Mr. Lightsey was released from jail after his arrest in 1977, their father attacked their mother again. (31 RT 6664.) She fled to a neighbor's house, and then moved out permanently into her current home on Holtby Road. (31 RT 6664-6665.) Richard spent one night with their father after this second incident, and could hear him crying and begging for mercy in the next room. (31 RT 6665.) He was plainly suffering physical and mental anguish. (31 RT 6665.)

Their father died in June of 1978. (31 RT 6666.) Richard had gone to his father's home that day, and saw police cars and ambulances outside. Mr. Lightsey was there, crying hysterically and banging his head and arms against the garage wall. (31 RT 6666.) The death of their father affected Richard deeply, and he became a Christian after his other brother John, already a devout Christian, came out from Louisiana and spoke to him. (31 RT 6666-6667.)

He was not sure how their father's death affected Mr. Lightsey, but believes he resumed his normal life. (31 RT 6667.) After Mr. Lightsey was released from prison in 1989, he showed signs of getting his life

together in an encouraging and impressive matter, getting a good job and buying a house. (31 RT 6667-6668.) His arrest in 1993 for molestation was very upsetting for Mr. Lightsey, as all he had done since his release from prison was put at risk, and Mr. Lightsey focused on proving his innocence. (31 RT 6668.) Richard loves his brother. (31 RT 6669.)

After their parents broke up, Richard moved in with their mother and Mr. Lightsey moved in with their father. (31 RT 6671-6672.) Richard's life was similar to Mr. Lightsey's, except that Richard had a much different adolescence after the incident when their father was hospitalized, while Mr. Lightsey was an adolescent before their father was hospitalized. (31 RT 6672.) All the Lightsey children had college degrees. (31 RT 6674.) His sister was a teacher, Richard was a minister, John was a chemical engineer, Joe was an accountant, and David was a sports medicine physiologist. Even after his two incarcerations, Mr. Lightsey was still able to get a job and a place to live, and get his life back on track. (31 RT 6675-6676.)

Richard was not frightened of Mr. Lightsey. When he said Mr. Lightsey was scary after his release from prison time on his cocaine possession case, he meant only that Mr. Lightsey was paranoid. (31 RT 6677-6678.)

4. Dr. William Pierce's Testimony

Dr. William Pierce, a clinical psychologist, testified that he interviewed Mr. Lightsey twice at Tehachapi State Prison in October of 1994. (31 RT 6694.) He also reviewed a complete set of records, including police reports, the coroner's report, the transcript of the preliminary hearing, and the competency proceedings in July of 1994. (31 RT 6694.) He reviewed defense investigation reports and the evaluations made by Dr. Burdick, Dr. Manohara, and Dr. Velosa. (31 RT 6694.) He also interviewed Mr. Lightsey's brothers Richard and Joe, and his mother Rita. (31 RT 6747-6749.) He had planned to do further interviews, but was

notified by trial counsel about the penalty phase only a few days before his testimony. (31 RT 6753-6756.)

Based on his analysis of records and his two examinations, he diagnosed Mr. Lightsey as suffering from a severe emotional disturbance, with a paranoid delusional disorder and a narcissistic personality disorder with depressive characteristics. (31 RT 6695.) Mr. Lightsey's delusion is that he is being persecuted. (31 RT 6695.)

During his examination of Mr. Lightsey, Mr. Lightsey could not stay on subject, was overly verbose, made pressured speech with fragmented thinking, and jumped from topic to topic, with loose associations. (31 RT 6696.) Mr. Lightsey was difficult to understand due to this disordered thinking. (31 RT 6697.) He also made frequent religious allusions, invoking the wrath of God against those persecuting Mr. Lightsey and his family. (31 RT 6697-6698.) He believed God would protect him and his family. (31 RT 6698.) During their second interview, Mr. Lightsey broke down and cried about how his treatment by the authorities was destroying his family. (31 RT 6698.) Underneath his delusions of persecution, he had a sense of hopelessness and despair. (31 RT 6699.)

Dr. Pierce wanted Mr. Lightsey to take a battery of clinical psychological tests designed to test one's personality and organization, and to test for organic impairment of the central nervous system. (31 RT 6700.) However, Mr. Lightsey refused to take such tests. (31 RT 6702.)

Mr. Lightsey insisted that his early childhood was good, and he was part of a happy family. (31 RT 6703.) Mr. Lightsey's family members did not agree. As a child, they said, Mr. Lightsey was hyperactive and suffered from a hypothyroid condition. (31 RT 6704.) His mother also said Mr. Lightsey had an unusually close relationship with father, unlike the other children, and his father would stand up for Mr. Lightsey when he argued with his mother. (31 RT 6703-6705.)

Mr. Lightsey's father was a strict disciplinarian who would beat the children with his belt. (31 RT 6705.) He was also violent towards their mother, who was afraid to intervene to protect her children as she was too worried about her own beatings. (31 RT 6705.) Mr. Lightsey got the worst beatings. (31 RT 6706.) According to Mr. Lightsey's brother Joe, the children led a tense and over-disciplined childhood, and were not allowed to even go out of the house to eat or attend picnics. (31 RT 6706.)

Mr. Lightsey had a glowing opinion of his mother, comparing her favorably with the Virgin Mary. (31 RT 6707.) Mr. Lightsey was also very close with and proud of his father as a self-made man. (31 RT 6707.) He told Dr. Pierce that he and his father went on frequent hunting trips. (31 RT 6708.) Mr. Lightsey's positive view of his childhood was in sharp contrast to what was relayed by his siblings. (31 RT 6708.)

Though Mr. Lightsey gave few details of his adolescent years, he said that he had been a good athlete, a top-notch swimmer, and popular with his peers. (31 RT 6709.) He said their home was a center for children in the neighborhood, as it was a place where people could meet and even play music. (31 RT 6710.)

However, in Mr. Lightsey's late adolescence tensions grew between his father and mother; there were many brief trial separations before they finally separated for good. (31 RT 6710-6711.) During this tense period, around 1972, Mr. Lightsey's father physically attacked his mother. (31 RT 6711.) Mr. Lightsey was attending Bakersfield City College at the time, and was selling marijuana, causing additional conflict in the family. (31 RT 6711-6712.) Mr. Lightsey's father gave tacit approval to his illegal activities. (31 RT 6711-6712.) Mr. Lightsey was arrested for these sales in 1974 or 1975, when he was 22 years old. (31 RT 6714-6716.)

That same year, Mr. Lightsey's father went into the hospital for a back operation and changed radically. (31 RT 6712.) He had a religious

vision and believed that he would not die, did not need to be buried, and had special magical powers. (31 RT 6712.) He had a delusional belief that he could now suddenly play piano without training, but would instead just incoherently pound on the keys. (31 RT 6712.) He also began reading and quoting the Bible regularly. (31 RT 6712.)

During this period, their father began increasing his drinking, now mixed with his pain pills, and became violent and uncontrolled. (31 RT 6713.) On one occasion, he chased the family around their house with a knife. (31 RT 6713.) The police were frequently called to the home, and Mr. Lightsey's father was twice sent to the psychiatric ward of Kern County Hospital for observation. (31 RT 6713.)

Unlike his siblings, Mr. Lightsey viewed these activities positively, as "spiritual flushing." (31 RT 6714.) As for Mr. Lightsey, after his release from jail for selling marijuana, his life went well: he completed probation, received a BA in business and public administration from Cal State Bakersfield, and was moving on with his life. (31 RT 6716.)

However, things took a turn for the worse when his father committed suicide on May 11, 1978. His father's death traumatized Mr. Lightsey, who "went to pieces." (31 RT6716-6717.) He appeared to put on a brave front and acted as if he was all right, but in reality he was just in denial, attempting to minimize his loss and trauma. (31 RT 6717-6719.)

As an adult, Mr. Lightsey had several jobs with oil companies and also as a substitute teacher. While teaching, Mr. Lightsey was accused of child molestation, something that was very embarrassing for his family. (31 RT 6718.) Dr. Pierce did not have the opportunity to review records from this molestation case. (31 RT 6720.) Mr. Lightsey also had a cocaine conviction in the late 1980s and was imprisoned for two years and paroled in 1990. (31 RT 6721.)

After he was paroled, he started a long-term relationship with

Beverly Westervelt and eventually moved in with her. (31 RT 6721.) Mr. Lightsey was working at Texaco during this time. (31 RT 6721.) Things were going well until he was arrested for child molestation in April of 1993. (31 RT 6721.)

Dr. Pierce had read the three psychiatric evaluations from the other doctors, but was ordered by the trial court not to discuss their contents. (31 RT 6721-6723.) After reviewing these reports and other materials, he diagnosed Mr. Lightsey as a "delusional paranoid disorder, persecutory type, and narcissistic personality with depressive features." (31 RT 6723.)

Mr. Lightsey's predominant symptom on Axis One was his delusional paranoid disorder, persecutory type, characterized by delusion of government persecution, and is a "severe psychiatric disorder." (31 RT 6724.)

His Axis Two diagnosis is a narcissistic personality disorder with depressive features. (31 RT 6724.) While often misviewed as being selfish, this disorder is actually a maladaptation based on feelings of despair and sadness. (31 RT 6725-6726.) Mr. Lightsey's family background contributed to this disorder, especially his close identification with a father who killed himself. (31 RT 6726.) Rather than dealing with his father's suicide, Mr. Lightsey pretended it was not a big factor, increasing the distortion between reality and his fantasy worlds. (31 RT 6726-6727.)

Mr. Lightsey's mental disturbance caused him to see the world differently from the actual reality, and his father's psychotic behavior affected him and his family more than Mr. Lightsey admitted to himself. (31 RT 6728.) Mr. Lightsey's delusions also caused him to blame his legal problems on his sense of persecution. (31 RT 6728-6729.)

Mr. Lightsey's way of speaking and inability to answer questions directly is actually evidence of his fragmented thought and tangential thinking: it is a form of thought disorder. (31 RT 6729.) This makes it

difficult to follow Mr. Lightsey due to his inability to make logical connections. That pattern of speech could also be seen in the transcripts of his preliminary examination, competency hearing, and his testimony during the penalty phase. (31 RT 6730-6732.) Mr. Lightsey's speech patterns became even more disjointed when discussing sensitive issues such as his father's death: he was clearly in conflict over the death, with his wishful thinking about a grand relationship and hunting trips dominating any conversations on this topic. (31 RT 6732.)

In Dr. Pierce's opinion, Mr. Lightsey had been suffering from these mental and emotional disturbances for years. It was typical for paranoid delusional disturbances to manifest only in late adolescence; here it began around the same time as his father's death. (31 RT 6734.) Mr. Lightsey was suffering from this delusional paranoid disorder, persecutory type, on Axis I, and on Axis II, a narcissistic personality disorder with depressive features, on the day of the homicide. (31 RT 6734-6735.)

Mr. Lightsey's Axis II personality disorder did not cause him not to know right from wrong. (31 RT 6760-6761.) However, his Axis I delusional paranoid disorder might have, as it was severe as suffering from schizophrenia. (31RT 6761-676.)

Mr. Lightsey's inability to deal with his father's psychotic behavior and suicide is the reason that he had more problems than other siblings. (31 RT 6770-6771.) Mr. Lightsey was also more disciplined by his father. (31 RT 6770.) Making matters worse for Mr. Lightsey, he also closely identified with his father, and it is diagnostically significant that he failed to react as expected to his father's death. (31 RT 6772-6773.) The suicide of his father was the turning point for Mr. Lightsey, even though he had drug convictions prior to then. (32 RT 6808-6809.)

Dr. Pierce believed that a sentence of life without the possibility of parole would curb Mr. Lightsey's behavior, as he would be incarcerated.

(32 RT 6814.) Both Mr. Lightsey's mental ailments could be treated, though his paranoid delusional disorder is difficult to treat. (32 RT 6815-6816.)

I.

MR. LIGHTSEY'S CONVICTIONS AND SENTENCE OF DEATH MUST BE REVERSED BECAUSE HE WAS INCOMPETENT TO STAND TRIAL, AND BECAUSE THE COMPETENCY PROCEEDINGS IN HIS CASE WERE FATALLY TAINTED BY PROCEDURAL ERRORS.

A. Introduction

Every attorney appointed to represent Mr. Lightsey quickly came to the conclusion that he was incompetent to stand trial.[16]

Six times, before and during Mr. Lightsey's trial, various attorneys representing or advising Mr. Lightsey asked the trial court to declare a doubt of his mental competence, citing examples of his delusional thinking and his inability to cooperate with his defense attorneys and investigators. Twice, proceedings were suspended for examinations by court-appointed experts. In all, three experts submitted reports to the court. Mr. Lightsey refused to be interviewed by one; of the other two, both found him to be suffering from mental illness. One expert found him incompetent both to represent himself and to stand trial, and the other concluded that he was incompetent to represent himself, but competent to stand trial.

During one set of competency proceedings, Mr. Lightsey, who adamantly denied that he was mentally ill, represented himself. In an odd plea bargain that reflects how little the trial judge regarded the proceeding and Mr. Lightsey's manifest impairment, the judge offered to find Mr. Lightsey competent if he would waive a jury trial on the issue of his competence. Mr. Lightsey readily accepted the offer.

Later, after Mr. Lightsey's advisory counsel questioned Mr. Lightsey's mental competence and his ability to continue representing

[16] In all, seven attorneys were appointed either to represent or advise Mr. Lightsey: Stan Simrin, Donnalee Huffman, Edward Brown, James Sorena, Ralph McKnight, James Gillis, and Michael Dougherty.

himself, Mr. Lightsey accepted the appointment of two attorneys, James Gillis and Michael Dougherty, to represent him. Gillis and Dougherty did not again raise the issue of his mental competence until the penalty phase of his trial.

Under the stress of his criminal trial, Mr. Lightsey's mental illness continued and worsened. He disrupted the trial with frequent interruptions, verbal outbursts, and rambling and delusional colloquies. His attorneys were repeatedly distracted during witness testimony and arguments on motions and objections by their efforts to control Mr. Lightsey's troublesome and self-defeating behavior. The trial judge incessantly warned Mr. Lightsey to control himself and lectured him, without effect, on the bad effect his outbursts and comments were having on the jury. But the judge never seemed to entertain the possibility that Mr. Lightsey was mentally ill. During the penalty phase, Mr. Lightsey's attorneys asked the court twice to declare a doubt of Mr. Lightsey's mental competence, but the judge refused.

The conflict between Mr. Lightsey's psychotic behavior and the trial judge's attempts to control it reached its culmination at the hearing on Mr. Lightsey's new trial motion, where the judge stopped Mr. Lightsey's frantic interruptions by having him handcuffed and gagged with duct tape – a grotesque scene caught by a news photographer and published in the local paper.

Individually and cumulatively, the court's errors and its failure to protect Mr. Lightsey from the consequences of his mental illness violated Mr. Lightsey's right not be tried while mentally incompetent. (*Dusky v. United States* (1960) 362 U.S. 402; *Pate v. Robinson* (1966) 383 U.S. 375, 386-387; Pen. Code, §§ 1368, 1369.)

These errors also violated Mr. Lightsey's state and federal constitutional rights to a fair trial, to due process of law, and to a

proportionate and reliable verdict of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.) In addition, the error breached his federal constitutional due process "liberty interest" under the state law competency provisions. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.) These errors require per se reversal of Mr. Lightsey's verdict and judgment of death. (*Dusky v. United States, supra,* 362 U.S. 402; *Pate v. Robinson, supra,* 383 U.S. 375, 386-387; *People v. Dunkle* (2005) 36 Cal.4th 861, 885.)

B. The Trial Court Repeatedly Violated Statutory And Constitutional Rules Governing Competency Proceedings

1. The United States Constitution Prohibits the Trial of a Mentally Incompetent Defendant, and California Law Requires That Criminal Proceedings Be Suspended for a Determination of Competence When the Court Has a Doubt of the Defendant's Competence.

It is well settled that a criminal defendant may only be tried where "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "he has a rational as well as factual understanding of the proceedings against him." (*Dusky v. United States, supra,* 362 U.S. 402, 402-403; see also *Pate v. Robinson, supra,* 383 U.S. 375, 378 [same]; *People v. Dunkle, supra,* 36 Cal.4th 861, 885 [same].) "Whether a person is competent to stand trial is a jurisdictional question, and cannot be waived by the defendant or counsel." (*People v. Castro* (2005) 78 Cal.App.4th 1402, 1414 [reversing judgment for failing to hold 'proper' competency proceedings], citing *People v. Pennington* (1967) 66 Cal.2d 508, 521.)

Criminal proceedings must be suspended wherever a "doubt arises in the mind of the judge as to the mental competence of the defendant." (Pen. Code, § 1368(a).) This doubt is defined using an objective 'reasonable judge' standard. A full competency hearing is required whenever

substantial evidence of incompetence appears that "raises a reasonable doubt about the defendant's competence to stand trial." (*People v. Danielson* (1992) 3 Cal.4th 691, 726; see also *People v. Castro, supra*, 78 Cal.App.4th 1402, 1416 ["standard to be applied in determining whether to suspend proceedings and evaluate the defendant's competency is an objective one."].)

Prior to holding a competency hearing, the court must appoint "a psychiatrist or licensed psychologist" to "examine the defendant." (Pen. Code, § 1369(a).) Where a defendant claims he _is_ competent, as occurred in the instant case, "the court shall appoint _two_" such experts. (*Id.*, emphasis added.) A defendant also has a statutory right to jury trial on his competency. (*People v. Harris* (1993) 14 Cal.App.4th 984, citing Pen. Code, § 1368.)

The above procedures were not followed in Mr. Lightsey's case. The numerous errors committed by the trial court require reversal of the entire judgment. (*People v. Ary* (2004) 118 Cal.App.4th 1016, 1030.)

2. The Court Erred in the Competency Proceedings of March, 1994 by Appointing Only One Expert and By Finding Mr. Lightsey Competent Solely on the Basis of the Report of That Expert, Even Though the Expert Had Not Conducted an Examination of Mr. Lightsey.

The first competency proceeding in Mr. Lightsey's case was jurisdictionally deficient because the trial court appointed only one expert to evaluate Mr. Lightsey and then found Mr. Lightsey competent on the basis of that expert's report, even though Mr. Lightsey had refused to be examined by him.

In the months following Mr. Lightsey's arrest on the capital charges, two court appointed attorneys, in turn, withdrew from representing Mr. Lightsey on the ground that he would not cooperate

with them in his defense.[17]

On March 3, 1994, Mr. Lightsey's third appointed counsel, Edward Brown, filed a motion for a proceeding under Penal Code section 1368(c). (3 CT 711 [3/7/94 Motion for PC 1368 Mental Competence Examination.].) In his written pleadings expressly gave notice that he was seeking to "suspend proceedings" pursuant to Penal Code section 1368, because he suspected Mr. Lightsey did not have "mental competence" to stand trial, and a requested a judicial determination of Mr. Lightsey's mental faculties. (3 CT 711.) On March 7, 1994, Judge Felice, the judge then assigned to the case, suspended the criminal proceedings and appointed one expert, Dr. Eugene Burdick, a psychologist, to examine Mr. Lightsey pursuant to Penal Code section 1368. (3 CT 712 [3/7/94 M.O.]; 3 CT 790-793 [RT of 3/7/94 Hearing].) Mr. Lightsey vehemently opposed the competency proceedings, tried to fire Brown, and moved to represent himself, but the judge denied his motions because proceedings had been suspended. Mr. Lightsey then demanded a hearing on the competency issue. (3 CT 790-793.)

On March 23, 1994, Dr. Burdick attempted to interview Mr. Lightsey but Mr. Lightsey declined to be examined, explaining that he had a pending *Marsden* motion against his appointed counsel and would only talk to Dr. Burdick in court, with a court reporter present. Dr. Burdick conceded that "it is not possible from this brief encounter to complete a formal psychiatric evaluation," but ventured an opinion

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[17] Mr. Lightsey's first attorney Stan Simrin, filed a successful motion to be relieved due to a lack of cooperation by Mr. Lightsey. (3 CT 681 [2/7/94 M.O.].) He was replaced by attorney Donnalee Huffman, who within days also successfully moved to be relieved due to a lack of cooperation from Mr. Lightsey. (3 CT 684 [2/10/94 Motion to Be Relieved As Counsel]; 3 CT 694 [2/22/94 M.O.].)

anyway. From his momentary interaction with Mr. Lightsey, Dr. Burdick concluded that he was able to understand the nature and purpose of the proceedings against him and "if he so chooses," was capable of cooperating rationally with his counsel in presenting his defense. (2 Conf. CT 398.)

On March 28, 1994, the date set for the hearing on Mr. Lightsey's competency, Mr. Lightsey filed, in pro per, a peremptory challenge against Judge Felice under Code of Civil Procedure section 170.6. (3 CT 757 [3/28/94 Motion to Recuse]; 3 CT 766 [3/28/94 M.O.].) Because the proceedings had been suspended, Judge Felice declined to rule on the peremptory challenge.

At the competency hearing, defense counsel and the district attorney submitted the matter on the basis of Dr. Burdick's report, and Judge Felice found Mr. Lightsey competent and resumed the criminal proceedings. (3/28/94 RT [Felice] 1-3.) Judge Felice then recused himself pursuant to Mr. Lightsey's peremptory challenge. (3/28/94 RT [Felice] 4-5.)

Later that morning, a hearing was held before the presiding judge, Judge Oberholzer, on a *Marsden* motion Mr. Lightsey had filed seeking replacement counsel for Ed Brown. (3 CT 764; 2 Supp. Conf. CT 355; 3/28/94 RT [Oberholzer--Sealed] 21.) During these Marsden hearings, Mr. Lightsey repeatedly accused Mr. Brown of "betraying" him, and of being part of a vast conspiracy to "oppress" victims like Mr. Lightsey. (3/28/94 RT (Marsden) 5, 10, 19.) In turn, Mr. Brown countered that Mr. Lightsey's insistence on focusing on such a conspiracy "won't work" and that neither Brown nor any other attorney could effectively work with Mr. Lightsey. (*Id.* at pp. 20-21.) Contrarily, Brown then went on to agree to represent Mr. Lightsey if a second counsel was also appointed to help deal with the "client's

attitude." (3/28/94 RT [987.9 Hearing] 2-3.) Judge Oberholzer denied the *Marsden* motion, but granted Brown's motion to appoint James Sorena as co-counsel to assist Brown. (3 CT 763; 2 Supp. Conf. CT 354; 3/29/94 RT [Oberholzer—Ex Parte] 3.)

3. The Competency Proceedings Were Inadequate to Permit a Reliable Determination of Appellant's Competence, and Judge Felice Erred in Finding Appellant Competent on the Basis of the Evidence Before Him.

a. Judge Felice Erred in Appointing Only One Mental Health Expert to Evaluate Appellant.

Penal Code section 1369(a) provides:

> "The court shall appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. In any case where the defendant or the defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists, licensed psychologists, or a combination thereof."

During the proceedings of March 7, 1994, Mr. Lightsey was very vocal in proclaiming that he was competent, demanding that his psychological examination be cancelled as unwarranted, and that he be given a full hearing to prove his competence. (3 CT 790-792 [RT of Proceedings]; see also 3 CT 712 [M.O.].) Mr. Lightsey reiterated his denial of incompetence and his opposition to the proceedings in his motion to recuse Judge Felice. (3 CT 757-762.)

Mr. Lightsey's explicit insistence that he was competent distinguishes this case from *People v. Lawley* (2002) 27 Cal.4th 102, 132-133. In *Lawley*, this court found that neither the defendant nor his attorney gave adequate notice to the judge that the defendant did not

concur his attorney's request for a competency evaluation. In contrast, Mr. Lightsey's objections to the competency proceedings could hardly have been clearer. Under section 1369, the judge was clearly required to appoint two experts.[18]

b. The trial court abused its discretion in finding Mr. Lightsey competent on the basis of the report of an expert who did not conduct a competency evaluation.

The court's finding of competence was unreliable for the additional reason that the single expert appointed to evaluate Mr. Lightsey was unable to do so. Dr. Burdick's contact with Mr. Lightsey was, even by his own admission, far from an evaluation. His conclusion, such as it was, that Mr. Lightsey appeared competent was based on a conversation too brief and neutral to permit identification of any but the most florid thought disorder.[19]

The competency proceeding founded on this nonexistent evaluation was, in effect, no proceeding.[20] No competent evidence was

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[18] *Lawley* is also distinguishable from this case by the fact that the court there did, ultimately, receive reports from two psychologists, the expert whom the court appointed and another psychologist retained by the defense. Furthermore, in contrast to Mr. Lightsey, Mr. Lawley, whatever his views about competency may have been, met with the court-appointed expert for two and one-half hours, allowing the expert to complete his evaluation. (*Id.*, at pp. 127, 135.)

[19] Even so, Mr. Lightsey's paranoid thinking manifested itself almost immediately, when he told Dr. Burdick that he would speak with him only on the record, in court. (2 Supp. CT 397.) In addition, Dr. Burdick reported that jail personnel had told him that Mr. Lightsey was "deliberately disruptive" -- another bit of information which should have alerted any mental health expert to the possibility that his patient was not, as Burdick suggested, capable of proceeding in a rational manner with counsel in presenting a defense.

[20] The entire proceedings took only moments, taking up only half a page of

presented on the issue of Mr. Lightsey's mental competence. Instead, the judge resumed proceedings without resolving the question of Mr. Lightsey's ability to rationally assist his counsel in the serious case before him. The result was the same as if no hearing on Mr. Lightsey's competence had been held at all. (See *People v. Marks* (1988) 45 Cal.3d 1335; but see *People v. Maxwell* (1981) 115 Cal.App.3d 807.)

Judge Felice was aware of substantial evidence suggesting that Mr. Lightsey might be incompetent to assist his attorneys. Mr. Lightsey's motion to recuse him was filled with indicators of mental impairment. (3 CT 757-762.) In that motion, Mr. Lightsey used frequent religious imagery consistent with a messianic persecutory delusion, opening the motion by announcing that it was being filed "in the name of Jesus" and warning Judge Felice that "You think Jesus does not know what is going on?" (3 CT 760.)

He moved on to claim that the trial had been "contaminated" by a dark "conspiracy to undermine this case," which included his own defense attorney Brown who was secretly working on behalf of the prosecution. (3 CT 762.) His attorney, Ed Brown, also noted in his ex parte motion for second counsel that Mr. Lightsey was "hostile to defense counsel" and refusing to cooperate, a further confirmation of his persecutory delusions. (2 Supp. Conf. CT 351.)

By appointing only one expert in the face of Mr. Lightsey's opposition on the competency issue and by letting the issue of Mr. Lightsey's competence drop after receiving a report so lacking in evidentiary value as Dr. Burdick's, Judge Felice failed to make a

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the Reporter's Transcript. No oral arguments were made by either the defense or the prosecution, no witnesses were heard, and the entire matter was dealt with by "submitting" the matter on the basis of Dr. Burdick's report. (3/28/94 RT [Competency Hearing] 2.)

decision "subject to the limitations of legal principles governing the subject of its actions." (*Westside Community for Independent Living, supra,* 33 Cal.3d 348, 355.) Mr. Lightsey was thus denied his right to an adequate and properly conducted competence hearing. (*Pate v. Robinson, supra*, 383 U.S. 375, 386; *People v. Castro, supra*, 78 Cal.App.4th 1402, 1416.) Because the court failed to follow the procedure required by statute, the court acted in excess of its jurisdiction in finding Mr. Lightsey competent. (*People v. Castro, supra*, 78 Cal.App.4th 1402, 1418.) This error alone required reversal of the judgment against Mr. Lightsey. (*Id.* at p. 1416.)

4. The Trial Judge Erroneously Refused to Declare a Doubt of Mr. Lightsey's Competence When Confronted with Judge Felice's Error in Appointing Only One Examiner and With Additional Evidence of Mr. Lightsey's Incompetence.

On April 5, 1994, a week after Judge Felice had made his defective ruling finding Mr. Lightsey competent, Mr. Lightsey filed a *Faretta* motion. (3 CT 798-810.) In that motion, prepared in the standard format by attorney Brown at Mr. Lightsey's request, Brown added a declaration where he demonstrated his belief that Mr. Lightsey was "hostile" and "uncooperative" towards counsel. (3 CT 806-808.)

On April 7, 1994, Judge Stuart was appointed to replace Judge Felice as the assigned judge in Mr. Lightsey's case. (4/7/94 RT [Oberholzer] 102; 3 CT 814.) Mr. Lightsey immediately launched into a renewal of his *Marsden* motion, repeatedly interrupting the judge and reading into the record an argument consisting of a series of legal headnotes, many irrelevant to the issue. His speech was so pressured that the judge repeatedly had to admonish him to speak more slowly because the court reporter could not follow him. When the district attorney mentioned

that Judge Stuart was related to a prosecution witness, the judge quickly recused himself. (4/7/94 RT [Stuart] 16-17; CT 814.)

Judge Stuart was replaced by Judge Kelly, who served as the assigned judge for the remainder of the case, through trial. (4/7/94 RT [Kelly—Unsealed] 1; 3 CT 817.)

In front of Judge Kelly, Mr. Lightsey launched into a pressured and confused speech about his *Faretta* motion. He complained that Brown had fraudulently signed Lightsey's *Faretta* papers, interjected that he had been a competitive swimmer in school, repeated that all he wanted was his "Brady-Ferguson" materials (an unexplained stock phrase he had used repeatedly before Judge Stuart as well), and argued that what he really wanted was another attorney. He went on to deny vehemently that he was mentally incompetent because (he said) he had been on the Dean's List at Bakersfield College. As he had in his earlier motion to recuse Mr. Brown, Mr. Lightsey again made various references to the conspiracy operating against him within the Kern County legal system, including all three of his previous defense attorneys, and argued that the conspiracy had "contaminated" the case. (4/7/94 RT [Marsden] 12-22.)

During that hearing, Judge Kelly cleared the courtroom and held a *Marsden* hearing with Lightsey and his attorneys. Lightsey resumed his confused and pressured argument, expanding it into an attack on every previous attorney who had been appointed to represent him, accusations of a vast conspiracy against him involving judges, defense counsel and investigators, prosecutors and court personnel, and complaints about the torment inflicted on him and his mother. At one point, attorney Brown said that the only time Mr. Lightsey had cooperated with him was in the preparation of the *Faretta* papers. Otherwise, he said, he found it impossible to represent Mr. Lightsey. All Lightsey would talk about was his victimization by the system; he would not cooperate on the case, and

communication with him was impossible. (RT 4/7/94 [Marsden] 33.)

The *Marsden* hearing continued into the next day. Mr. Lightsey continued his broad-based attack on the entire prosecution against him, alleging that transcripts had been forged and portions deleted, that his attorneys were working for the district attorney, and that he was being "tortured" by the system. At the end of the hearing, Judge Kelly denied the *Marsden* motion.

Defense counsel Brown and Sorena almost immediately asked Judge Kelly to declare a doubt of Mr. Lightsey's competence. (RT 4/7/94 [Kelly—Unsealed] 77-79; 3 CT 818.) They argued that the first competency hearing was invalid in that only one expert, rather than the required two, had been appointed. (RT 4/7/94 [Kelly—Unsealed] 77-78) and that Mr. Lightsey was mentally incompetent and continued to deny that he was mentally ill. (RT 4/7/94 [Kelly—Unsealed] 81-85.) Judge Kelly refused to initiate further competency proceedings, noting that Mr. Lightsey was capable of expressing himself well when he chose to. (*Id.* at p. 85.)

Judge Kelly erred in refusing to rectify the errors committed in the earlier proceedings before Judge Felice. Furthermore, signs of Mr. Lightsey's mental incompetence manifested themselves before Judge Kelly during the hearings held on April 7 and April 8, 1994. Mr. Lightsey's speech was pressured, to the point that the court had to repeatedly tell him to slow down so that he could be understood. (4/7/94 RT [Kelly—Unsealed] 5; 4/7/94 RT [Kelly—Sealed] 41.) The content of his arguments was perseverative: he was often unable to directly answer the court's questions regarding this *Faretta* motion, instead returning repeatedly to the same delusional themes of fraudulent preparation of forged transcripts by court staff and the ongoing conspiracy against him among nearly everyone involved in his case.

To Judge Kelly, as he had previously to Judges Oberholzer and

Stuart, Mr. Lightsey rambled about the broad conspiracy he believed was working against him. He accused his then attorney Ed Brown of lying under oath and working with Judge Felice – also a liar -- to sabotage his case. (4/7/94 RT [Kelly—Unsealed] 3-4, 6.) He claimed that Brown and his investigator, Purcell, were conspiring against him, withholding key material from him, and "torturing" him. (4/7/94 RT [Kelly—Sealed] 15-28; 4/7/94 RT [Kelly—Sealed] 50-51.) He accused his previous attorney, Stan Simrin, of holding secret meetings with the prosecution in order to sabotage his case. (4/8/94 RT [Kelly—Sealed] 57.)

He insisted that corrupt court staff had forged the preliminary hearing transcript in his case, with the tacit cooperation of defense counsel Brown. (4/7/94 RT [Kelly—Sealed] 27-28, 41-42; 4/7/94 RT [Kelly—Sealed] 55.) He confided that he had further information about this dark cabal against him that could only be revealed in private in-chambers discussions without the presence of the conspiratorial attorney Brown.

In addition, Mr. Lightsey proffered oddly irrelevant facts, such as his past status as a competitive swimmer, as grounds for having his *Faretta* motion granted. (4/7/94 RT [Kelly—Unsealed] 5.)

At the conclusion of the hearing, however, Judge Kelly observed merely that Mr. Lightsey was too "emotionally involved" in his case and was "hurting" his case by his actions. (4/7/94 RT [Kelly—Sealed] 75-76.)

C. The Second Set of Competency Proceedings, Held In July and August of 1994, Were Jurisdictionally Defective, and the Finding of Competence Constitutionally Deficient, Because the Trial Court Permitted Mr. Lightsey to Represent Himself After Declaring a Doubt of Mr. Lightsey's Competence Both to Assist Counsel and To Represent Himself; Because the Court Mistakenly Believed that Both Experts Who Examined Mr.

Lightsey Had Found Him Competent to Stand Trial; and Because the Court Permitted Mr. Lightsey to Waive His Right to a Hearing on His Competence in Return for a Finding That He Was Competent.

1. Introduction

In July of 1994, Judge Kelly was persuaded to declare a doubt of Mr. Lightsey's competence. However, the judge erroneously permitted Mr. Lightsey, who vehemently denied any mental illness, to represent himself during those proceedings and a subsequent hearing to determine whether he was competent to represent himself and to bargain away his right to a competency hearing in return for a judicial finding that he was competent.

2. Events Before July 28, 1994 Competency Hearing

On April 11, 1994, after refusing the request of defense counsel Brown and Sorena that he declare a doubt of Mr. Lightsey's competence, Judge Kelly granted Mr. Lightsey's *Faretta* motion. Defense counsel Brown and Sorena were dismissed, and Mr. Lightsey began representing himself. (4/11/94 RT 159-164; 3 CT 822.) On April 13, 1994, yet another attorney, Ralph McKnight, Jr., was appointed as advisory counsel. (4/13/94 RT 165-167; 3 CT 823.)

Like the four appointed counsel who had preceded him, McKnight quickly came to the conclusion that Mr. Lightsey was mentally incompetent. On June 29, 1994, he filed a motion to terminate Mr. Lightsey's pro per status due to his mental incompetence. (3 CT 906; see also 2 Supp. Conf. CT 428.) In a declaration filed under seal, Mr. McKnight made plain that he thought Mr. Lightsey was suffering from "irrational thought processes, delusional and paranoid thinking, and has a persecution complex and a messianic complex." (4 CT 1143; 2 Supp. Conf. CT 428.) He gave a detailed summary of Mr. Lightsey's persecutory delusions and the wide-ranging conspiracy he feared was

formed against him. (4 CT 1144-1149; 2 Supp. Conf. CT 428-434.) McKnight also filed a sealed declaration from John Purcell, a former defense investigator in Mr. Lightsey's case, outlining the disjointed nature of Mr. Lightsey's thought processes. (4 CT 1150-1152.)[21]

On July 7, 1994, Judge Kelly suspended proceedings in the case until the competency issue could be resolved. (1 RT 1-57; 3 CT 918.) Mr. Lightsey, who was still representing himself, tried to recuse Judge Kelly, but was told he could not because the proceedings had been suspended (7/7/94 RT 35.) He then invoked his right to a jury trial on the issue of his competency. (7/7/94 RT 43-45.)

After suspending the proceedings, Judge Kelly offered Mr. Lightsey the opportunity to choose one of the two experts to be appointed by the court. Mr. Lightsey did not want any of the experts from the court's panel and asked for time to find someone else.

At a further hearing on July 11, 1994, Judge Kelly appointed Dr. Luis Velosa, a psychiatrist, to examine Mr. Lightsey. (1 RT 58-81; 1 CT 114; 4 CT 977.) Mr. Lightsey argued at length, with various strange digressions into religion and his past life, that he was competent, and he renewed his demand for a jury trial on the issue of his competency. (7/11/94 RT 58-66; 1 CT 120.) Mr. Lightsey then gave the judge the name of a Dr. Hall, whom he had picked out of the telephone book "because she is a woman and has Ph.D. and just out of instinct." (7/7/94 RT 65). Dr. Hall, it turned out, was not willing to take the

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[21] The court had also been served copies of two interlocutory petitions filed in the Fifth District Court of Appeal by Mr. Lightsey *in propria persona* that provided further evidence of Mr. Lightsey's mental impairments by repeating and expanding upon his persecutory claims of a vast conspiracy against him. (CT 996-1023; 2 Supp. CT 6218-6266; 2 Supp. CT. 6267-6454.)

appointment, and on July 12, Mr. Lightsey proposed another name, Dr. Sakrapatna Manohara, also apparently from the telephone book. (7/12/94 RT 86.) The court called Dr. Manohara, who agreed to conduct the examination. (4 CT 980, 995.)

Dr. Velosa interviewed Mr. Lightsey on two separate occasions on July 13, 1994 and July 19, 1994 and undertook a "highly complex" evaluation of him. (2 Supp. Conf. CT 388; see also 2 Supp. Conf. CT 400-405.) In his report, Dr. Velosa found Mr. Lightsey to be *incompetent* to stand trial. Dr. Velosa's reported that Mr. Lightsey was "suffering from a psychiatric disorder which impairs his thinking process." (2 Supp. Conf. CT 401.) He was both "bipolar" and "paranoid," which resulted in "paranoid thinking, persecutory delusions, [and] a false belief that there is a conspiracy against him." (*Ibid.*) Another symptom of his disorder was his uncontrollable compulsion to make "rambling" comments, caused by the "rambling of thoughts" due to his mental disorder. (*Ibid.*)

Based on this disorder, Dr. Velosa's diagnostic impression was that Mr. Lightsey was suffering from "bipolar disorder manic type" and possible paranoia. (2 Supp. Conf. CT 405.) He concluded that Mr. Lightsey, "because of his psychiatric symptoms … is unable to cooperate in a rational manner with counsel in presenting a defense." (2 Supp. Conf. CT 401.) Moreover, because of his psychiatric symptoms, he was equally unable "to represent himself." (*Ibid.*)

Dr. Velosa provided detailed examples of Mr. Lightsey's rambling thought processes, his persecutory delusions, and his inability to answer questions directly. (*Id.* at pp. 402-405.) In the last sentence of his report, he stated, "Judgement is impaired and he has no insight into his mental disorder." (*Ibid.*)

Dr. Manohara met with Mr. Lightsey only once. Like Dr.

Velosa, he concluded that Mr. Lightsey was mentally ill. (2 Supp. Conf. CT 392.) However, his report, based on a single one-hour meeting with Mr. Lightsey (8/2/94 RT 155), was less detailed and insightful than Dr. Velosa's. The historical information Dr. Manohara received came only from Mr. Lightsey during the interview and demonstrates the weakness of expert testimony based on such limited information. (*People v. Marks* (2003) 31 Cal.4th 197, 219.) Mr. Lightsey would not elaborate on how his father had died and denied that there was any mental illness in his family. (2 Supp.Conf. CT 393.)[22]

Dr. Manohara's concluded that Mr. Lightsey "does not have any clear-cut psychotic disorder although he seems to be excessively mistrustful of the system." (2 Supp. Conf. CT 394.) His diagnosis was that Mr. Lightsey was suffering from Narcissistic Personality Disorder. (2 Supp. Conf. CT 394; see also 7/28/94 RT 101-102.)

Regarding Mr. Lightsey's competence to stand trial, Dr. Manohara wrote, "His personality disorder makes it difficult to work with him as an attorney, but in my opinion he is competent to stand trial." (2 Supp.Conf. CT 394.) Dr. Manohara continued, "However, he is not competent to represent himself because of his lack of objectivity and his grandiose sense of self-importance and his tendency to be circumstantial with a sense of entitlement. He may overreact to criticism with feelings of rage." (*Ibid.*)

While he did opine that Mr. Lightsey 'understood the proceedings,' Dr. Manohara never expressly stated whether or not Mr. Lightsey met the second prong of competency, whether Mr. Lightsey

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[22] In fact, Mr. Lightsey's father had twice been hospitalized for severe mental illness (with symptoms strikingly similar to Mr. Lightsey's own) and had committed suicide by shooting himself with a shotgun. (See Arg. 8, *infra.*)

had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." (*Dusky v. United States, supra,* 362 U.S. 402, 402-403.)

Dr. Manohara's failure to address the second competency factor is hardly surprising, given that he had only done one competency evaluation before, had to have Penal Code section 1368 and 1369 faxed to him by the court, and had his name randomly picked out of the phone book by the psychic "instincts" of Mr. Lightsey. (7/7/94 RT 65; 7/13/94 RT 95; 1 Supp. CT 40-45.)

3. July 28, 1994 Competency Hearing.

On July 28, 1994, a hearing was held in the competency proceeding. Judge Kelly summarized the findings of Dr. Velosa and Dr. Manohara for Mr. Lightsey, and Mr. Lightsey insisted that he was competent and renewed his demand for a jury trial on the issue of his competency. (7/28/94 RT 100-104.)
Judge Kelly seemed not to grasp that Dr. Velosa had found Mr. Lightsey incompetent to stand trial: "[a]nd Dr. Velosa, although he reflects what I would suggest to be some reservation in that regard, he does indicate that you are able to understand the nature and purpose of the proceedings." (7/28/94 RT 106.)

The district attorney, who understood that the experts disagreed about Mr. Lightsey's competence, offered a compromise: "if Mr. Lightsey is willing to waive a jury trial on the issue, we're willing to submit it on the reports if this Court is inclined to find that Mr. Lightsey is competent to stand trial, which I believe is what he wishes." (7/28/94 RT 105.)

Judge Kelly asked Mr. Lightsey if he contested the judge's following the district attorney's recommendation that he find Mr. Lightsey competent if he agreed to waive a jury trial on the issue. Mr.

Lightsey affirmed that he did not. Judge Kelly asked, "You waive a jury trial on that issue so we can get on with the show; is that correct?" Mr. Lightsey agreed. The judge then found on the record, "pursuant to the reports of the two doctors, that the defendant is in fact competent to stand trial based upon the opinions expressed by the two doctors." (7/28/94 RT 108.)

Ralph McKnight, Mr. Lightsey's advisory counsel, did not participate in the competency hearing. After the criminal proceedings were resumed, Mr. McKnight asked the judge to relieve him and appoint a different attorney to advise Mr. Lightsey. The reasons he gave for his request made it clear that Mr. Lightsey was incapable of assisting an attorney in a rational manner.

McKnight told the judge:

> Mr. Lightsey has gotten to the point where communications with me have broken down to recriminations, accusations and basically nothing, nothing that relates to moving forward on his case. I'm not certain, because of my perception of his mental condition that anybody is going to get a whole lot more cooperation unless they're willing to be a door mat for him.
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> . . .
>
> [A]lmost without exception when I seek to advise him on a legal matter, instead of a discussion concerning that legal issue or apparent comprehension of my advice, I get argument, I'm advised I'm lying to him, that my advice is not only not good but an attempt to sabotage his defense.
>
> . . .
>
> My explanations to him of the scope and limits of my authority and purpose in the case have gone unheeded, and he simply -- if we get five minutes of productive time together in our meetings it's more than average because our

communications are not as adviser to client. It's a situation of being complained to and complained of and referred to in most uncomplimentary terms as being some sort of surrogate for the prosecution.

. . .

I don't believe any attorney who challenges Mr. Lightsey's preconceptions of the law or ideas of how the case should be run is going to have any better result than I have had. (RT 7/28/94 122-124.)

Judge Kelly relieved McKnight, but Mr. Lightsey, who had repeatedly tried to interrupt McKnight's explanation, began arguing anyway, "There's just too many places in the Bible, your Honor, pointblank says that you're not to trust someone who is an atheist, and Mr. McKnight has admitted that he's an atheist." When the judge reminded him that he had concurred with McKnight's withdrawal Mr. Lightsey answered, "McKnight had a chance to speak . . . You said I have a chance to speak. Mr. McKnight just spoke on something." (RT 7/28/94 125.)

4. The Court's Finding on July 28 that Mr. Lightsey was Competent was Deficient Because Mr. Lightsey Was Permitted to Represent Himself at the Hearing and Because the Court Mistook Dr. Velosa's Conclusion that Mr. Lightsey was Incompetent as Saying That He Was Competent.

The competence proceeding before Judge Kelly was fatally deficient in at least three respects: the judge permitted Mr. Lightsey to act as his own attorney; he made his competence finding based on a misunderstanding of Dr. Velosa's report, and he permitted Mr. Lightsey to bargain away the issue of his competence.

a. Mr. Lightsey Should Not Have Been Permitted to Represent Himself in a Proceeding at Which His Mental Competence Was In Doubt.

It does not appear that this Court has directly confronted the question whether a defendant can constitutionally be permitted to act as his own attorney in proceedings to determine his competence to stand trial. However,

Penal Code section 1368 states:

> (a) If, during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the pinion of the attorney, the defendant is mentally competent. *If the defendant is not represented by counsel, the court shall appoint counsel.* (Emphasis added.)

Under section 1368, therefore, it appears that when a court declares a doubt of an unrepresented defendant's competence it has a statutory obligation to appoint counsel.

The question whether a defendant may be permitted to represent himself in proceedings to determine his competence implicates the due process right of criminal defendants not to be tried while mentally incompetent. (U.S. Const. Amend. XIV; *Drope v. Missouri* (1975) 420 U.S. 162, 171; *Pate v. Robinson, supra*, 383 U.S. 375, 378.) In addition, the failure to appoint counsel to represent a defendant whose competence is in doubt potentially violates the defendant's right to counsel under the Sixth Amendment.

Three federal circuits have expressly held that the Sixth Amendment prohibits defendants whose competence is in doubt from representing themselves. (*United States v. Purnett* (2d Cir. 1990) 910 F.2d 51, 55; *United States v. Boigegrain* (10th Cir. 1998) 155 F.3d 1181, 1185-1186; *United States v. Klat* (D.C. Cir. 1998) 156 F.3d 1258, 1262-1263.)

In *Purnett,* the Second Circuit held that when a defendant's competence is questioned, the Sixth Amendment requires representation until the defendant is found competent. The court wrote:

> To afford defendant the constitutional right to self-representation at the same time the district court is questioning a defendant's competency, necessarily permits a possibly incompetent defendant to waive an equally substantial constitutional right - the right to the assistance of counsel. These conflicting constitutional concerns may be accommodated if a trial court refuses to accept a waiver of the right to counsel until it is satisfied that the defendant fully understands the consequences of such an election and is competent to make it. (910 F.2d at p. 52.)

Elsewhere in its opinion, the court reasoned, "The trial court should not accept a waiver of counsel unless and until it is persuaded that the waiver is knowing and intelligent. Logically, the trial court cannot simultaneously question a defendant's mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel." (*Id.*, at p. 55.)

In *United States v. Boigegrain, supra*, the Tenth Circuit reached a similar result, holding that the defendant's right to self-representation under *Faretta v. California* (1975) 422 U.S. 806, was not violated by the district court's appointment of the public defender to represent him during competency proceedings. The Court of Appeals reasoned:

> An accused who forgoes the assistance of counsel surrenders substantial benefits. Therefore, "in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." [Citations omitted.] The defendant's decision to waive counsel must be knowing, voluntary, and competent before it can be recognized. [Citations omitted.] The district court had a duty to ensure that the defendant was choosing self-representation in an

> informed manner before allowing him to proceed on his own.
>
> Here, the court waited to rule on the defendant's motion to dismiss the public defender until the issue of the defendant's competency to stand trial had been resolved. That was the most appropriate course because "[l]ogically, the trial court cannot simultaneously question a defendant's mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel." *United States v. Purnett*, 910 F.2d 51, 55 (2d Cir.1990). Although that common sense statement almost resolves this matter on its own, a more recent case from the Supreme Court, *Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993), clarifies it completely. In *Godinez*, the Court held that the degree of competence necessary to waive the right to counsel is identical to the degree of competence necessary to stand trial. See *id.* at 399-400, 113 S.Ct. 2680. Therefore, it was impossible for the district court to allow the defendant to waive counsel before determining whether he was competent to stand trial. Before resolving the first question, the court had to resolve the second. (*Boigegrain*, 255 F.2d at pp. 1185-1186.)

In *United States v. Klat, supra,* 156 F.3d 1158, the District of Columbia Circuit employed similar reasoning to hold that the district court had erred in allowing the defendant's appointed counsel to withdraw before the issue of the defendant's competence had been resolved. That court wrote:

> [W]e find support for our conclusion from the [United States Supreme] Court's decision in *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), where it found that a defendant could not waive his right to a competency hearing when there was a question as to his competency to stand trial: "[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his

> capacity to stand trial." *Id.* at 384, 86 S.Ct. 836. Likewise, we find it contradictory to conclude that a defendant whose competency is reasonably in question could nevertheless knowingly and intelligently waive her Sixth Amendment right to counsel. Such a defendant may not proceed pro se until the question of her competency to stand trial has been resolved. (*Klat, supra,* 156 F.3d at p. 1263.)

This Court has applied similar reasoning to hold that counsel in competency proceedings can make fundamental tactical decisions that, in criminal proceedings, would be reserved to the client. (See., e.g., *People v. Hill* (1967) 67 Cal.2d 105, 115, fn. 4 ["When evidence indicates that the defendant may be insane it should be assumed that he is unable to act in his own best interests. In such circumstances counsel must be free to act even contrary to the express desires of his client"]; *People v. Samuels* (1981) 29 Cal.3d 489, 495 ["[I]f counsel represents a defendant as to whose competence the judge has declared a doubt sufficient to require a section 1368 hearing, he should not be compelled to entrust key decisions about fundamental matters to his client's apparently defective judgment."]

In *People v. Masterson* (1994) 8 Cal.4th 965, this Court held that counsel in a competency proceeding could waive a twelve-person jury over his client's objection. In its opinion, the Court reasoned that the balance of rights between client and counsel in a competency proceeding should be considered with reference to the nature of that proceeding and the purpose it serves:

> The sole purpose of a competency proceeding is to determine the defendant's present mental competence, i.e., whether the defendant is able to understand the nature of the criminal proceedings and to assist counsel in a rational manner. (Citations omitted.) Because of this, the defendant necessarily plays a lesser personal role in the proceeding than in

> a trial of guilt. How can a person whose competence is in doubt make basic decisions regarding the conduct of a proceeding to determine that very question? (*Id.* at p. 970.)

The court went on to state that the limitation on the defendant's role "extends to the fundamental decision whether to hold a competency hearing at all. The United States Supreme Court has recognized that 'it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial.' (*Pate v. Robinson* (1966) 383 U.S. 375, 384 [15 L.Ed.2d 815, 821, 86 S.Ct. 836].)"

If assigning decision-making powers to counsel in competency proceedings is necessary to preserve the integrity of the proceedings from the defendant's questionable judgment, the appointment of counsel in the first place is just as necessary, particularly when letting a defendant with no insight into his mental illness represent himself would result in the waiver of the constitutionally required determination of his capacity to stand trial.

The trial court in this case, by permitting Mr. Lightsey to act as his own attorney, effectively permitted him to waive that required determination. Certainly, it eliminated any chance of subjecting the issue to the adversarial process. Neither the district attorney nor Mr. Lightsey had any interest in seeing Mr. Lightsey declared incompetent. Consequently, at the competency hearing, when Judge Kelly misunderstood Dr. Velosa's finding that Mr. Lightsey was incompetent, none of the parties corrected his error. No one sought a hearing at which the competing views of the experts might be explored and other evidence received, such as testimony by McKnight and the other attorneys and their investigators who had tried unsuccessfully to obtain rational cooperation from Mr. Lightsey, so that the judge could make a

determination on a fuller and more reliable record. No one, in short, represented either Mr. Lightsey's interest in having his competency fairly determined or his due process right not to be tried while incompetent. Instead, the issue was resolved with a plea bargain and waiver in a proceeding that was anathema to the constitutional and humanitarian principles that are the foundations of competency proceedings.

b. The Trial Court Erred in Inviting and Permitting Mr. Lightsey to Waive a Hearing on His Competence to Stand Trial.

In addition to letting Mr. Lightsey represent himself in his competency proceeding and misreading an expert's finding that he was incompetent, the judge invited Mr. Lightsey to plea bargain the issue of his competence away. Knowing that Mr. Lightsey wanted to be found competent, the judge, at the suggestion of the district attorney, offered him a deal: forego his right to a trial on the issue, and the judge would follow what he, at least, thought was the conclusion of the two experts, and find Mr. Lightsey competent.[23]

Once a doubt of a defendant's competency has been declared, the right to a hearing cannot be waived by the defense. (*People v. Marks* (1987) 45 Cal.3d 1335, 1340; *Pate v. Robinson* (1966) 383 U.S. 375, 384.) "The obligation and authority to determine a defendant's competency belong to the trial court or jury, not to the defendant's counsel." (*Marks, supra*, 45 Cal.3d at p. 1340.)

The judge in Mr. Lightsey's case solicited and obtained a waiver of the hearing from him. Although Judge Kelly, unlike the trial court in

[23] Although the judge seems to have made an honest mistake about Dr. Velosa's conclusion, the district attorney who suggested the plea bargain seems to have been aware of the conflict in the experts' opinions. (7/28/94

the *Marks* case, eventually made a finding on the record that Mr. Lightsey was competent, the context of his ruling shows clearly that this finding was made pursuant to a bargained-for waiver, and not on the basis of evidence taken at an adversarial hearing, even one where the parties agreed to submit the matter on the evidence of the reports. (*Marks, supra,* at p. 1342, citing *People v. Maxwell* (1981) 115 Cal.App.3d 807, 812; see also *People v. Pennington* (1967) 66 Cal.2d 508, 521[" A 'hearing' is generally understood to be a proceeding where evidence is taken to the end of determining an issue of fact and a decision made on the basis of that evidence."].)

Judge Kelly twice explained his proposal to Mr. Lightsey as a bargained-for transaction:

> [Judge Kelly]: It's apparently the position of the People that they would not find it necessary to contest in any way the reports *if the Court interprets those reports to conclude that you are in fact competent to stand trial.* That's your position, I believe; is that correct?
>
> MR. LIGHTSEY: That's correct. (7/28/94 RT 106, emphasis added.)
>
> THE COURT: What Ms. Humphrey has suggested is invite you to waive a jury trial on that issue so the Court can go ahead and follow Dr. Velosa's -- Dr. Velosa and Dr. Manohara's determination that you are competent to stand trial.
>
> MR. LIGHTSEY: Yes, your Honor. I'm all for
>
> --
>
> THE COURT: You're not contesting that issue,
>
> right?
>
> MR. LIGHTSEY: Not at all.
>
> THE COURT: You waive a jury trial on that issue

RT 106.)

so we can get on with the show; is that correct?

MR. LIGHTSEY: Yes, your Honor.(7/28/94 RT 108.)

"Once a doubt has arisen as to the competence of the defendant to stand trial, the trial court has no jurisdiction to proceed with the case against the defendant without first determining his competence in a section 1368 hearing, and the matter cannot be waived by defendant or his counsel." *People v. Hale* (1987) 44 Cal.3d 531, 541; *People v. Pennington, supra,* 66 Cal.2d at p. 521.)

"In trying defendant without first determining at a hearing his competence to stand trial, the court both denied to defendant a substantial right [citations omitted] and pronounced judgment on him without jurisdiction to do so. In such cases the error is per se prejudicial." (*Pennington, supra,* at p. 521.)

By inviting and accepting Mr. Lightsey's waiver of a hearing on his competence, the judge committed an error which requires reversal of the judgment in this case.

c. Judge Kelly's Finding That Mr. Lightsey Was Competent to Stand Trial Was Deficient Because He Did Not Understand That Dr. Velosa Had Concluded that Lightsey Was Incompetent.

Even if this court finds that Judge Kelly's ruling on July 28 was based on evidence at a hearing, rather than on a bargain with the defendant, the ruling was still fatally deficient because it was based on the mistaken belief that Dr. Velosa had concluded that Mr. Lightsey was competent to stand trial.

At the July 28 hearing, Judge Kelly reviewed the reports of Drs. Manohara and Velosa and noted that Dr. Velosa had concluded that Mr. Lightsey was able to understand the nature and purpose of the criminal proceedings. On this basis, Judge Kelly concluded that Dr. Velosa had found Mr. Lightsey competent to stand trial, though not competent to

represent himself. (7/28/94 RT 106.)[24] The judge then explained to Mr. Lightsey that he was inclined to follow "the recommendations of the doctors" and find him competent to stand trial. (7/28/94 RT 107.)

While deference is given to a trial court's decisions, such deference is only required where the decision was made "subject to the limitations of legal principles governing the subject of its actions." (*Westside Community for Independent Living, supra,* 33 Cal.3d 348, 355.)

Judge Kelly's plea bargain with Mr. Lightsey and his ultimate finding that Mr. Lightsey was competent hinged on his mistaken belief that Dr. Velosa had reached a conclusion about Mr. Lightsey's competence diametrically opposite to his actual finding. Because of this, the judge believed that the two appointed experts agreed that Mr. Lightsey was competent to stand trial, when in fact their opinions were in conflict. His ruling, based on such an egregious factual mistake, was not a finding of fact entitled to deference, but an error which resulted in an unreliable ruling on the issue of Mr. Lightsey's competence.

Even considered separately from the other serious errors which affected the competency proceedings, this error requires reversal of the judgment in this case. As this Court has noted, "no deference" is due a lower court finding of fact that was not "supported by substantial evidence," as occurred here where Judge Kelly made a material factual error in wrongfully concluding that Dr. Velosa had found Mr. Lightsey to be competent. (See, e.g., *In re Thomas* (2006) 37 Cal.4th 1249, 1257 [reversing lower court referee findings].)

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[24] The judge seemed to think that Dr. Velosa's finding that "because of his psychiatric symptoms, the defendant at present is unable to cooperate in a rational manner with counsel in presenting a defense" (2 Supp. Conf. CT 394) related only to the issue of Mr. Lightsey's competence to represent

d. **The Cumulative Effect of the Errors in the July 28 Competency Proceedings.**

Taken together, the judge's failure to appoint counsel to represent Mr. Lightsey's interests, his mistaken belief that both experts had found Mr. Lightsey competent, and his disposition of the competency proceedings pursuant to a bargained waiver by Mr. Lightsey, resulted in a proceeding where the issue of Mr. Lightsey's competence to stand trial was never fairly litigated. None of the strong evidence of Mr. Lightsey's incompetence was presented to a trier of fact: the observations and conclusions of the experts; the extensive evidence of Mr. Lightsey's delusions and paranoia; his inability to cooperate with attorneys or control his verbosity in court; and his lack of a rational understanding of the proceedings against him. What took its place was a hollow exercise in which both parties advocated for the same result: to find Mr. Lightsey competent and, in the words of the judge, "get on with the show." As a result of the errors, the proceedings failed to protect Mr. Lightsey's due process right not to be tried while incompetent.

"[T]he failure of a trial court to employ procedures to protect against trial of an incompetent defendant deprives the defendant of his due process right to a fair trial and requires reversal of his conviction." (*People v. Hale, supra*, 44 Cal.3d at p. 539; *Pate v. Robinson, supra*, 383 U.S. at p. 377; *Drope v. Missouri, supra,* 420 U.S. 162, 171.) The court's failures in this case require that the judgment against Mr. Lightsey be reversed.

D. **The Jurisdictional Defects of the Competence Proceedings Were Not Cured by the Subsequent Hearing On August 2, 1994 In Which the Court Purported to Determine Mr. Lightsey's Competence to Represent Himself.**

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himself. (7/28/94 RT 106.)

1. The August 2 Hearing, and the Court's Ruling.

After finding Mr. Lightsey competent to stand trial, Judge Kelly continued to express concerns about Mr. Lightsey's ability to represent himself. (7/28/94 RT 115, 118.) He set a date of August 2 for a hearing on the issue of Mr. Lightsey's competency to waive his *Faretta* rights. (7/28/94 RT 129-130.)

At the hearing on August 2, Mr. Lightsey was still representing himself, and he had no advisory counsel to assist him, since no attorney had been appointed to replace McKnight. (8/2/94 RT 135; 4 CT 1110.)[25]

The prosecution called Dr. Velosa, Dr. Manohara, and Dr. Burdick as witnesses and submitted their reports as evidence. (8/2/94 RT 134-285; 4 CT 1110; 4 CT 1071; 2 Supp. Conf. CT 391 [Manohara Report]; 2 Supp. Conf. CT 396 [Burdick Report]; 2 Supp. Conf. CT 399 [Velosa Report].)

Dr. Manohara and Dr. Velosa had both been asked to assess Mr. Lightsey's competence to represent himself as well as his competence to stand trial. Both experts had concluded that he was not competent to represent himself. However, neither of their reports had addressed the question whether Mr. Lightsey was able to make a knowing and intelligent waiver of his right to counsel. (See *Godinez v. Moran* (1993) 509 U.S. 389; *People v. Hightower* (1996) 41 Cal.4th 1108.)

Early in the hearing, the district attorney clarified for the court

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[25] At the hearing on July 28, the judge had proposed replacing Ralph McKnight with Michael Sprague, but Sprague declined to take the assignment because he had known William Compton. 7/28/94 RT 125, 128; 8/2/94 RT 135.) At the August 2 hearing, the judge asked James Gillis, another attorney, to sit at the counsel table with Mr. Lightsey, saying, "The anticipation is that you'll be appointed as advisory counsel in this matter." (8/2/94 RT 144.)

that the -issue properly before it was simply whether Mr. Lightsey could knowingly and intelligently waive his right to counsel. (8/2/94 RT 139-141.) Mr. Lightsey, confused about the issue, demanded a jury trial, which the court denied.

Drs. Manohara, Burdick and Velosa testified. At the end of his direct examination of Dr. Manohara, the district attorney asked him whether he thought, on the basis of his examination, that Mr. Lightsey could "make a knowing and intelligent waiver." Dr. Manohara, answered, "In one hour interview, may not be able to make a full, accurate judgment, but from the examination I had he probably is." (8/2/94 RT 177.)

Not realizing that Dr. Manohara had given a favorable response, Mr. Lightsey proceeded to engage him in a rambling and hostile cross examination directed to proving that he, Mr. Lightsey, was mentally competent. (8/2/94 RT 177-194.)

Dr. Burdick, when asked on direct examination whether he had an opinion whether Mr. Lightsey could "capably make a knowing and intelligent waiver of a right," answered, "I have no way of knowing that." Mr. Lightsey's cross examination of him began reasonably well, but ended after he asked Dr. Burdick whether it wouldn't be more fair for the court to appoint experienced co-counsel for him than advisory counsel, and the judge sustained the prosecutor's objection. (8/2/94 RT 204-206.)

Dr. Velosa, in his testimony, repeated and explained his opinion that Mr. Lightsey understood the nature and purpose of the proceedings against him but was unable to cooperate in a rational manner with counsel. (8/2/94 RT 233.) The prosecutor did not ask him whether he believed Mr. Lightsey could make a knowing and intelligent waiver of a right, but merely established that he was not aware of the legal

requirements for a waiver of counsel when he prepared his report concluding that Mr. Lightsey was not competent to represent himself. (8/24/94 RT 244-245.)

Mr. Lightsey's cross examination of him consisted mostly of argumentative questions aimed at rationalizing the various statements which Dr. Velosa had cited as evidence of Mr. Lightsey's mental illness. (8/24/94 RT 245-266.)

After the experts' testimony, the prosecutor argued that Mr. Lightsey should be permitted to waive counsel. (8/24/94 RT 267-274.) Mr. Lightsey, on the other hand, expressed his reluctance to proceed without counsel and said he would accept appointed counsel if an acceptable attorney were offered. (8/24/97 RT 274-280.) The judge found that Mr. Lightsey had "the basic understanding of the consequences of self-representation," granted his *Faretta* motion, and appointed James Gillis as his advisory counsel.

2. The Hearing and Ruling Did Not Cure the Error in the Preceding Competency Proceedings.

The procedural defects of the competence proceedings and the invalidity of the trial court's finding that Mr. Lightsey was competent were not in any way cured or made moot by the August 2 hearing.

The district attorney and the judge both recognized that the only issue before the court at that hearing was the question, distinct from that of trial competence, whether Mr. Lightsey was competent to make a knowing and intelligent waiver of his right to counsel.[26] (*Godinez v. Moran, supra,* 509 U.S. 389, 399-400 [trial court may not ascertain a

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[26] Later, when defense counsel cited Dr. Velosa's findings in motions for a section 1368 hearing during Mr. Lightsey's trial, the district attorney argued vehemently that the purpose of the pretrial proceeding was only to decide Mr. Lightsey's competence to represent himself, not his competence to stand trial. (29 RT 6209, 30 RT 6403.)

defendant's competence to waive counsel by evaluating the ability to represent himself or herself].) Even though the experts appointed to assess Mr. Lightsey's competence testified on August 2 about their evaluations of Mr. Lightsey and their diagnostic impressions of him, that testimony and the prosecutor's questioning and argument were directed solely to the issue of his ability to make a knowing and intelligent waiver of his right to counsel. It was understood by all parties (with the possible exception of Mr. Lightsey) that the issue of Mr. Lightsey's trial competence had been decided in the July 28 proceeding. The criminal proceedings were no longer suspended, and the only question presented on August 2 was the validity of Mr. Lightsey's *Faretta* waiver. At the conclusion of the hearing, the judge found that Mr. Lightsey was capable of waiving counsel and permitted him to continue to represent himself.[27]

E. Judge Kelly Failed or Refused on Multiple Subsequent Occasions to Address the Issue of Mr. Lightsey's Obvious Incompetence.

1. The Fourth Motion by Advisory Counsel Gillis and Mr. Lightsey's Relinquishment of his Pro Per Status.

Like the five appointed attorneys before him, James Gillis soon came to the conclusion that Mr. Lightsey was mentally incompetent. On September 12, 1994, he filed a motion to revoke Mr. Lightsey's pro per status, on the ground that Mr. Lightsey was not mentally competent to serve as his own attorney. (4 CT 1129.)

In his unsealed declaration in support of the motion, Gillis outlined Mr. Lightsey's paranoid delusions and his belief in a grand

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[27] Although the court's finding was problematic, and its jurisdiction to make it disputed, appellant has not raised this issue in this appeal, because Mr. Lightsey relinquished his right to self-representation shortly afterward and accepted the appointment of James Gillis and William Dougherty, who represented him through his trial and sentencing. (9/27/94 RT 27.)

conspiracy against him, and stated that he felt Mr. Lightsey was mentally incompetent. (4 CT 1130-1138.) In a second *in camera* declaration, Gillis laid out in detail how Mr. Lightsey's paranoid delusions barred him from assisting advisory counsel in conducting a proper investigation or preparing for trial. (4 CT 1139-1141.) He also attached the two earlier submitted *in camera* declarations by advisory counsel McKnight and defense investigator Purcell. (4 CT 1143-1152.)

On September 27, 1994, Judge Kelly held a hearing on the motion. (9/27/94 RT 1-32; 4 CT 1113.) During this hearing, Mr. Lightsey voluntarily agreed to terminate his in pro per status if Judge Kelly would appoint William Dougherty to serve as lead counsel, perhaps with Gillis as co-counsel. (9/27/94 RT 7, 13, 27.)

Judge Kelly appointed Mr. Dougherty – the seventh attorney appointed in the case – as lead counsel and Mr. Gillis as co-counsel. (9/27/94 RT 27; 4 CT 1113.)

Judge Kelly abused his discretion in failing to suspend proceedings in order to determine Mr. Lightsey's competence to stand trial.

The need for a hearing was obvious from the materials filed by Gillis. As Gillis demonstrated, Mr. Lightsey was suffering from paranoid delusions and belief in a grand conspiracy against him. (4 CT 1130-1138, 1139-1141, 1143-1152.) Gillis outlined in detail Mr. Lightsey's obsessive fixation on his theories that a grand "conspiracy" was using "forged transcripts" against him, and that Mr. Lightsey was therefore both "incompetent" to stand trial and also could not "knowingly and intelligently" waive counsel. (4 CT 1129-1138.) In his attached in camera declaration, Gillis also outlined the parameters of Mr. Lightsey's "paranoid delusions" and explained how this mental imbalance made it impossible for Mr. Lightsey to focus on his very strong alibi defense, in that he believed

the transcripts that provided him with an alibi had been forged. (4 CT 1139-1142.) Based on the strength of this evidence, Judge Kelly erred in not suspending proceedings and holding a new competency hearing.

F. The Court Erred in Refusing to Declare a Doubt of Mr. Lightsey's Competence Before or During His Trial, Despite Obvious Indications That Mr. Lightsey Continued to Be Unable to Rationally Understand the Proceedings or Cooperate with Counsel and Despite Evidence That His Condition Was Deteriorating Over the Course of the Trial.

1. Overview.

After the appointment of Dougherty and Gillis, neither Mr. Lightsey's delusions nor his courtroom behavior improved. As the trial went on, in fact, his condition deteriorated, and his outbursts became more and more frequent and bizarre and harder for the judge and his attorneys to control.

He made faces and verbal comments and interjections during witnesses' testimony and disrupted the proceedings with increasingly desperate attempts to protest his innocence and argue his delusional conspiracy theories. His frequent interruptions and disruptive verbal outbursts in court distracted his attorneys, tried the court's patience, and undoubtedly alienated the jury, to the point where, when a juror had a heart attack during the trial, the judge appeared to blame Mr. Lightsey for causing it. (32 RT 6881-6894; and see, e.g., 1/17/95 RT 7-8; 3/22/95 RT 80; 4/4/95 RT 300-302, 4/7/95 RT 430-431, 436-437; 4/12/95 RT 503; 4/13/95 RT 532; 14 RT 3088-3089, 3097; 15 RT 3223-3226, 3378-3380; 24 RT 5137-5138; 28 RT 6227; 29 RT 6295, 6326.)

Mr. Lightsey seemed to try to contain himself, but was unable to. When the judge admonished him for inappropriate behavior, he sometimes apologized and agreed to try to refrain from speaking out of turn. (See, e.g. 3/22/95 RT 80-81, 82; 5 RT 917; 26 RT 5519; 29 RT

6217; 30 RT 6564.) He spoke civilly and respectfully to the judge. His speeches, when he made them, were almost always attempts to explain his innocence. They were loud, disorganized, delusional, grandiose, full of repetitions and strange digressions, but they were not profane or intentionally disrespectful to the court. (29 RT 6229-6230, 6232.)

The judge recognized that Mr. Lightsey's emotionalism and inability to keep quiet was hurting his case. (See, e.g., 4/4/95 RT 300; 4/7/95 431, 436; 4/12/95 RT 503; 14 RT 3088-3089.) At one point the court observed that Mr. Lightsey's bad habit of making faces at witnesses in response to the prosecutor's questions "can't help him. It can't help his interests in this case to be continually animated with pleasure or displeasure." (25 RT 5371; and see 26 RT 5518 [Mr. Lightsey's compulsion to make faces at the jury was "to his detriment"].)

More specific to his mental incompetency, the trial court conceded that Mr. Lightsey "can't seem to discipline his thought processes" and that his resulting actions were "detrimental" to Mr. Lightsey's case. (29 RT 6326-6327.) Yet at no point did the court declare a doubt of Mr. Lightsey's competence to proceed.

Despite the accumulation of new evidence of Mr. Lightsey's incompetence, Judge Kelly repeatedly failed to take any effective action to protect Mr. Lightsey's rights. If anything, it appears that the judge determinedly closed his eyes to the spectacle of Mr. Lightsey's escalating mania. For most of the trial, the judge contented himself with keeping Mr. Lightsey chained to the floor and admonishing him like a small child to keep quiet. (3/22/95 RT 81-83, 105, 240; 4/4/95 RT 300; 4/5/95 RT 430; 5 RT 917; 6 RT 1162; 15 RT 3225, 3383; 17 RT 3727; 24 RT 5136; 25 RT 5370, 5372; 27 RT 574, 5770.)

2. Mental Incompetence During Pretrial Proceedings.

Even before the trial began, Mr. Lightsey's mental illness was a

constant source of difficulty for the court and counsel.

Mr. Lightsey's obsessive and unshakeable conviction that the transcripts in both his murder prosecution and his previous unrelated prior had been altered persisted throughout his murder trial. He came to believe at some point that he had been in court all day on July 7, 1993,[28] and not only in the morning as the record indicated, and insisted that the transcripts of that day's proceedings and the telephone records confirming that he had called a bail bondsman from his home shortly before noon that day were a forgery and part of the far-ranging conspiracy against him. (4/12/95 RT [Kelly—Sealed] 448-449, 462-464.)[29]

In January of 1995, at a hearing on a motion which Mr. Lightsey had filed to strike the preliminary hearing transcript (5 CT 1582), the judge reprimanded Mr. Lightsey for engaging in a "shouting match" with his attorneys when the court allowed him to meet with them in the jury room. (1/17/95 RT 3.) The judge also noted that the deputies bringing him to court were complaining about his "antics." (*Ibid.*) Dougherty explained that the argument had been over Mr. Lightsey's insistence that the transcripts in his case were fraudulent. (*Id.* at p. 8.)

Mr. Lightsey testified at the hearing, reciting around ten instances in which he contended that the testimony of witnesses at the preliminary hearing had been changed in the transcript from what they had actually said. (*Id.* at pp. 15-31.) The judge denied the motion, remarking, "There must be some figment of his imagination that there is some difference

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[28] It appears that he had confused July 7, 1993 with his hearings on July 9, 1993 when he *had* been in court all day. (3/22/95 RT 57; 4/12/95 RT 464, 485; 23 RT 5041; 24 RT 5131-5133; 26 RT 5655, 5660; 27 RT 5816.)

[29] The irrationality of his argument was obvious even at the time of trial, because, as will be discussed in Argument II, *infra*, even the 'forged' transcript and the telephone records provided Mr. Lightsey with a strong alibi for the homicide.

between what was said and what was contained in those transcripts." (*Id.* at pp. 35-36)

At a motions hearing in March and April of 1995, the judge admonished Mr. Lightsey about his outbursts in court and threatened to discipline him. When Mr. Lightsey responded with a speech about his indignation over the fraud in his case, the judge replied that he could see he wasn't getting through to Mr. Lightsey and said that Mr. Lightsey must deal with the reality of the upcoming trial. (3/22/95 RT 81-83.) His admonitions did no good: Mr. Lightsey continued interrupting his lawyers, arguing with them, and trying to speak to the judge directly. (4/7/95 RT 104-105, 116-117, 147, 164, 299-301, 415, 419, 422, 430, 534, 581, 601.)

In the midst of the motions hearing, Mr. Lightsey made a *Marsden* motion. His argument for replacing Dougherty and Gillis was a long, rambling history of grievances against his previous attorneys and their alleged collusion with the prosecution, accusations of fraud and forgery of transcripts and records, complaints about the effect of the case on his family,[30] and denials that he was mentally ill. (4/7/95 RT 459-496.)

3. Trial: Guilt Phase

Mr. Lightsey's interruptions and distractions continued unabated through his trial. (1 RT 102, 104, 106, 118, 120-122, 139-140; 14 RT 3088-3089, 3097; 15 RT 3223-3226, 3380-3383, 3226-3228, RT 3383; 24 RT 5136-5138, 5380-5384; 26 RT 5517-5520, 5570, 5740-5741, RT 5767; 27 RT 5871, 6144.)

The judge continued to warn him about the harm he was doing to his case with his loud whispering and facial expressions. (14 RT 3088;

[30] In one of the many strange turns of phrase that pepper Mr. Lightsey's language, he complained that his mother had developed "ostrich blood" over the case and hardly dared go to the store. (4/12/95 [Marsden] RT 488.)

15 RT 3383; 24 RT 5136-5138; 25 RT 5381-5384; 26 RT 5518-5520, RT 5374.) At one point, he noted that the jurors were shifting in their places to avoid looking at Lightsey. (26 RT 5518.) He threatened repeatedly to have Mr. Lightsey gagged or removed from counsel table or the courtroom. (15 RT 3226, 3383; 24 RT 5136; 25 RT 5381-5384; 26 RT 5518-5520.) Once, he threatened to gag him with gauze with a dog bone in his mouth and wrap his head in duct tape to keep him from talking and staring at the jurors. (15 RT 3226.) He accused Mr. Lightsey of "theatrics" (15 RT 3382).

When the guilt phase verdicts were read, Mr. Lightsey lost control and shouted, "I didn't kill anybody; the transcripts of 7/7/93 are one hundred percent fraud, they're totally fraud." (28 RT 6144, 6198.) As the bailiff cleared the jury from the courtroom, Mr. Lightsey continued his tirade, shouting, "They're totally fraud, she solicited witnesses – fraud from every single witness on the prosecution side. That's the truth . . . There was never court sessions 7/7/93 except at five o/clock P.M., Judge Randall, Superior Court, one, when Dominic Eyherabide got D.A. Carbone to get Judge Randall to hold readiness out of order. They hid that --- fraud." (228 RT 6144-6145.)

Once the courtroom was cleared, the judge tried to calm Mr. Lightsey down, telling him to control himself and that he was not benefiting himself by this "irresponsible outrage." (28 RT 6145-6146.) Mr. Lightsey tried to explain himself – "there's so much fraud in this case, Judge Kelly. You didn't let Dut Dauwalder testify[31], and he could have testified where I got the guns on July 30th . . . Even the telephone bill is a fraud, and it came through your courtroom, Judge Kelly." (28 RT 6145-6146.) Mr. Lightsey went on for several more minutes, and

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[31] See Argument 4, *infra*.

the judge repeatedly interrupted him and, exasperated, threatened to have him gagged if his attorneys couldn't control his behavior. (28 RT 6145-6148.) Finally, after Gillis asked to be allowed to speak with Mr. Lightsey in private, the judge declared a recess. (28 RT 6148.) When court reconvened, Gillis said Mr. Lightsey had promised to keep his mouth shut for the remainder of the hearing. (28 RT 6149.) The court called the jury back in, and the rest of the verdicts were read, apparently without incident. (6149.)

4. Trial: Penalty Phase

a. Fifth Motion Filed By Trial Counsel Dougherty and Gillis.

Between the guilt and penalty phases of trial, defense counsel filed another motion to have Mr. Lightsey declared incompetent to stand trial. (8 CT 2227.) In their motion, they noted that Mr. Lightsey was "delusional" and "paranoid" and so fixated on the "conspiracy" against him that he was unable to assist counsel. (8 CT 2227-2239.)[32]

On the first day of the penalty phase of trial, counsel discussed their concerns with the judge, while Mr. Lightsey, at the counsel table, made strange comments about handcuffs and compulsively combed his hair. (29 RT 6198-6199.)

Gillis explained to the court that Mr. Lightsey's condition has "progressively gotten worse" during trial and that Lightsey was very detrimental to his own case. He stated that he and Dougherty were limited in their conduct of the trial by Mr. Lightsey's intense mistrust. Lightsey, he said, was so incompetent that he not only couldn't help his counsel, but actually "hurts counsel in presenting his defense." He questioned whether

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[32] Defense counsel pointed out that the district attorney was, in fact, out to get Mr. Lightsey because he had been acquitted earlier on a child molestation charge, but that Mr. Lightsey was unable to move beyond this in order to assist in his defense. (14 CT 2227.)

Lightsey understood the gravity and seriousness of the charges, and he requested another competency exam. (29 RT 6199-6200.) Gillis asked to be heard out of the presence of the district attorney, because explaining Mr. Lightsey's incompetence would require revealing privileged communications. (29 RT 6200-6202.)

The district attorney objected to being excluded from the courtroom and argued at length against suspending proceedings, insisting that Mr. Lightsey was trying to delay the proceedings and was a "master manipulator," who was merely unwilling to cooperate with his attorneys and voluntarily withholding evidence from them. She accepted Mr. Lightsey's belief that "there is some giant conspiracy that exists in Kern County," but argued, "Just because they can't change his mind that a conspiracy exists, that doesn't mean that he's incompetent." She argued – despite her opposition to counsel's request to be heard *in camera* -- that counsel had not presented sufficient new evidence to warrant suspending proceedings. (29 RT 6206-6211.)

Trial counsel Gillis explained that Mr. Lightsey had become "progressively more paranoid" over the course of trial about the "fraud" and forging of transcripts. (29 RT 6212.) Gillis argued, correctly, "When a person has an inability to assist counsel because of his belief in a fraud, that is the criteria that is met in the statute, and that's what they are talking about. They're not talking about anything other than his ability to assist counsel." (*Ibid.*) Mr. Lightsey had reached a point, he said, where he "does not even understand the exact gravity of the circumstances that he's involved in." (*Ibid.*)

Defense counsel Dougherty also noted that there were new indicators of Mr. Lightsey's "deteriorated" mental condition before the court. (29 RT 6214.) In particular, his recent "actions" and the "way he reacts" to the case, especially his outburst at the close of the guilt phase,

showed his recently developed mental deterioration. (29 RT 6214.) Rather than assisting counsel with a very strong alibi case, Mr. Lightsey insisted that all the transcripts supporting his alibi were a fraud and focused his efforts on letters to President Clinton and Attorney General Reno about the purportedly forged transcripts in his case. (29 RT 6216.) Counsel explained the impossible position Lightsey's mental illness had placed them in:

> To talk to your client and try and convince him and show him hard evidence of sworn testimony that went together and interlocked and said what it said, said what it purported to say and have him go off in never, never land and fantasies and irrational ramblings, he was not able to help us in his defense. (29 RT 6216.)

Notwithstanding these arguments and evidence, Judge Kelly declined to declare a doubt of Mr. Lightsey's competence. (29 RT 6218-6226; 8 CT 2240.)

In a lengthy statement, he judge said he was "fully convinced that Mr. Lightsey has a mental capacity – he may not have a mental discipline, but he's got a mental capacity to be fully aware of what is happening, what's going on with what the procedures are." (29 RT 6219.) Missing Gillis's point entirely, he expressed "surprise" that Gillis would tell the court that Mr. Lightsey didn't appreciate the gravity of the proceeding. (29 RT 6220.) He cited the August 2, 1994 hearing, incorrectly, as one where Mr. Lightsey's competence to stand trial had been determined. (29 RT 6221.) He noted that he saw no evidence of a breakdown in communications between Mr. Lightsey and his attorneys; on the contrary, he noted, "Mr. Lightsey is constantly talking to his attorneys" – even interrupting them in the middle of a sentence. (29 RT 6223-6224.)

The judge's ruling was punctuated with interruptions from Mr. Lightsey, correcting him and complaining about the judge's sometimes

uncomplimentary descriptions of his behavior, and accusing him (with inadvertent accuracy) of "setting a record one way, sir." (29 RT 6217, 6225, 6226.)

The court's refusal to declare a doubt of Mr. Lightsey's competence was followed, ironically, by a discussion of what to do about his inability to control his courtroom behavior. The judge had suggested gagging him, but then made arrangements, at defense counsel's request, to put him in a vacant courtroom with a closed circuit television connection, if counsel could not keep him quiet in front of the jury.

At defense counsel's urging, the judge permitted Mr. Lightsey to read a statement before the jury were called in. Mr. Lightsey launched into a rapid-fire dissertation repeating his claims of forgery, fraud, and conspiracy:

> My attorneys have covered up the prosecution's fraud, oliciting of perjury and purposefully failed to bring out these frauds in the proper questioning and unveil these nsurmountable –
>
> THE REPORTER: Stop.
>
> THE COURT: Diane has to write this down.
>
> THE DEFENDANT: My attorneys ever covered up for he prosecution's fraud and soliciting of perjury and purposefully failed to bring out these frauds through proper questioning and unveil these insurmountable mount of felony judicial crimes committed by D.A.Lisa Green, Judge Alan Klein, Stan Simrin, Diane Daulong, D.A. John Somers, more galore, and call the proceedings in case 58601 where the court's employees had to go back to five months to change what truly covered--
>
> THE REPORTER: Repeat after truly covered.
>
> THE DEFENDANT: What where numerous so-called publicly trusted officials had to go back five months to change what truly transpired to cover up for the original malpractice and civil rights violations

> and due process violations on 7/7/93 when Dominic Eyherabide and D.A. Carbone went out the back door of the Corbin Emdy trial at 4:45 p.m. and visited Roger D. Randall in his chambers and conspired with him and got him to hold my readiness out of order and skipped my motions hearing that was truly scheduled at 1:30 p.m. on 7/7/93, was truly trailed from 6/29/93 at 8:30 a.m. when department number ten first call case number twelve. That every -- that this fraud caused a chain reaction of fraud to such an extent to make every single transcript on 6/29/93, 7/7/93, and 7/9/93 one hundred percent fraud –
>
> THE COURT: there –
>
> THE DEFENDANT: There was another small paragraph.
>
> THE COURT: Well, nothing that you have said is related to what we're doing here, Mr. Lightsey. (29 RT 6228-6230)

Later that day, in a conference after the prosecution had rested its case, Judge Kelly repeated his denial of the request to suspend proceedings and ruled again that "the court does not have any doubt as to Mr. Lightsey's competency to stand trial in this matter." (29 RT 6306; 8 CT 2333.)

Against the advice of his attorneys, Mr. Lightsey insisted on testifying at the penalty phase. (29 RT 6316-6317.) After the defense opening statement, the jury was excused so that the bailiff could move Mr. Lightsey to the witness stand without the jury seeing his chain and leg brace. During that recess, the judge admonished Mr. Lightsey just to answer the questions of the attorneys. He also tried to obtain a waiver on the record of Mr. Lightsey's right to silence, but Mr. Lightsey was unable to focus on the question; instead, he rambled about his "need to testify on every aspect" and his regret about not having testified at the guilt phase. (29 RT 6321-6326.) Finally, the judge commented to counsel that it would be "very detrimental, I'm afraid, to Mr. Lightsey's interest for him to testify

since he can't seem to discipline his thought processes, respond to the simple questions I'm asking him about his right to remain silent?" (29 RT 6326.)

Defense counsel Gillis reminded the judge about their earlier request for suspension of the proceedings. Given the denial of motion, he said, the defense could go forward, but only "because we have no other place to go." He explained, again, that Mr. Lightsey didn't understand the case or the reality of what is going on, that he clung to his delusions, even when shown documentary proof that he was wrong, and that he was living in "a fantasy." Dougherty noted that Mr. Lightsey now believed that he, Dougherty, was part of the conspiracy against him. (29 RT 6328.)

The judge responded, dismissively, that he was "convinced" Mr. Lightsey understood the case and the evidence, but was merely "in a position of denial" about what he had done to the victim. (*Ibid.*) When the judge asked counsel whether he felt Mr. Lightsey understood his right to remain silent, Dougherty answered, "[T]he answer has got to be no, because he thinks that he can --- he thinks he can waive that right and talk about anything he wants. That's what he thinks." (29 RT 6329.) Dougherty noted that when the judge had questioned him during the hearing, he had never gotten a direct answer: "Every time the Court asked a question that had to do with yes or no, as you said asked him what time it was, he wanted to tell you what the weather was like outside . . . And he thinks he's going to be able to talk about anything he wants." (29 RT 6229-6330.)

Judge Kelly responded, "All right. The Court's going to accept the waiver of the defendant to remain silent." He then said he was "surprised at his counsel's response to my last question. There's no doubt in my mind that Mr. Lightsey understands that he has a right to remain silent." (29 RT 6330.)

Mr. Lightsey immediately began to outline the testimony he wished to present, which included reading into the record letters he had sent to a grand juror, the FBI, Attorney General Janet Reno and President Clinton. He rambled about presenting evidence that should have been presented in the guilt phase and the need to have his investigator go to the video store where the cameras in evidence had been purchased. (29 RT 6332-6335.) As the judge tried to explain to him that his testimony would be limited, Dougherty agonized about the terrible mistake Lightsey was committing; "we just see disaster ahead, if he testifies. He's going to hurt himself." (29 RT 6334-6335.)

b. Evidence of Incompetence in the Penalty Phase

Mr. Lightsey's mental illness was manifest in his testimony, which was, as his lawyers had predicted, disastrous.

Mr. Lightsey's testimony responding to the evidence which the prosecution had introduced in aggravation was rambling and full of digressions into his school and work history, his medical problems, and pervasive claims of perjured testimony and forged documents. He often gave completely unresponsive answers to questions from his attorneys. He expounded on his belief that the district attorneys' office was pursuing a vendetta against him because he had been acquitted in a high profile child molestation case and because he had been a juror in a criminal case in which the defendant had been acquitted. He listed the government officials, organizations, and individual lawyers to whom he had written, to "try to get outside intervention from the insurmountable amount of judicial fraud crimes that have taken place in my case, beginning with the cover up that took place 7/7/93 between 5:00, 5:15 p.m. when the readiness hearing was held." (30 RT 6447.)

He denied the alibi defense that had been presented at the guilt phase, claiming instead that he had never been in Department 10 on July 7,

1993, but had instead spent the entire day, morning and afternoon, in a different courtroom, and that a different prosecutor, not Somers, was in court on his case that day. (30 RT 6448.)

Both the judge and his attorneys repeatedly admonished him to answer the questions posed to him, but with little effect. (29 RT 6239, 6342, 6353, 6362, 6364, 6366, 6369, 6374, 6377, 6380, 6381, 6384, 6387; 30 RT 6396-6397, 6398, 6417, 6420, 6432, 6438, 6439, 6441, 6445, 6447, 6448.)

On cross-examination, Mr. Lightsey continued to testify about the perjured testimony that had been presented against him and accused the trial prosecutor of forging transcripts and his former attorneys of collusion with the prosecution. (30 RT 6450-6461, 6484-6485.) He continued to digress into discussions of subjects well beyond the focus of his testimony, disputing, for example, that marijuana was a drug and accusing the arresting officer in one of his prior cases of stealing his coin collection, sticker collection, swimming medals, television, cash, and stereo during a police raid on his parents' house. (30 RT 6473.) He testified again, in more detail, about his belief that he and his mother were in court together all day on July 7, 1993, and accused everyone who had contradicted this, including his own brother, of lying. (30 RT 6488-6494.)

During counsels' penalty phase arguments, Mr. Lightsey made so many interruptions that the judge declared a recess in order to give Mr. Lightsey a lecture on the need for him to behave responsibly in the final days of his trial. (32 RT 6855-6863.)

The judge described Mr. Lightsey's interjections as an "intentional effort to continue with expressing himself improperly, irresponsibly and unreasonably." His next comment, however, echoed what the attorneys had earlier said in arguing that he was incompetent:

> Mr. Lightsey's life is at stake. Mr. Lightsey doesn't

> seem to have an appreciation for that, or, in the alternative, if he does, he feels apparently that his conduct in some way or another with this bizarre – continuing bizarre conduct will somehow or other assist him in saving his own life.

Mr. Lightsey continually interrupted the judge's speech, ignoring orders from his attorneys and the bailiff to be quiet. (32 RT 6859-6863.)

After the jurors were called back in and arguments resumed, Mr. Lightsey continued commenting loudly on the attorneys' statements. Finally, the judge called another recess and arranged to have Mr. Lightsey removed from the courtroom for the rest of the arguments. (32 RT 6875, 6879-80.)[33]

5. The Sixth and Final Section 1368 Request.

On the morning after Mr. Lightsey's removal from court, while the jurors were deliberating, defense counsel made a last request for the judge to declare a doubt of Mr. Lightsey's competence to proceed. (33 RT 6941.) Dougherty said that he had been so distracted by Mr. Lightsey's confusion and interruptions that he had forgotten to make a section 1118.1 motion at the end of the case. (*Ibid.*) He argued that the behavior which led to the suspension of the trial and the exclusion of Mr. Lightsey from the courtroom, along with his interruptions of counsel and witnesses during the trial, showed "clearly that he is incapable of aiding his counsel in the

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[33] It appears that Mr. Lightsey was, at this point, shouting his comments. Even after he was moved to a jury room fifty feet away, the judge told the deputies guarding him there not to let him disrupt the proceedings in nearby courtrooms with his outbursts and said he would gag him with duct tape if he did so. (32 RT 6880-6881.)

The atmosphere in the courtroom was apparently so stressful that one juror developed heart trouble during his testimony and had to be replaced just prior to penalty phase deliberations. Her treating physician expressly opined that it was the stress of her jury service that caused her heart condition. (32 RT 6881, 6892-6894.)

defense of his case." (*Ibid.*)

The judge again dismissed counsel's arguments as nothing new. He noted (incorrectly) that Mr. Lightsey had been examined "several times" by mental health experts who found no problem with his competence. The judge insisted that Mr. Lightsey was making a voluntary decision not to cooperate and that he just wanted to tell his own story, that even in the penalty phase he kept going to guilt issues. His problem, the judge said, was just a bad "attitude." Lightsey, he said, had it together, understood the proceedings and the charges, and had, he noted, filled out many pages of instructions for his attorneys. Lightsey, in his opinion, was "playing with a full deck," and had demonstrated his understanding repeatedly to the court, to the point where the court had even allowed him to go in pro per at one point. The judge insisted, "There is no doubt in this Court's mind as to the competence of Mr. Lightsey, none whatsoever," and denied the motion. (33 RT 6941-6944.)

The jury returned a death verdict that day.

6. Sentencing

Mr. Lightsey was sentenced on August 15, 1995. Before sentencing Mr. Lightsey, the judge ruled on the defense's motion for a new trial. Mr. Lightsey interrupted the hearing with numerous comments and attempts to disqualify the judge and his counsel, until the judge declared a recess and had him gagged and his hands cuffed behind him. (8/15/95 RT 6964-6965.) Even gagged, Mr. Lightsey continued making noise and at one point struggled free of the gag for long enough to request a *Marsden* hearing. (8/15/95 RT 6965-6966 6975.)

For the sentencing hearing itself, the judge had the gag removed and permitted Mr. Lightsey a final statement, in which he recapitulated his claim of innocence, his alibi, and his arguments about the district attorney's fraud and subornation of perjury to obtain his conviction and

his betrayal by his attorneys. (8/15/95 RT 6998-7018). As the judge pronounced sentence, Mr. Lightsey tried to speak, but was cut off by the bailiff. (8/15/95 RT 7019, 7021.)

7. The Trial Judge Erred in Refusing to Declare a Doubt of Mr. Lightsey's Competence.

Mr. Lightsey never received a proper hearing on his competence to stand trial.

In the face of his patently delusional thinking, his obvious inability to control his disruptive courtroom conduct, and repeated pleas from attorneys to suspend proceedings, the trial court failed again and again to acknowledge and act on the overwhelming evidence of Mr. Lightsey's incompetence.

In *Dusky v. United States* (1960) 362 U.S. 402, the United States Supreme Court defined competence to stand trial as a defendant's " 'sufficient present ability to consult with his lawyer with a *reasonable degree of rational understanding*' " and " 'a *rational as well as factual* understanding of the proceedings against him.' " (*Id.*, at pp. 402-403, emphasis added.)

The judge's adamant refusal to find a doubt of Mr. Lightsey's competence can be understood, in part, as stemming from a misunderstanding of what trial competence is. In his rulings throughout the proceedings, the judge limited his discussion of the issue of Mr. Lightsey's problem to whether Mr. Lightsey seemed to be communicating with his attorneys and to understand that he was on trial for his life. (See, e.g., 7/28/94 RT 105-108; 8/2/94 RT 274-282; 29 RT 6219-6220; 33 RT 6941-6944.)[34]

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[34] The judge also seemed impressed with Mr. Lightsey's intelligence and understanding of the law. However, as this Court has observed:

> Whether the question for the trial court is

Arguments regarding the need for changed circumstances for a second competency hearing are not pertinent in this case, because Mr. Lightsey never received an actual hearing on his competence or a ruling directed to the issue of his *rational* understanding of the proceedings against him and his ability to rationally assist his attorneys. Even the district attorney agreed that the proceedings initiated by the motion of James Sorena in 1994 and the hearing of August 2, 1994, had been directed not to Mr. Lightsey's competence to stand trial, but to the separate issue of his competence to represent himself. (29 RT 6209.) The fact was that Judge Kelly never, at any point, came to grips with the issue of Mr. Lightsey's trial competence as measured under the proper the issue of Mr. Lightsey's trial competence as measured under the proper constitutional standard.

The preceding sections of this argument summarize only a small portion of the instances of disordered behavior that pervaded Mr. Lightsey's trial. The record shows clearly that Mr. Lightsey was suffering from a thought disorder and mania and that he was so driven by his obsessive and delusional beliefs in the forgery of transcripts and records and the collusion of his attorneys with the prosecution that he not only

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competence to stand trial or competence to waive counsel and represent oneself, the competence standard is the same: the defendant must have " 'a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding- and "' a rational as well as a factual understanding of the proceedings against him.' " (Citations.) The focus of the inquiry is the defendant's mental capacity to understand the nature and purpose of the proceedings against him or her. (Citations.) The defendant's " 'technical legal knowledge' " is irrelevant. (Citations.)" (*People v. Blair* (2005) 36 Cal.4th 686, 711.)

could not cooperate in presenting his genuine defense of alibi, but actually tried to undercut it by insisting that the transcripts of that day were forged and he was in court until the late afternoon on the date of Compton's death. Another consequence of his mental illness was that he could not keep himself from trying to break into the proceedings with repetitive, rapid-fire speeches about the fraud, conspiracy, and betrayals in his case.

Far from assisting his attorneys, he could not be swayed from his delusional theories enough to provide anything like a reasonable degree of help in defending his case. Instead, he interrupted his attorneys, peppered them with notes, and kept them so distracted with trying to control his behavior that they forgot questions to witnesses and even important motions. (See, e.g., 3/23/95 RT 147, 164; 5 RT 919; 14 RT 3097; 15 RT 3380-3381; 27 RT 5868; 33 RT 6941.)

Mr. Lightsey's strange behavior rattled the judge and unnerved the jurors. His uncontrollable courtroom demeanor became, in effect, character evidence against him at the guilt phase of trial and an uncharged factor in aggravation in his sentencing.

"The 'sole purpose [of competency proceedings] is" the humanitarian desire to assure that one who is mentally unable to defend himself not be tried upon a criminal charge."'" (*People v. Pòkovich* (2006) ____ Cal.4th ____ [slip opn. at p. 12].) Instead of suspending the proceedings and possibly putting an end to the cruel spectacle being played out before the jury charged with ending or sparing Mr. Lightsey's life, Judge Kelly left Mr. Lightsey chained, literally and figuratively, in the courtroom.

G. The Trial Court's Errors Violated Mr. Lightsey's Constitutional Rights to a Fair Trial, To Due Process of Law, and To a Reliable and Proportional Verdict and Sentence of Death.

"The humanitarian impulse reflected in competency hearings is of

constitutional dimension." (*People v. Pokovich, supra*, concurring and dissenting opinion of Werdegar, J., p. 2, fn. 2.)

A State's trial of a mentally incompetent defendant violates due process. (U.S. Const., Amend. XIV; *Pate v. Robinson, supra*, 383 U.S. 375, 383; see also *Dusky v. United States, supra,* 362 U.S. 402, 402-403; see also *People v. Weaver* (2001) 26 Cal.4th 876, 903 [same], citing *Medina v. California* (1992) 505 U.S. 437, 448; *People v. Dunkle* (2005) 36 Cal.4th 861, 885 [same].) It also violates the constitutional right to a fair trial. (U.S. Const., Amends. VI and XIV; *Pate v. Robinson, supra*, 383 U.S. 375, 385.) Mr. Lightsey's judgment and sentence of death must be reversed, because his constitutional right not to be tried while incompetent was violated.

This Court has repeatedly confirmed that a "defendant's trial while incompetent violates . . . federal due process guarantees." (*People v. Dunkle, supra*, 36 Cal.4th 861, 885.) This right is ongoing, and a trial court has an affirmative duty to vigilantly be aware of any "changed circumstances" that demand renewed competency proceedings. (*Drope v. Missouri* (1975) 420 U.S. 162, 181; *Burt v. Uchtman, supra*, 422 F.2d 557, 568.)

Mr. Lightsey's federal due process liberty interests were also violated by the trial court's failure to follow California's competency laws. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.) His unconstitutional trial while incompetent also violated Mr. Lightsey's rights to a reliable and proportional verdict of death. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The trial court's egregious failure to follow proper competency procedures in Mr. Lightsey's case violated his state and federal

constitutional rights to a fair trial, due process of law, and to a proportionate and reliable verdict of death, requiring reversal of his verdict and sentence of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.)

H. The Error Requires Reversal.

1. Per Se Reversal.

Due to the "difficulty of retrospectively determining an accused's competence to stand trial," a violation of the right to an "adequate hearing" on "competency to stand trial" usually requires per se reversal. (*Pate v. Robinson, supra*, 383 U.S. 375, 386-387, citing *Dusky v. United States, supra*, 362 U.S. 402, 403.) This is only logical given that a new competency "jury would not be able to observe the subject of their inquiry" at the time a claim of incompetency was relevant, i.e. in the instant case a new competency jury could not directly observe Mr. Lightsey's state of mind in 1993-1995. (*Pate v. Robinson, supra*, 383 U.S. 375, 387.) Similarly, new "expert witnesses would have to testify solely from information contained in the printed record," rather than doing an examination of the defendant. (*Ibid.*) Moreover, "the failure of the trial court to comply with the statutory [competency] requirements affects the fundamental integrity of the court proceedings." (*People v. Castro, supra*, 78 Cal.App.4th 1402, 1418.)

In some rare cases it might be possible to conduct a "post appeal evaluation of the defendant's pretrial competence." (*People v. Castro, supra*, 78 Cal.App.4th 1402, 1419 [retroactive proceedings only theoretically appropriate and rarely practicable].) However, "it is the rare case in which a meaningful retrospective competency determination will be possible." (*People v. Ary, supra*, 118 Cal.App.4th 1016, 1028.)

Due to the inherent difficulties in "retrospectively determining" an

appellant's competency nunc pro tunc, a delay of only a little more than a year from the time of trial to the time of reversal on appeal was enough to mandate a complete reversal of a conviction and sentence. (*Dusky v. United States, supra*, 362 U.S. 402, 403.) Similarly, in *Pate v. Robinson*, per se reversal was required for violating the right to an adequate competency hearing because the original competency proceedings had occurred six years previously. (*Pate v. Robinson, supra*, 383 U.S. 375, 843.) In the instant case, it has been thirteen years since the original inadequate competency hearings were held. The lapse of so great a time clearly requires reversal of Mr. Lightsey's sentence and judgment of death. (*Pate v. Robinson, supra*, 383 U.S. 375, 386-387; *Dusky v. United States, supra*, 362 U.S. 402, 403.)

2. Remanding for Nunc Pro Tunc Proceedings.

Should this Court nevertheless still return the case for such a nunc pro tunc determination, it should instruct the trial court to first "determine whether the available evidence and witnesses are sufficient to permit it to reach a 'reasonable psychiatric judgment' of defendant's competence to stand trial." (*Id.* at p. 1029, citing *Odle v. Woodford* (9th Cir. 2001) 238 F.3d 1084, 1089.) Only then may a retrospective competency determination *even be attempted.* (*People v. Ary, supra*, 118 Cal.App.4th 1016, 1028-1029.) However, due to the inherent difficulties in doing such a nunc pro tunc evaluation Mr. Lightsey's judgment and sentence of death must simply be reversed. (*Pate v. Robinson, supra*, 383 U.S. 375, 386-387; *Dusky v. United States, supra*, 362 U.S. 402, 403.)

II.

MR. LIGHTSEY'S CONVICTIONS AND SENTENCE OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT PREJUDICIALLY ERRED IN REFUSING TO ADMIT EVIDENCE OF HIS ALIBI.

A. Introduction

Mr. Lightsey had an unusually strong alibi to the charged murder. Specifically, he was in court for a hearing regarding his bail on another case during the morning the homicide occurred.[35] The prosecution's theory was that Mr. Lightsey murdered Compton after leaving court, assaulting Compton as he was about to take a shower before leaving for his 11:30 medical appointment. The question when Mr. Lightsey's court hearing ended was a major, disputed issue at his guilt trial.

The trial court refused repeated defense requests to introduce the full transcript of the morning's proceedings in the department where Mr. Lightsey's matter was heard, and would not permit counsel to even argue that the length of the transcript indicated the passage of a certain amount of time in the courtroom. The court's rulings excluding this evidence and argument were erroneous and severely hampered Mr. Lightsey's attorneys in establishing his alibi defense. (*People v. Babbitt* (1988) 45 Cal.3d 660; *People v. Linder* (1971) 5 Cal.3d 342; Evid. Code, § 352.)

The errors also violated Mr. Lightsey's constitutional right to raise a defense, to present evidence in support his defense, to a fair trial with due process of law, and to a proportionate and reliable verdict of death. (*Crane v. Kentucky* (1986) 476 U.S. 683; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Gonzales v. Lytle* (10th Cir. 1999) 167 F.3d 1318; *Rosario v. Kuhlman* (2nd Cir. 1988) 839 F.2d 918; U.S. Const., Amends. 5, 6, 8, and 14; Cal.

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[35] The hearing that morning also included a brief discussion of a previously filed motion to dismiss and motion to sever in that case. (1 CT 58.)

Const., art. 1, §§ 7, 15, 17 and 28.) In addition, the error was a violation of a state-created right, which breached his federal constitutional due process "liberty interest" under the state Evidence Code. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.) Reversal is therefore required, because the error cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24.)

B. Factual and Procedural Background.

1. Timeline.

The evidence showed, and the prosecution and defense agreed, that William Compton was killed sometime during the morning of July 7, 1993. According to the evidence introduced at trial, a neighbor, Elva Atkins Cantu, saw Mr. Compton outside his house at about 7:45 a.m. on July 7, 1993. (15 RT 3304-3319.) Between 9:30 and 10:00 that morning, another neighbor, Alice Toole, also saw someone she assumed was Mr. Compton standing by his motor home. (15 RT 3391-3394.)

Undisputed evidence was introduced that Mr. Lightsey was elsewhere between 8:00 and 9:30 that morning. Robin Lorenz testified that he saw Mr. Lightsey at their mutual defense attorney Dominic Eyherabide's office on July 7, 1993 at around 8:00 a.m. (RT 5343-5344.) Mr. Lightsey, Mr. Lightsey's mother, Lorenz, and Eyherabide then all walked to the courthouse together. (RT 5344-5346.) Eyherabide told Mr. Lightsey that he would meet him in superior court, and Eyherabide and Lorenz went to take care of Lorenz's matter in municipal court. (RT 5346-5347.) Lorenz's hearing was completed by 9:30 a.m., or a bit earlier. As he walked back afterward to Eyherabide's office, he saw that Mr. Lightsey's mother's Volvo was still parked where it had been at 8:00. (25 RT 5355-5362.)

Eyherabide testified that his notes indicated that he went to Department 10, the courtroom where Mr. Lightsey's bail proceeding was set for hearing, at around 8:45 or 9:00 a.m., before the beginning of the

morning calendar, but left to appear with another defendant in Dept. 4 at precisely 9:02. (25 RT 5396-5398.) Darrell Epps, the bailbondsman present in the bail proceeding, saw Mr. Lightsey arrive at Department 10 around 8:40 or 8:45 with an elderly woman, whom he assumed was his mother. (24 RT 5118.)

Diane Daulong, the court reporter in Department 10 that morning, testified that Mr. Lightsey's hearing was first called as line item 13 of the morning priority calendar, which was customarily started between 8:45 and 8:55 a.m. (23 RT 5024-5025.) However, the court bailiff Mike Forse announced that Mr. Lightsey's attorney Mr. Eyherabide was not in court, but had come by earlier and indicated to court staff that he was busy in another trial and would be back around 10:45 a.m. (3 RT 5024-5025; 23 RT 5025-5028; see also 1 CT 43.)

Mr. Lightsey's case was called for the second time after Mr. Eyherabide returned, but Mr. Lightsey was down in the coffee shop with his mother, so the matter was trailed while the court bailiff retrieved him. (23 RT 5031-5033.) After one other hearing involving another defendant was held, Mr. Lightsey's case was then called for a third time, with Mr. Lightsey, his defense attorney Mr. Eyherabide, the bailbondsman Mr. Epps, and prosecutor Somers all present. (23 RT 5035-5036.) After various arguments were made by Mr. Eyherabide, Mr. Epps announced that he had not yet filed a response to the bail motion, and Mr. Lightsey's hearing was then continued until two days later, on July 9, 1993, and Mr. Lightsey was excused from court. (23 RT 5039-5041.),

Bailbondsman Epps testified that he thought he saw Mr. Lightsey leaving with his mother from the courtroom possibly as early as 10:30 a.m., though he was not sure of the exact time. (24 RT 5132-5134.)[36] Rita

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[36] At the preliminary hearing in this case, Epps testified, consistently with

Lightsey testified that, according to a test-walk she performed under the supervision of a defense investigator, it took 9 minutes, 30 seconds at a regular pace to walk from the courthouse to the space near Eyherabide's office where her car had been parked on July 7. (26 RT 5546-5547.) It took an additional 7 minutes, 45 seconds to drive from there to her home, which was about a half mile from Mr. Compton's house. (26 RT 5548.)

Telephone records introduced by the prosecution showed that Mr. Lightsey made a call from his home to Robert Herman, a bailbondsman from Lancaster, at 11:50 a.m. on the morning of July 7. (Exh. 130 [Phone Records].) Robert Herman testified that he had received the call. (24 RT 5172.)

2. Prosecution Theory of the Case

The prosecution's theory, based on this evidence, was that Mr. Lightsey rode with his mother to her house, picked up his car, and made the short drive to Mr. Compton's house, where he assaulted Mr. Compton as Compton was preparing to shower[37] before making the fifteen minute drive to his 11:30 medical appointment.[38] (15 RT 3284; 28 RT 5914.)

Mr. Eyherabide's trial notes, that the case was *called* for the second time around 10:30. (PX 29.) At trial, Epps changed his testimony, claiming that to recall that the second calling of the case occurred at around 10:15 or 10:20.

[37] Undisputed evidence was introduced at trial that Mr. Compton always showered before going to his chemotherapy appointments and that it was Mr. Compton's custom to arrive at his chemotherapy appointments at least fifteen minutes prior to his appointments. (16 RT 3247, 3473-3474, 3486-3487, 3662-3664, 3468-3470.) The evidence at the scene indicated that Mr. Compton was getting ready to take a shower before his death.

[38] The prosecutor made this concession only in her guilt phase argument. During the trial, however, she presented a second theory, through the testimony of Diane Daulong, the court reporter in Department 10. Ms. Daulong testified that she had seen Mr. Lightsey, dressed in a black silk shirt, in court early on the morning of July 7, and had seen him appear there later, looking out of breath and wearing a white sweatshirt. Daulong's

For both the defense and prosecution, therefore, the time Mr. Lightsey left the courthouse was crucial evidence. The prosecution's *entire case* came down to whether Mr. Lightsey left at around 10:30 as the prosecutor claimed, or sometime later, as the defense claimed. The transcript of the proceedings in Department 10 that morning was a critical piece of defense evidence, as it constituted an unbiased court record providing uniquely unimpeachable evidence of the time that elapsed between Mr. Lightsey's first appearance in that court on July 7 and the end of his last one. His defense of alibi rested on the argument that he was in the courthouse until closer to 11:00 a.m., and accordingly could not have reached Mr. Compton's house in time to attack him before he showered and left for his medical appointment. (15 RT 3290-3293 [opening statements discussing alibi defense]; 28 RT 6007-6020 [closing arguments discussing alibi defense].)

3. The Trial Court Erroneously Refused the Defense's Requests to Introduce The Full Transcript of The Morning's Proceedings in Department 10 or To At Least Argue That the Length of Transcript Indicated a Certain Passage of Time.

In their original motion to have the full transcript of the morning calendar prepared, the defense vigorously argued that the entire transcript

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testimony was contradicted by Robin Lorenz and other witnesses who said that Lightsey was wearing a white dress shirt when he first went to court and by Mr. Lightsey's mother, who testified that Mr. Lightsey did not wear black shirts of the sort described by Daulong and that she had looked through his clothing, which she has stored for him after he went into custody and found no such shirt. It was also impeached by earlier statements Daulong had made that she did not recall seeing Lightsey that morning. The prosecutor's argument was actually something of a "non-concession concession," stating, "personally I do not believe that this is when Mr. Compton was killed based on the evidence that I know now," but adding, "But I also realize ... that there are twelve of you and only one of me. As the Judge has told you, what I say is not evidence." (RT 5977-5978.)

was needed to "specifically establish the defendant's whereabouts on July 7, 1993, between 8:00 a.m. and 12:00 p.m.," because the defense had "no other means by which to obtain this information." (2 Supp. Conf. CT 439.)

Judge Felice, then serving as the trial court prior to his later recusal, granted the motion. (2 Supp. Conf. CT 441.) However, the trial judge, Judge Kelly, denied defense counsels' requests to introduce the full transcript, or even to argue that the length of the transcript indicated a certain length of time.

In proceedings before Judge Kelly, the defense first tried to move the transcript into evidence in the context of Mr. Lightsey's motion to dismiss the case pursuant to Penal Code section 995, but the court declined to rule on the issue at that stage of the proceedings. (3/22/95 RT 108-111.)

At trial, before the guilt phase presentation of evidence defense counsel again sought admission of the transcript. (14 RT 3144.) Both the prosecution and the defense stipulated that the transcript was accurate and that the court could properly take judicial notice of the transcript, but the prosecution objected to its admission as evidence for the jury on relevance grounds as it was too "speculative" a tool to use to estimate the passage of time. (14 RT 3144-3159.)

Instead, the prosecution moved that only the three hearings held that morning involving Mr. Lightsey should be admitted into evidence, rather than the entire morning calendar. (14 RT 3146.) In response, the defense argued that only by viewing the entire transcript could the jury estimate the passage of time based on the number of matters heard between Mr. Lightsey's three hearings that morning, and the jury could then deduce when Mr. Lightsey left the courthouse. (14 RT 3147-3153.)[39]

[39] This was necessary because the court reporter from that hearing, Diane Daulong, confirmed that no hearing times were listed on the transcript, other than when coincidentally discussed by parties on the record. (23 RT

Accordingly, the defense argued that the jurors should receive the entire transcript so they could simply read the transcript out loud and make an "estimation" of the passage of time they could use during their deliberations. (14 RT 3151.) Prosecutor Green countered that the entire transcript was too "speculative" as to the issue of the passage of time to be relevant. (14 RT 3158-3159.)

The trial court sustained the prosecution's objection to the evidence, stating that the evidence could not properly be used "to try to urge them to speculate on a certain time frame." (4 RT 3157.) The court permitted the prosecution to introduce extracts from the morning transcript that covered the three brief hearings in Mr. Lightsey's bail case during its case-in-chief. (See, e.g., Exhs. 168 & 169 [extracts from RT of hearing].)

During the defense case-in-chief, the defense then again raised the issue of admitting the entire "transcript" of the morning calendar, but the trial court refused to either directly address the issue or allow the transcript to be admitted into evidence. (27 RT 5740.)

After the close of evidence, the defense raised the issue a third time, urging the court to at least allow them to argue to the jury that they could use the length of the transcript to estimate the passage of time. (27 RT 5784-5787.) However, the court refused this request as well. (27 RT 5802-5803.)

C. The Exclusion of Evidence Was Erroneous.

The court's rulings denied Mr. Lightsey his right to raise a defense, his right to due process of law, and his rights to a reliable and proportional verdict of death. They also violated his rights under California constitutional and evidentiary law to introduce relevant evidence in his defense.

5030.)

California law is well settled that transcripts of hearings providing an alibi to a defendant should generally be admitted into evidence as long as there is no problem with their authenticity or violation of some other legal principle. (See, e.g., *People v. Linder* (1971) 5 Cal.3d 342, 347-348 [exclusion of transcript supporting alibi defense requires reversal of conviction].)

In the instant case, no one -- not the trial court, the prosecution, or defense counsel -- disputed the accuracy of the July 7, 1993 transcript.[40] Nor, contrary to the prosecution's argument, was the transcript so "speculative" that its exclusion was mandated under Evidence Code section 352. Section 352 permits courts to exclude evidence where 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, emphasis added.)

"Speculative" evidence is only evidence that does not "have a tendency in reason" to "prove or disprove a disputed fact." (*People v. Babbitt (1987)* 45 Cal.3d 660, 681, citing *People v. Plane* (1979) 88 Cal.App.3d 223, 244.) Neither the excluded transcript nor the excluded argument that the length of the transcript showed a particular passage of time was speculative. Indeed, the court had no such concern when it overruled a defense objection to having John Somers testify that the length of an excerpt of the same transcript reflected the passage of a

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[40] As discussed elsewhere in this brief, Mr. Lightsey, however, has continued to insist that this transcript is forged, even though it provides him with an alibi to the murder. (See, e.g., Arg. I, infra.) This issue is outside the scope of the appellate record and left to the evaluation of Mr. Lightsey's habeas counsel.

certain period of time. (25 RT 5482-5483.) The transcript was relevant evidence that could fairly support an inference regarding the disputed fact of the length of Mr. Lightsey's time in court that morning. (*Babbitt, supra*, 45 Cal.3d 660, 681, citing *People v. Plane, supra,* 88 Cal.App.3d 223, 244.)

The key issue at trial was whether the morning calendar proceedings in the court where Mr. Lightsey appeared on the day of the homicide took around an hour and a half or closer to two hours. The excluded transcript would have shown that twenty-two (22) different matters were heard between the first calling of Mr. Lightsey's case and Mr. Lightsey's release from court that morning and that those proceedings took up sixty pages of transcript.[41] The jury could easily use the transcript and Somers's testimony about the length of the single

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[41] These 22 items included the 3 Lightsey court calls, and 19 separate hearing involving other defendants. (1 CT 2 [Defendant Whitfield discovery hearing]; 1 CT 4 [Defendant Rollins no-show hearing]; 1 CT 6 [Defendant Owen discovery hearing]; 1 CT 8 [Defendant Minear probation hearing]; 1 CT 11 [Defendant Ramirez counsel appointment hearing]; 1 CT 12 [Defendant Benson two sentencing hearings for two separate cases]; 1 CT 22 [Defendants Pasamante and Baeza sentencing hearing]; 1 CT 29 [Defendant Glass 995 Hearing]; 1 CT 34 [Defendant Kruser sentencing hearing in two separate cases]; 1 CT 38 [Defendant Doss probation hearing]; 1 CT 40 [Defendant Atkerson continuance hearing]; 1 CT 42 [First Hearing for Mr. Lightsey, counsel not present, trailed]; 1 CT 43 [Defendant Patterson sentencing hearing]; 1 CT 46 [Defendant Whicker sentencing hearing, no-show]; 1 CT 48 [Defendant Souryavongxa sentencing hearing]; 1 CT 51 [Defendant Varelas bench warrant hearing]; 1 CT 52 [Defendant Carranza sentencing hearing]; 1 CT 54 [Defendant Whicker sentencing hearing, renewed, still no-show]; 1 CT 54 [taking of "mid-morning break"]; 1 CT 55 [Second Hearing for Mr. Lightsey, defendant in court coffee shop, trailed]; 1 CT 56-57 [Whicker withdrawal of plea hearing]; 1 CT 58-60 [third calling of Mr. Lightsey's case].) Additional matters were also heard after Mr. Lightsey was released after the third calling of his case.

hearing as shown by the transcript to estimate the amount of court time reflected in that sixty pages.

Moreover, both the United States Supreme Court and this Court have made plain that "the trial court's authority under Evidence Code section 352 to exclude relevant evidence must yield to his constitutional right to raise a defense." (*People v. Babbitt* (1988) 45 Cal.3d 660, 684 [evidence may be excluded only where it does not tend to prove a disputed fact], citing *Washington v. Texas* (1967) 388 U.S. 14, 23.)

For purposes of evaluating an "alibi," it is "exclusively" the jury's "province to determine the weight of that evidence." (*People v. Tracy* (1942) 50 Cal.App.2d 460, 465 [where jury given opportunity to weigh all available alibi evidence, no need for appellate court to reweigh evidence].) The evidence of the transcript should have gone to the jury for evaluation rather than being barred by the court. The exclusion of the transcript and related argument was therefore erroneous. (*Babbitt, supra*, 45 Cal.3d 660, 681.)

D. The Trial Court's Error Violated Mr. Lightsey's Constitutional Rights To Raise a Defense, To Due Process of Law, and To a Reliable and Proportional Verdict and Sentence of Death.

The United States Constitution, and its analogous state constitutional provisions, requires that a criminal defendant be allowed to raise a defense. (*Washington v. Texas, supra,* 388 U.S. 14, 23.) More specifically, the exclusion of a transcript that provides an alibi to a defendant is constitutional error. (*Gonzales v. Lytle, supra,* 167 F.3d 1318; *Rosario v. Kuhlman, supra,* 839 F.2d 918.)

In *Rosario*, the trial court erroneously excluded a transcript providing an alibi to a defendant charged with murder. (*Rosario v. Kuhlman, supra,* 839 F.2d 918, 920-922 [murder conviction reversed].) This error deprived the defendant "of his due process rights to a fair trial

and to present a defense." (*Id.*, citing U.S. Const., Amends. VI, XIV.) As the *Rosario* court made plain, reversal was therefore required because the "right to raise a defense is one of the minimum essentials of a fair trial." (*Rosario v. Kuhlman, supra*, 839 F.2d 918, 924, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 294; see also *Gonzales v. Lytle, supra,* 167 F.3d 1318, 1324 [reversal required due to exclusion of alibi transcript where it "rendered his trial fundamentally unfair in violation of the Fourteenth Amendment due process clause."].)

As the United States Supreme Court has explained: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi, supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas, supra*, 388 U.S. 14, 23, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' *California v. Trombeta, supra,* 467 U.S. 479, 484." (*Crane v. Kentucky, supra,* 476 U.S. 683, 690 [violation of right to raise a defense requires reversal of murder conviction].) The erroneous exclusion of this evidence also violated Mr. Lightsey's rights to a fundamentally fair trial with due process of law, and a reliable and proportional verdict of death. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

Accordingly, the failure of Judge Kelly to allow this defense evidence and argument violated Mr. Lightsey's state and federal constitutional rights to raise a defense, to due process of law, and to a proportionate and reliable verdict of death, requiring reversal of his verdict and sentence of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.)

E. The Error Was Prejudicial.

While the pages containing the transcripts of the three callings of

Mr. Lightsey's cases were introduced into evidence, there was a great deal of conflicting evidence about what time these three hearings took place. The excluded transcript would have assisted the jury in resolving those conflicts.

The defense proffered evidence from court reporter Diane Daulong that the morning calendar was customarily not called until sometime between 8:45 and 8:55 a.m. (23 RT 5024-5025.) Mr. Lightsey's defense attorney testified that he thought the morning calendar might not have started until as late as 9:00 a.m. (25 RT 5396-5397.) Daulong testified that the mid-morning breaks were always at least ten minutes long, and sometimes longer. (23 RT 5062.) In order for Mr. Lightsey to have left at 10:30 a.m., all twenty-two matters heard in court that day from the beginning of court at around 8.45 to 8:55 a.m. to Mr. Lightsey's last hearing, including the ten to fifteen minute morning break, would have had to been resolved in only around 90 minutes. (23 RT 5024-5025; 24 RT 5118; 25 RT 5396-5397.)

In the transcript of the first calling of Mr. Lightsey's cases, the bailiff announced that he did not expect to recall Mr. Lightsey's bail matter until 10:45 a.m., because his defense counsel had left a message he would be busy in another courtroom until that time. (Exh. 168; 1 CT 42.) In his trial testimony, prosecutor Somers also conceded that he had testified at the preliminary examination that the second calling of Mr. Lightsey's case did not occur until 10:45 a.m. (25 RT 5479-5481.) Diane Daulong also testified that when Mr. Lightsey's hearings were finally held, they covered many matters that presumably would have taken some time. (23 RT 5039-5043; see also Exh. 169.)

Dominic Eyherabide, Mr. Lightsey's defense counsel at the July 7 appearance testified that after Mr. Lightsey's hearing in Department 10 he went straight back to Department 4, where he was in trial, arriving there at

10:55 a.m. (RT 5401-5403.) Mr. Lightsey's mother, Rita Lightsey, testified that Mr. Lightsey drove back to her house with her and did not leave her house until sometime between 11:30 a.m. and 12:00 p.m. (26 RT 5543, 5638-5640.)

On the other hand, John Somers, the prosecutor that day, testified that the morning calendar started as early as 8:40 a.m. (25 RT 5462-5463.) He also recanted his testimony at the preliminary examination and instead testified at trial that the second calling of Mr. Lightsey's case had actually occurred at 10:30 a.m. (25 RT 5479-5481.) In support of this contention, court reporter Daulong also testified that she thought Mr. Lightsey's second calling of the case may have actually happened at 10:30 a.m., rather than 10:45 a.m. (23 RT 5031-5033.)

Deputy Mike Forse, the bailiff in Department 10 on July 7, testified that he may have gone to get Mr. Lightsey from the coffee shop for his final court call that day anytime between 9:00 a.m. to 10:35 a.m. (25 RT 5455.) Bail bondsman Epps also testified, contradicting his preliminary hearing testimony that the case was called after 10:30, that he thought he saw Mr. Lightsey leaving with his mother from the courtroom possibly as early as 10:30 a.m. (24 RT 5132-5134.) The prosecution also impeached Mr. Lightsey's mother's testimony with her prior inconsistent statements, even though she also proffered an innocent explanation for the discrepancies. (26 RT 5552-5564.)[42]

The excluded transcript was evidence which might have helped the defense convince the jury that there was at least a reasonable doubt that Mr. Lightsey had left the courthouse as early as the prosecution claimed. The transcript, which is in the record and before this Court, shows that twenty-

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[42] Mr. Lightsey muddied the waters further by insisting that he had been in court the entire day on July 7 and that all the records that showed otherwise had been falsified.

two (22) separate matters were called that morning, through the last of Mr. Lightsey's proceedings. Twelve (12) hearings were held before Mr. Lightsey's case was called for the first time. (1 CT 2-42.) Another six (6) matters were heard after Mr. Lightsey's, followed by a recess which Daulong testified lasted at least ten minutes. (1 CT 43-54.) After the break, Mr. Lightsey's case was called for the second time, but he was down in the coffee shop so the matter was trailed. (1 CT 55.) A withdrawal of plea hearing was then held for a defendant named Whicker (1 CT 56-57), followed by the third calling of Mr. Lightsey's case. (1 CT 58-60.)

Provided with this evidence, the jury might very well have decided that the evidence left a reasonable doubt that Mr. Lightsey could have reached Mr. Compton's house in time to accost him before he entered the shower. Put another way, the "preclusion of this highly probative evidence went to the crux of the case, and the harm caused by its exclusion was not cured by the receipt of other evidence that was significantly less compelling." (*DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1065 [California murder conviction reversed where evidence relevant to right to raise a defense excluded under state law].)

The exclusion of this evidence and the denial of counsel's request even to argue it deprived Mr. Lightsey of a fair trial and the right to present evidence and to defend against the charges against him. (U.S. Const., Amends. VI and XIV.) Because the error was of constitutional dimensions, reversal is required unless the prosecution can show that it was "harmless beyond a reasonable doubt." (*Rosario v. Kuhlman, supra*, 839 F.2d 918, 924 [exclusion of alibi transcript requires analysis of prejudice under *Chapman* standard], citing *Chapman v. California, supra,* 386 U.S. 18, 24). Even under the lesser standard for state law error, there is a "reasonable probability" that Mr. Lightsey would have obtained a more favorable result absent the error. (*People v. Linder, supra*, 5 Cal.3d 342, 348, citing *People*

v. Watson, supra, 46 Cal.2d at p. 836). The verdict and sentence of death must therefore be reversed.

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III.

MR. LIGHTSEY'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT PREJUDICIALLY ERRED IN PROHIBITING THE IMPEACHMENT OF KEY PROSECUTION WITNESS KAREN LEHMAN.

A. Introduction

At trial, Mr. Lightsey was wrongfully barred from impeaching the testimony of a key prosecution witness, Karen Lehman, with relevant evidence of her assault with a deadly weapon against her ex-husband (7 CT 2058; 25 RT 5314-5321), and her past and current drug use. (19 RT 4134-4149, 25 RT 5315-5321.) The court's barring of this evidence was prejudicial error. (*People v. Castro* (1985) 38 Cal.3d 301, 314; *People v. Wheeler* (1992) 4 Cal.4th 284, 294, 300, fn. 14; *People v. Anderson* (2001) 25 Cal.4th 543, 574; *People v. Bell* (1956) 138 Cal.App.2d 7, 11-12.) Ms. Lehman was a key witness against Mr. Lightsey, who gave damaging testimony about his alleged prior links to Mr. Compton, his later possession of Mr. Compton's guns, and his purported threats to Ms. Lehman not to discuss these matters.

These errors also violated Mr. Lightsey's state and federal constitutional rights to raise a defense, to due process of law, and to a proportionate and reliable verdict of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17, and 28.) In addition, the error breached his federal constitutional due process "liberty interest" right to attack the credibility of witnesses under the state evidence code. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.) As the errors cannot be shown to be harmless beyond a reasonable doubt, appellant's verdict and sentence of death must be reversed. (*Chapman v. California, supra,* 386 U.S. 18, 24.)

B. The Trial Court Erred In Barring The Impeachment Of Karen Lehman With Her Prior Penal Code Section 245(A)(1) Conviction For Assault With A Deadly Weapon.

Karen Lehman was the sister of Brian Ray, the man initially arrested for Compton's murder after being found in possession of guns belonging to Compton. (19 RT 4070.) Lehman and Mr. Lightsey had begun a casual relationship after he and Beverly Westervelt separated in the summer of 1993. (19 RT 4117.) At the time, Lehman was divorced and had no apartment of her own, but was staying at her brother Brian Ray's house. (19 RT 4070.) In June and early July of 1993 Mr. Lightsey asked her to house-sit for him one or two nights a week; a couple of times during that period they had sex. (19 RT 4080-4081.) The relationship ended when Mr. Lightsey reconciled with Ms. Westervelt. (19 RT 4133-4134.)

After Brian Ray's arrest, Lehman called Detective Boggs, anxious to give information to help her brother. She told him that Lightsey had given Ray some guns (though not as many as had been found in Ray's possession). (19 RT 4132.) She also told Boggs that Lightsey said he had gotten some of his guns from his father. (19 RT 4132.)

Lehman was called as a prosecution witness at Mr. Lightsey's trial. Before her testimony, defense counsel pointed out that they had not received discovery of her rap sheet and wanted that information before cross-examining her. The district attorney argued that she had no obligation to give discovery of witness rap sheets and stated that she had disclosed Lehman's only conviction, for a misdemeanor assault with a deadly weapon on her husband. Defense counsel said they had information that Lehman had been arrested three times in the past year and had been released without charges filed. The district attorney referred to a rap sheet she had obtained in April of 1995 and asserted that it contained no record of arrests after the assault conviction. (19 RT 4059-4060.)

Soon afterward, Lehman was called as a witness. She testified that in early July Lightsey had told her that he was going to check up on a sick old man who lived down the street from his mother; she recalled him

saying that the man's age was 72 or 76. (19 RT 4091-4094, 4129.)[43] She also testified that some time around July 8 or 9 Lightsey stored something in the trunk of her car for several days and that after he unloaded the trunk at his house she saw about 20 guns and some ammunition in the master bedroom of his house. (19 RT 4107-4110.)

According to Lehman, Lightsey, while drunk one night, put a choke hold on her and told her that she would wake up with a shank in her neck if she "pointed the guns toward" Lightsey, and that he didn't have to be there to do it. (19 RT 4114-4115.) Lehman's testimony was often vague as to dates and details, and she admitted on cross examination that her memory was poor. (19 RT 4127, 4135.)

At the close of Lehman's direct examination, Mr. Lightsey's counsel requested the court's permission to impeach her with her conviction for assault with a deadly weapon. The district attorney objected and asked the court to defer its ruling until she could research the issue of admissibility, and the court agreed. (19 RT 4122-4126.)

During cross-examination, Lehman admitted that she did not have a good memory for dates. Defense counsel asked her if she had taken any drugs that day, and she denied having done so. Defense counsel asked her when she had last used drugs, and she answered, "Oh, gosh, I don't remember. It's been a long time." (19 RT 4134.)

The district attorney objected. Out of the presence of the jury, the district attorney argued that Lehman's past drug use was irrelevant and questioning her about it was unethical. (19 RT 4125-4137.) Defense counsel made an offer of proof that they had information from sources other than Lightsey that Lehman was a drug abuser and noted that even past

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[43] She was impeached on cross-examination with her earlier statement to Detective Boggs that Lightsey had never mentioned anyone living on Holtby Street other than his mother. (19 RT 4131.)

drug abuse has adverse effects on memory. (19 RT 4138-4139.) When the judge said he would accept counsel's representation regarding Lehman's past drug use, the district attorney professed outrage and argued that this was inadmissible bad character evidence. The judge then called defense counsel's questioning "out of line," reproved the defense for not informing the district attorney earlier that they had information about Lehman's drug abuse, ruled that the evidence was more prejudicial than probative, and prohibited counsel from pursuing that line of inquiry. (19 RT 4148, 4150.)

At the close of Lehman's testimony, she was excused subject to recall. (19 RT 4153.)

Before the prosecutor rested her case, she submitted points and authorities regarding the use of Lehman's assault conviction. Defense counsel said they wanted the issue resolved before the prosecution rested its case. (24 RT 5083-5084.) Counsel and court then went on to argue an issue regarding the jailhouse informant, and the question of the impeachment of Lehman was not taken up again that day.

The court and parties returned to the impeachment issue the following morning. (25 RT 5314.) Defense counsel asked the court to take judicial notice of the prior conviction and gave the court a certified copy of the judgment. Defense counsel also noted that the crime had originally been charged as a felony but reduced to a misdemeanor. The district attorney conceded that the assault was a crime of moral turpitude, but argued that misdemeanor conduct was less probative of honesty than a felony and should therefore be analyzed for probative value under Evidence Code section 352. She argued that the conduct underlying the conviction, that Lehman threw a rock at her ex-husband, was not very probative of dishonesty. The judge found that the prejudicial effect of the prior outweighed its probative value and ruled it inadmissible. (25 RT 5321.)

1. A Witness May be Impeached With Misdemeanor Conduct.

The California Constitution allows impeachment of a witness with a prior misdemeanor conviction so long as the prior involves conduct amounting to moral turpitude. (Cal. Const. Art. I. § 28(f); *People v. Wheeler* (1992) 4 Cal.4th 284, 294, 300, fn.14, *People v. Collins* (1986) 42 Cal.3d 378, 389). Accordingly, "if past criminal conduct amounting to a misdemeanor has some logical bearing upon the veracity of a witness in a criminal proceeding, that conduct is admissible, subject to trial court discretion, as relevant evidence under Penal Code, § 28(d)." (*Wheeler, supra,* 4 Cal.4th at 295).

As this Court has made plain, a trial court should not limit impeachment to only felonious conduct, because "[m]isconduct involving moral turpitude may suggest a willingness to lie [citations omitted] and this inference is not limited to conduct which resulted in a felony conviction." (*Wheeler, supra,* 4 Cal.4th at 295-96). Accordingly, misdemeanor conduct involving moral turpitude, such as assault with a deadly weapon, may only be excluded where its "probative value is substantially outweighed by its potential for prejudice, confusion, or undue consumption of time." (*Wheeler, supra,* 4 Cal.4th at 295, citing Evid. Code, § 352.)
The trial court erred in barring impeachment of Ms. Lehman based upon her prior conviction for assault with a deadly weapon by attempting to smash her ex-husband's head with a rock.

2. Assault With a Deadly Weapon Is A Crime of Moral Turpitude

A crime involving moral turpitude has been defined as one involving "a readiness to do evil." (*People v. Castro* (1985) 38 Cal.3d 301, 314.) Assault with a deadly weapon is a crime of moral turpitude, as even the

prosecutor conceded at trial. (RT 5315:26-28; see also *People v. Thomas* (1988) 206 Cal.App.3d 689, 695 [holding that assault with a deadly weapon is a crime of moral turpitude]; *People v. Valdez* (1986) 177 Cal.App.3d 680, 696 [same]; *People v. Means* (1986) 177 Cal.App.3d 138, 139 [same]; *People v. Cavazos* (1985) 172 Cal.App.3d 589 [same].) Notwithstanding this concession, the prosecution argued, and the trial court ruled, that the conduct underlying Ms. Lehman's prior misdemeanor conviction for assault with a deadly weapon was inadmissible under Evidence Code section 352. (RT 5315-16.)

3. The Trial Court Failed to Properly Weigh the Probative Value of Admitting the Conduct Underlying Ms. Lehman's Prior Misdemeanor Conviction Against the Prejudicial Effect of the Admission of Such Evidence.

The trial court has broad discretion both in determining the relevance of evidence and in assessing whether its prejudicial effect outweighs its probative value. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Green* (1980) 27 Cal.3d 1, 19.) However, "the trial court must exercise its discretion" in such a manner that such priors are only excluded where "the risk of undue prejudice . . . *substantially* outweigh[s] the probative value of the evidence." (*People v. Holt* (1984) 37 Cal.3d 436, 453, emphasis added).

While a trial court is not required to engage in an "on-the-record evaluation" of the factors affecting the weighing process, "the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value." (*People v. Green* (1980) 27 Cal.3d 1, 25.) The trial court in this case merely stated, without any detailed discussion or analysis on the record, that the conduct underlying the conviction was "much more prejudicial [than] probative to bring that into the picture about something throwing a rock at her ex-husband." (25 RT 5321.)

The trial court abused its discretion by not properly balancing the

prejudicial effect of the introduction of the conviction against its probative value as impeachment. (Evid. Code § 352.) Even if the court had engaged in a proper weighing process, the prior was highly probative and the prejudice of its admission was slight; its exclusion was therefore an abuse of discretion. (*People v. Holt, supra,* 37 Cal.3d 436, 453.) Lehman's vindictive attack on her ex-husband was very probative as to Lehman's stability, credibility and honesty; furthermore, it showed her willingness to seek revenge against the former men in her life, both her ex-husband Deputy Lehman and her ex-lover Mr. Lightsey. It was probative evidence of her bias and her potential willingness to hurt Mr. Lightsey by testifying falsely against him.

The risk of prejudice or misleading the jury was nonexistent. The assault was not at all inflammatory or likely to prejudice the jury against Lehman. The truth of the assault had been established by Lehman's own admission to it. The court did not mention the possibility of undue consumption of time, but that issue was made moot by the district attorney's offer to stipulate to the conviction if the evidence was ruled admissible. (25 RT 5320.)

As will be discussed in part F *infra*, the error was also prejudicial, requiring reversal of Mr. Lightsey's convictions and sentence of death. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d at p. 836.)

C. The Trial Court Erred In Barring The Impeachment Of Karen Lehman With Her Memory-Damaging History Of Methamphetamine Abuse.

Notwithstanding the confusion of the trial court, it is well-settled that California law permits "a witness to be impeached on cross-examination" with evidence of "drug" addiction or any other matter that affects "his powers of perception, memory or narration." (*People v. Bell, supra,* 138

Cal.App.2d 7, 11-12 [witness properly impeached with drug abuse, as it is known to affect memory].) Here, Mr. Lightsey's counsel attempted to examine Karen Lehman about her prior drug use after she demonstrated her inability to properly recall events as to which she had testified on direct examination. (19 RT 4134-35).

Specifically, Ms. Lehman could not remember the following: where she was on the date of the murder of Mr. Compton (19 RT 4127); whether or not she was present when Mr. Lightsey called the bail bondsman in Lancaster (19 RT 4127); when it was that Mr. Lightsey supposedly told her he was caring for an old man (19 RT 4127); whether or not she went back to Mr. Lightsey's residence after his arrest on the bench warrant in July of 2003 (19 RT 4128-4129); whether or not she told Detective Boggs about ammunition she claimed she saw at Mr. Lightsey's residence (19 RT 4132); and when she started house-sitting for Mr. Lightsey. (19 RT 4133, 19 RT 4134.) Through impeachment with her past and current drug addiction, the defense wanted to show that these errors were symptoms of widespread drug-induced cognitive limitations and a general lack of credibility, rather than mere lapses of memory common to even reliable witnesses.

But the trial court improperly barred defense cross-examination of Ms. Lehman as to her prior drug use. (24 RT 4135-4149). In barring the defense from cross-examining Ms. Lehman, the trial court ruled "I don't think it's proper to ask a witness the questions that you have asked this witness regarding drug usage or have you used drugs today. It's not relevant to this proceeding and is not a proper means of impeaching the witness." (19 RT 4148:21-26).

The trial court was incorrect. A witness may be disqualified if she is "incapable of expressing ... herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him." (Evid. Code § 701). Evidence Code § 702 requires that

"the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." (Evid. Code § 702). If an individual has the capacity to perceive and recollect, "the determination whether he in fact perceived and does recollect is left to the trier of fact." (*People v. Anderson* (2001) 25 Cal.4th 543, 574 [mental illness or impairment by psychiatric drugs properly dealt with through cross-examination, rather than exclusion of witness].)

Here, defense counsel proffered, outside the presence of the jury, that drug use affects one's memory and ability to correctly recall events. (19 RT 4138.) Defense counsel further proffered that he had received information from an individual, not Mr. Lightsey, that Ms. Lehman had been and was using drugs, both when she viewed the events to which she testified and at the time of trial when her testimony occurred. (19 RT 4139, 19 RT 4140). Defense counsel indicated that should it be necessary on rebuttal, he was prepared to call a witness to testify as to Ms. Lehman's drug use. (19 RT 4141.) This proposed impeachment was both proper and constitutionally required.

Both state and federal law allows for the impeachment of a witness where their drug use may have affected their ability to reliably testify. In *People v. Barnett* (1976) 54 Cal.App.3d 1046, for example, the trial court refused to give an instruction presented by defense counsel after the defense presented evidence that the witness was intoxicated at the time of her testimony. The instruction proposed by the defense would have instructed the jury, in part:

> "[Y]ou may consider whether any witness was under the influence of alcohol, drugs or other intoxicants at the time he testified; and if you believe that any witness was under the influence of alcohol, drugs, or other intoxicants at the time of his testimony, you may but are not obliged to disregard or give little weight to his or her testimony insofar as you find

> that his credibility has been impaired thereby; you may reach that conclusion if you find that as a result of being under the influence of alcohol, drugs, or other intoxicants while testifying, such witness' ability to recollect and relate matters about which he or she testified was impaired." (*Barnett*, *supra,* 54 Cal.App.3d 1046, 1051.)

The court of appeal in *Barnett* held that the jury instruction proposed by the defense on witness credibility due to intoxication was improperly withheld, even when the standard general witness credibility instruction was given by the court. (*Id.* at p. 1052.)

Similarly, in *United States v. Vgeri* (9th Cir. 1995) 51 F.3d 876, 881, the Ninth Circuit held that not only may a witness be impeached on cross-examination about their drug use, but that a "witness using drugs" or "addict" instruction is appropriate whenever a witness is a drug addict. This is only logical, given that it is well known that drug abuse can affect one's memory and recollection. (*People v. Bell, supra*, 138 Cal.App.2d 7, 11-12.)

As other federal courts have made plain, "[t]he readily apparent principle is that the jury should, within reason, be informed of all matters affecting a witness's credibility to aid in their determination of the truth [Citations]." (*United States v. Partin* (5th Cir. 1974) 493 F.2d 750, 761, 762 [holding "where the government's case in a criminal prosecution may stand or fall on the jury's belief or disbelief of one witness, that witness's credibility is subject to close scrutiny."]; see also *United States v. Fajardo* (5th Cir. 1986) 787 F.2d 1523, 1527 [jury instruction indicating that the testimony of a person who "was using addictive drugs during the time he or she testified about" is proper].)

Here the defense proffered evidence that Ms. Lehman used addictive drugs at the time of her trial testimony as well as during the events about

which she testified, and sought to impeach her with these plainly relevant facts. Mr. Lightsey's jury had a right to be informed about this conduct in evaluating her testimony, especially considering Ms. Lehman's demonstrated inability to fully remember, recall, or perceive the events about which she testified. (*United States v. Partin, supra,* 493 F.2d 750, 760.)

The trial court therefore abused its discretion in barring this highly relevant impeachment evidence. As the error was prejudicial under both the federal and state standard of review, Mr. Lightsey's convictions and judgment of death must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d at p. 836.)

D. The Trial Court's Errors In Excluding Impeachment Evidence of Lehman's Prior Assault and Drug Use Violated Mr. Lightsey's Constitutional Rights to Present a Defense, to Due Process of Law, and to a Reliable and Proportional Verdict and Sentence of Death.

By limiting Mr. Lightsey's impeachment of this crucial witness, the trial court not only committed error under California law but also violated Mr. Lightsey's federal constitutional rights to present a defense, to due process of law, and to a reliable and proportional sentence of death.

It is well settled that improperly limiting cross-examination is a violation of the federal constitutional right to due process of law. (*Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 5, citing *Pointer v. United States* (1965) 380 U.S. 400, 405; see also *Collins, supra*, 42 Cal.3d at p. 387 [impeachment with moral turpitude priors on cross-examination authorized by due process clauses of both the federal and state constitutions]; *Castro, supra*, 38 Cal.3d 301 at pp. 314-315 [same].)

Accordingly, "cross-examination of a witness in matters pertinent to his credibility ought to be given the largest possible scope." (*McConnell v.*

United States (5th Cir. 1968) 393 F.2d 404, 406, citing *Harris v. United States* (9th Cir. 1967) 371 F.2d 365, 366-367.) By barring impeachment of this key prosecution witness, the trial court violated Mr. Lightsey's right to raise a defense. (*United States v. Fajardo, supra,* 787 F.2d 1523, 1527-1528 [federal constitutional right to present an effective defense is implicated by barring drug addiction impeachment]; see also *United States v. Vgeri, supra,* 51 F.3d 876, 881; *United States v. Partin, supra,* 493 F.2d 750, 761, 762.)

By wrongfully tipping the scales of evidence in favor of the prosecution, this barring of this critical impeachment evidence also violated Mr. Lightsey's rights to a fundamentally fair trial with due process of law, and a reliable and proportional verdict of death. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

E. The Error Was Prejudicial

Karen Lehman's testimony was the only evidence that Mr. Lightsey had had contacts with Mr. Compton since the one visit conceded by the defense. Her testimony also placed Mr. Lightsey in possession of Mr. Compton's guns soon after the homicide. Mr. Lightsey's secretive behavior about the guns, described by Lehman, could be interpreted as evidence of consciousness of guilt. (19 RT 4092-4096, 19 RT 4108-4110). As the prosecution conceded during closing arguments, "Karen Lehman's testimony" was a "critical" piece of the prosecution's case. (28 RT 6042.) Accordingly, the prosecution argued her testimony in great detail during her closing arguments. (28 RT 5962, 5973, 5980-5984, 6040-6042.) Concretely, the prosecution argued that her testimony "points a clear picture of Christopher Lightsey as the killer in this case and should convince you beyond any reasonable doubt that he is the murderer." (28

RT 5982.)

Taking advantage of the exclusion of the impeachment evidence against Ms. Lehman, the vigorously argued during her rebuttal closing argument that Ms. Lehman's testimony was very reliable, because the defense failed to impeach her with anything more than the testimony of her "ex-husband" that she was "not to be believed," but without any specifics about *why* she was "not to be believed." (28 RT 6040-6042.)

Thus, as even the prosecution conceded, Ms. Lehman's testimony was very harmful to the defense, but the jury never got to hear relevant evidence bearing on her ability to remember facts and her motive and willingness to lie about Mr. Lightsey. But for the error in barring the impeachment of her with this evidence, the jury might very well have rejected her testimony and come back with a verdict of not guilty. This is especially true given the lack of any forensic evidence or witnesses directly linking Mr. Lightsey to the murder, and his possession of an unusually strong alibi defense.

The error in barring this impeachment cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18, 24). Even under the lesser standard for state law error, there is a "reasonable probability" that Mr. Lightsey would have obtained a more favorable result absent the error. (*People v. Watson, supra*, 46 Cal.2d at 836.)

The barring of this highly relevant impeachment evidence requires reversal of his verdict and sentence of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.)

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IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR AND PREVENTED APPELLANT FROM PRESENTING HIS THEORY OF THE CASE, BY EXCLUDING ADMISSIBLE, RELEVANT, AND EXCULPATORY EVIDENCE.

A. Introduction

The primary prosecution evidence introduced against Mr. Lightsey at trial was his post-homicide possession of the stolen weapons of Mr. Compton. Along with his unusually strong alibi defense[44], Mr. Lightsey sought to counter this with evidence that he had bought the weapons from a man working out of a home owned by John Ruby, a neighbor of both Mr. Lightsey's mother and Mr. Compton. It was the defense theory at trial that Mr. Lightsey was not involved in the murder of Mr. Compton, but that whomever he purchased the weapons from was likely responsible for the murder. (See 21 RT 4611, 27 RT 5720-5723, 28 RT 5954; 7 CT 2085.) However, the trial court excluded admissions made by Mr. Lightsey on two separate occasions that he had illegally bought the weapons from this third party.

The trial court erred in excluding these two statements on hearsay grounds, because their admission was mandated by Mr. Lightsey's constitutional right to present a defense, which bars the "mechanistic" application of state hearsay rules. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302; see also *Green v. Georgia.*) This wrongful exclusion also violated Mr. Lightsey's constitutional rights to due process and compulsory process, including the right to present witnesses and evidence in his own defense. (*Washington v. Texas* (1967) 388 U.S. 14, 18-19; *In re Martin* (1987) 44 Cal.3d 1, 29; *People v. Cudjo* (1993) 6 Cal.4th 585, 638 (dis. opn. of Kennard, J.).) Accordingly, the exclusion of this exculpatory evidence

[44] See Argument II, supra.

as to how Mr. Lightsey obtained the weapons deprived him of his constitutional rights to due process, to present a defense, and to a proportionate and reliable determination on guilt and penalty. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Cons., art. 1, §§ 7, 15 and 28.) As the error cannot be shown to be harmless beyond a reasonable doubt, appellant's verdict and sentence of death must be reversed. (*Chapman v. California*, *supra,* 386 U.S. 18, 24).

B. The Trial Court Erred In Barring Evidence From Beverly Westervelt And Dut Dauwalder That Mr. Lightsey Admitted To Buying Firearms From A Third Party.

Mr. Lightsey sought to introduce statements he had made to his girlfriend Beverly Westervelt and to Dut Dauwalder, a family friend, that he had illegally bought the weapons (later linked to Mr. Compton) from a man working out of the notorious John Ruby house in his mother's neighborhood, a residence apparently well-known to the police and to the neighborhood as a meeting grounds for illegal activity. Both these statements were made long before Mr. Lightsey became a suspect in this case, and before he would have had a motive to manufacture a reason for possessing the weapons, because he volunteered them at a point when neither Westervelt nor Dauwalder were aware of the guns existence.

The prosecutor first objected when defense counsel questioned Beverly Westervelt where and when Mr. Lightsey had earlier told her he had obtained the firearms that had originally belonged to Mr. Compton. (21 RT 4603.) The court sustained the objection. During the questioning of Dut Dauwalder, the court again prevented the defense from asking what Mr. Lightsey told Dauwalder about where he obtained the firearms. (27 RT 5723-5724.)

The trial court erred in sustaining the prosecutor's objections, because the court's rulings excluding this reliable and vital evidence

violated Mr. Lightsey's constitutional right to present a defense. (U.S. Const., Amends. VI and XIV; *Chambers v. Mississippi* (1973) 390 U.S. 284; *Crane v. Kentucky* (1986) 476 U.S. 683.)

Mr. Lightsey consistently stated that he had bought the guns traced back to William Compton without knowing their origin. Beverly Westervelt told the police and district attorney, and testified at trial, that during their relationship, Mr. Lightsey bought guns, among other things, through third parties via such mediums as newspaper ads and the Bargain Box (a local free paper consisting of classified advertisement.) Regarding the guns that he took to Brian Ray's house and the video cameras she saw in his house, Westervelt testified during the preliminary examination that Mr. Lightsey told her he had bought them used for a good price. (CT 106 [PX RT].) In letters he wrote from prison, which Westervelt turned over to the prosecution, he told her that he had bought them from a scraggly looking man selling them from the trunk of a car near Lightsey's mother's house. (CT 33 [PX RT].)[45]

At a hearing on a motion to suppress evidence, Mr. Lightsey himself testified that he had purchased the guns from a man who called himself "Jerry," who was linked to a house owned by John Ruby[46], across the street from Lightsey's mother's house. Jerry had sold guns to Mr. Lightsey on two other occasions, so he knew that Mr. Lightsey was a potential customer. Jerry approached Mr. Lightsey on July 17, 1993, when Mr. Lightsey was washing his car outside his mother's house, and showed him a number of guns in the trunk of a car parked nearby. Mr. Lightsey bought the guns with some cash he was storing at his mother's home. (3/23/95 RT

[45] This testimony was elicited from Westervelt by the district attorney on redirect examination.

[46] While Mr. Lightsey testified during pre-trial proceedings that he was not sure if "Jerry" actually lived at the John Ruby house, he indicated that he

236-247.)

The district attorney, aware of the importance of this evidence, worked systematically to exclude it at trial. The prosecutor argued vigorously that Mr. Lightsey should instead be required to testify about his purchase of the guns, rather than have the evidence come in through the two prior statements, so that she could impeach him with his prior felony convictions. (12 RT 2554.) As will be demonstrated, this argument was incorrect.

Beverly Westervelt testified as a witness for the prosecution. During cross-examination, she stated, in response to questions from defense counsel, that Mr. Lightsey had told her, during their relationship, that he had bought guns from newspaper and Bargain Box advertisements. Defense counsel then asked her whether Mr. Lightsey had ever told her he had bought guns from the trunk of someone's car. (21 RT 4603.) The district attorney objected before she could answer.

Out of the presence of the jury, defense counsel argued that Mr. Lightsey's statement was admissible as a party admission or as a declaration against his penal interest, because he was admitting that he had bought and possessed guns even though he was a convicted felon. Alternatively, he argued, the district attorney opened the door to this evidence by eliciting other evidence regarding Mr. Lightsey's statements about the guns. Counsel also noted that Mr. Lightsey had given the same account about buying the guns to another witness, Dut Dauwalder. The district attorney argued, with remarkable candor, that she had been careful not to elicit that particular admission from Westervelt or to introduce the letters containing those statements because she wanted to force Mr. Lightsey to testify. (21 RT 4605) The judge sustained the district

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was indeed associated with the residence. (3/23/95 RT 245-246.)

attorney's objections to the statements. (21 RT 4608, 4611.) The issue arose again later in the trial, when the defense was about to call Dut Dauwalder to testify. (27 RT 5719-5720.)

In arguing that the defense's right to raise a defense by introducing the statements made to Westervelt and Dauwalder must be satisfied by having Mr. Lightsey testify at trial, rather than introducing the two prior statements, the district attorney presented a false choice to the court.

Mr. Lightsey's testimony at trial regarding his prior statements to Westerveldt and Dauwalder would have been subject to objection on the ground that his testimony regarding those earlier statements, given at trial after he had become a suspect and had a motive to fabricate, would have little or no credibility, and hence little relevance. Concretely, an admission to a crime *less* than "murder" made by a criminal suspect *after* he become a suspect in a "first degree murder" is actually "exculpatory" in nature, rather than "inculpatory," and it is not at all "reliable" or relevant due to its self-serving nature. (*People v. Elliot* (2006) 37 Cal.4th 453, 483, 484 [holding trial court properly excluded hearsay declaration where more exculpatory than inculpatory].)

Whether or not the two statements precisely fit into California's definition of a statement against penal interest, defense counsel was correct that the two *pre-arrest* statements admitting he had illegally bought weapons were *factually* against Mr. Lightsey's interests and it is that fact that made them relevant and credible. As the United States Supreme Court has made plain "whatever the parameters of the penal-interest" rule of a particular state's hearsay rules, a "confession" is "in a very real sense self-incriminatory and unquestionably against interest" and therefore bears "persuasive assurances of trustworthiness." (*Chambers v. Mississippi, supra*, 410 U.S. 284, 301, 302 [trial court erred in excluding statement against penal interest, even when properly excluded under state hearsay

rules].)

Specifically, when Mr. Lightsey made these two statements to Westervelt and Dauwalder he was not a suspect in the Compton murder, so making these statements did not help him clear himself from those charges. Nor was there any other need to reveal that he had bought the weapons, as he could have just kept his possession of the weapons hidden from both of these individuals. Accordingly, these earlier statements, unlike exculpatory evidence from a defendant at trial or in preparation for trial, would be reliable and relevant evidence, as "self-inculpatory statements have long been recognized as bearing strong indicia of reliability[,]" because "reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." (*Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997, 1004-1105 [exclusion of hearsay statements against interest was reversible error], citing *Williamson v. United States* (1994) 512 U.S. 594, 599.)

C. The Trial Court's Error Violated Mr. Lightsey's Constitutional Right To Present A Defense, To Due Process Of Law, And To A Reliable And Proportional Verdict And Sentence Of Death.

Under the unique circumstances of this case, the exclusion of Mr. Lightsey's statements therefore violated his constitutional rights to present evidence in his defense and to a fair trial. A defendant's right to due process and compulsory process under the federal Constitution includes the right to present witnesses and evidence in his own defense. (*Washington v. Texas.)* "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. [] This right is a fundamental element of due process of law." *(Id.)* Put another way, "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." (*Crane v.*

Kentucky (1986) 476 U.S. 683, 690.) The right to present witnesses and evidence are also guaranteed by the California Constitution. (*In re Martin* (1987) 44 Cal.3d 1, 29; *People v. Cudijo* (dis. opn. of Kennard, J.).)

Accordingly, a State may not arbitrarily deny a defendant the ability to present testimony that is "relevant and material, and . . . vital to the defense." *(United States v. Valenzuela-Bernal,* citing *Washington v. Texas.)* Moreover, the state may not apply a rule of evidence "mechanistically to defeat the ends of justice." *(Chambers v. Mississippi;* see also *Green v. Georgia, supra,* [exclusion of reliable hearsay mitigating evidence violates due process]). Yet in this case, the trial court "mechanistically" *(Chambers)* applied evidentiary rules to exclude crucial exculpatory evidence that would have supported appellant's claims of innocence. (21 RT 4611, 27 RT 5723, 27 RT 5724.)

The Ninth Circuit has outlined the test to be applied in evaluating whether the exclusion of defense evidence amounts to a due process violation under *Chambers* (*Chia v. Cambria, supra,* 360 F.3d 997, 1004 [reversal required where right to raise a defense violated through exclusion of hearsay declaration excluded under California hearsay rules]; see also *Tinsley v. Borg*.) The reviewing court must first consider five factors: whether the evidence 1) has probative value on the central issue; 2) is reliable; 3) can be evaluated by the trier of fact; 4) is the sole evidence on the point or "merely cumulative"; and 5) constitutes a major part of the defense. (*Tinsley v. Borg, supra,* 895 F.2d at p. 530.) Next, the court must "balance the importance of the evidence against the state interest in exclusion." (*Ibid.*)

As part of this process, courts "have traditionally applied a balancing test to determine whether the exclusion of evidence in the trial court violated petitioner's due process rights, weighing the importance of the evidence against the state's interest in exclusion In balancing these

interests, we must, on the one hand, afford 'due weight to the substantial state interest in preserving orderly trials, in judicial efficiency, and in excluding unreliable ... evidence [citation].' On the other hand, we must stand vigilant guard over the principle that '[t]he right to present a defense is fundamental' in our system of constitutional jurisprudence [citation]." (*Chia v. Cambra, supra*, 360 F.3d 997, 1103-1004, citing *Miller v. Stagner* (9th Cir. 1985) 757 F.2d 988, 994, *Perry v. Rush* (9th Cir. 1985) 713 F.2d 1447, 1450-1451.)

Under the test set forth above, it was clearly a violation of Mr. Lightsey's due process rights to exclude the proposed evidence. All five *Tinsley/Chia* factors support the claim that excluding this evidence was a violation of due process. First, the evidence was clearly probative on the central issue in the case – whether appellant committed the crime. Second, the jury could have evaluated the proposed evidence. Indeed, both Ms. Westervelt and Mr. Dauwalder were available for cross-examination as to the circumstances and attendant reliability of the making of the two statements by Mr. Lightsey.[47] Third, the introduction of appellant's admissions was not "merely cumulative," as these two statements provide the only explanation as to where appellant purchased Mr. Compton's firearms. Fourth, the admissions by Mr. Lightsey that he purchased the firearms from a third party across the street from his mother's residence, and had not taken them by force from Mr. Compton, was obviously a major element of appellant's defense. (*Tinsley*.)

Accordingly, the only real issue was whether the evidence was reliable, and given that the two statements were factually statements against

[47] Nor did the jury need Mr. Lightsey's testimony in order to evaluate the evidence. Mr. Lightsey, had he been called as a witness, could have added nothing of significance to Westervelt's and Dauwalder's testimony, since he did not deny that he had made the statements in question.

Mr. Lightsey's interest (in that it exposed him to possible prosecution for being a felon in possession of a firearm), there were plainly strong, historically recognized indicators of reliability for these statements, even though they did not precisely fit into California's evidentiary scheme, because such statements necessarily bear "persuasive assurances of trustworthiness." (*Chambers v. Mississippi, supra*, 410 U.S. 284, 302 [reversing murder conviction].)

Mr. Lightsey's statements did fit into at least the general framework of California's statutory scheme, even if they did not qualify as an exception to the hearsay rule under relevant case law. Evidence Code § 1230[48] provides an exception to the rule excluding hearsay where the statement made by the hearsay declarant "subjected him to the risk of ... criminal liability." (Evid. Code § 1230). Mr. Lightsey stipulated during trial that he had prior felony convictions for possession of marijuana for sale (H & S Code §11359) and possession of methamphetamine (H & S Code § 11378). (29 RT 6291-6292; 30 RT 6442, 6470, 6531-6532; See also Exhs. 185 and 186). As a result of his prior felony convictions, Mr. Lightsey was statutorily prohibited from possessing a firearm. (Pen. Code § 12021(a).) As a convicted felon, Mr. Lightsey's possession of such firearms subjected him to "criminal liability." (Evid. Code, § 1230; Pen. Code § 12021.).

While this same rule also mandates that such an out of court declarant be "unavailable," Evidence Code section 240 defines unavailability to include persons who are "exempted" from testifying "on the ground of privilege from testifying." Here, Mr. Lightsey was exempt from testifying under the Fifth Amendment right against self-incrimination.

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(Evid. Code § 1230.)

To be sure, this Court has interpreted these two statues to mean that such an exemption cannot be "creat[ed]" by a defendant "invoking a privilege not to testify," making Mr. Lightsey's two statements outside a strict application of California's hearsay exception rules. (*People v. Elliot, supra,* 37 Cal.4th 453, 483.)

However, in that same decision this Court's full ruling was that under "the totality of the circumstances" the statements were not "sufficiently 'against the declarant's penal interest *when made* and sufficiently reliable to warrant admission despite their hearsay character.' [citation]." (*Elliot, supra*, 37 Cal.4th 453, 484 [finding the statements in *Elliot* to be insufficiently reliable and against penal interest], emphasis added.) But, as will be demonstrated, Mr. Lightsey's two statements were plainly distinguishable from the out of court declarations made in *Elliot* and, more specifically, were "sufficiently reliable to warrant admission despite their hearsay character" under the "totality of the circumstances." (*Ibid.*)

In *Elliot*, the statements by the defendant were statements made long *after* he had become a suspect in the charged murder and were obviously self-serving "exculpatory" statements designed to free him from his "prosecution for first degree murder." (*Elliot, supra*, 37 Cal.4th 453, 483.) Specifically, the statements consisted of letters he had written after he had been arrested in which he self-servingly claimed he was "intoxicated" when he killed the victim and just "snapped" during the homicide, making the killing, at worst, voluntary manslaughter. (*Id* at p. 483.) Put another way, they were basically "exculpatory" in that they were offered to explain and mitigate the *already filed* charges for first degree murder, rather than true statements against penal interest. (*Ibid.*)

In contrast, Mr. Lightsey's two statements were made long *before* he

became a suspect in the murder, and when he had no need to make any explanation about the weapons, and were therefore plainly "inculpatory" in nature when made. (*Ibid.*) Accordingly, Mr. Lightsey's statements to Westervelt and Dauwalder were reliable declarations against his interests, even though they did not precisely fit into a mechanistic application of California's hearsay exception provisions mandated by Evidence Code sections 1230 and 240, as interpreted by this Court. Yet state hearsay rules cannot be "applied mechanistically" such that they "defeat the ends of justice." (*Chambers v. Mississippi.*)

Here, excluding the evidence of Mr. Lightsey's prior statements did not further the state's interest in the unavailability requirement in Evidence Code section 1230. Indeed, these statements had already been confirmed by Mr. Lightsey under oath in his motion to suppress proceedings, where had been subject to cross-examination by the prosecution, and were known to the prosecution from the outset of the proceeding. The prosecutor therefore had no need to question Mr. Lightsey at trial on whether he had made the statements, since he had affirmed them in prior testimony. Questioning him in court would add nothing, and the prosecutor only wanted Mr. Lightsey to testify so that she could get Mr. Lightsey's highly inflammatory priors before the jury. The statements had also already been elicited by the prosecutor from Westervelt at the preliminary hearing, and were being suppressed deliberately by the prosecutor in order to prevent exculpatory evidence from reaching the ears of the jury.

Given all these unique circumstances, the "ends of justice" mandated the admission of the evidence in the interests of maintaining Mr. Lightsey's right to raise a defense. Despite the trial court's ruling to the contrary, this proposed testimony should not have been excluded simply because the court deemed it hearsay, because the state's interest in excluding unreliable evidence, which is the foundation of the hearsay rule (*In re Cindy L.*), was

not applicable in this case, and in any event certainly did not outweigh Mr. Lightsey's right to present evidence in his defense under these circumstances. (*Chambers v. Mississippi* [due process violation to exclude hearsay evidence that "bore persuasive assurances of trustworthiness" and fell within a recognized exception to the hearsay rule]; see also *State v. Brown* [*Chambers* and *Green v. Georgia* hold that "the constitutional right to present a defense . . . trump[s] the rule against hearsay"].)

The exclusion of this evidence was therefore a violation of Mr. Lightsey's California and federal right to present a defense. By wrongfully tipping the scales of evidence in favor of the prosecution, this error also violated Mr. Lightsey's rights to a reliable and proportional verdict of death. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17, and 28.).

D. The Error Was Prejudicial

But for the exclusion of the evidence of Mr. Lightsey's statements, the jury might have had a reasonable doubt as to his guilt and found him not guilty. Other than Mr. Lightsey's possession of Mr. Compton's weapons, the prosecution's case that Mr. Lightsey was Compton's killer was extremely weak. To begin with, the district attorney was trying to pin Compton's murder on a defendant who had indisputably been in court for most of the morning on which the killing had occurred. The prosecution was reduced to theorizing that Mr. Lightsey had rushed from court to his mother's house, and then to Mr. Compton's house in time to accost him not much after 11 in the morning, stab him forty-three times, find over twenty guns, video cameras, and other small items and load them into his car, and drive to his own home in time to make a telephone call to a bail bondsman at 11:50. The linchpins of its case were Karen Lehman, the vindictive,

drug-abusing sister of their first suspect in Mr. Compton's murder, Brian Ray, and a professional prison informant named Robert Rowland desperately seeking a transfer to an out-of-state prison to save his life from California inmates who had already tried to kill him at least once. Evidence that Mr. Lightsey had told friends before his arrest where he had bought the stolen guns was potentially fatal to the prosecution's attempt to prove him guilty.

Without the excluded evidence of where Mr. Lightsey had obtained the guns, all the defense could do was "chip[] away at the fringes" of the prosecution's theory of the case, without providing the defense's theory of the case. (*Chambers v. Mississippi, supra*, 410 U.S. 284, 294.) The defense did lay the groundwork for Mr. Lightsey's defense that he had bought the weapons from a man named "Jerry" who was linked to his mother's neighbor John Ruby's house, by presenting evidence that the Ruby house was full of dangerous criminals who might plausibly be linked to the murder of Mr. Compton, and that Mr. Lightsey had a custom and practice of making such second-hand purchases using sums of cash that the frugal Mr. Lightsey kept on hand to make such purchases.

For example, the defense elicited testimony about the dangerousness of the denizens of the people at the John Ruby house during the defense cross-examination of Bakersfield Police Detective Boggs. Boggs testified he did not investigate the possible involvement of Mr. Ruby or any of the other individuals residing across the street from Rita Lightsey because of Ms. Lightsey's credible fears for her safety should such an investigation be undertaken, and implicitly that he found her fears to be credible. (18 RT 3940-3941.) If linked up to the two excluded statements, this police testimony would have been an admission by the lead investigating officer that the Ruby house was indeed a dangerous residence tied to dangerous people. It therefore would have supported the defense's

third-party culpability theory of the case.

Ms. Lightsey also testified that John Ruby allowed transients to live in the residence, stating that "[t]he faces are not the same from months to months." (22 RT 4756.) Janell Catron, Mr. Lightsey's sister, also confirmed that Ruby lived across the street, and that a lot of transients floated in and out of the house. (22 RT 4756.) If linked to the two excluded statements, this evidence also would have provided evidence in support of the defense's third-party purchase theory of the case.

As part of laying the groundwork for the defense theory that Mr. Lightsey kept cash on hand to make such second-hand purchases, the defense elicited on cross-examination from Beverly Westervelt that Mr. Lightsey routinely kept thousands of dollars in cash at his mother's house, had bought his car with cash for $5,000, and had a habit of buying things with cash. (22 RT 4602, 4626.) Yet, like the testimony of Detective Boggs, Rita Lightsey, and Janell Catron, the significance of her testimony was hidden from the jury by the exclusion of the evidence that Mr. Lightsey had earlier told Beverly Westervelt and Dut Dauwalder that he bought the guns and other items from a third party with a cash payment of several thousand dollars to someone from the John Ruby house. (22 RT 4603-4612.)

Without the two statements showing Mr. Lightsey's purchase of the guns, the jury could not have understood the connection between the weapons and the evidence introduced by the defense regarding the John Ruby house and its denizens, and Mr. Lightsey's habit of keeping cash on hand to make purchases from third parties.

Increasing the prejudice of the court's wrongful exclusion of this evidence, the prosecutor argued to the jury (after suppressing any viable alternative explanation from the defense) that Mr. Lightsey did not present any other explanation as to where appellant obtained the guns other than he

"murdered [Mr. Compton] and stole them on July 7th, 1993." (28 RT 5954.)

But for the error in barring the testimony of Westervelt and Dauwalder, the jury might very well have found a reasonable doubt as to Mr. Lightsey's guilt of the charged offenses. This is especially true given the lack of any forensic evidence or witnesses directly linking Mr. Lightsey to the murder, and his possession of an unusually strong alibi defense.

The trial court's violation of appellant's due process right to present a defense, and his Fifth, Eighth and Fourteenth Amendment rights to a fair and reliable trial on both guilt and punishment, requires this Court to reverse both the guilt and penalty verdicts unless the violation "was harmless beyond a reasonable doubt." (*Chapman v. California, supra, ; In re Ruzicka*). Given the importance of the improperly excluded evidence to the basic theory of the defense, it cannot be reasonably concluded that the verdicts in this case were "surely unattributable to the error." (*Sullivan v. Louisiana*).

Further, even assuming arguendo that excluding this evidence was harmless beyond a reasonable doubt at the guilt phase, the Court must still find that the error was reversible as to the penalty phase in light of the higher standards of reliability applicable to capital verdicts. *(Woodson v. North Carolina; Gardner v. Florida; Andres v. United States* ["In death cases, doubts should . . . be resolved in favor of the accused"].)

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V.

MR. LIGHTSEY'S CONVICTION MUST BE REVERSED BECAUSE THE PROSECUTOR VIOLATED THE TRIAL COURT'S ORDER NOT TO MENTION MR. LIGHTSEY'S STATUS AS A PRISONER, THEREBY CAUSING MATERIAL PREJUDICE TO MR. LIGHTSEY BEFORE THE TRIER OF FACT.

A. Introduction

It is well settled that "it is the imperative duty of an attorney to respectfully yield to the rulings of the court." (*Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126.) As an officer of the court, an attorney owes a duty of respect for the court. (Bus. & Prof. Code, § 6068, subd. (b).)

It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. (*People v. Batts* (2003) 30 Cal.4th 660; *People v. Robinson* (1995) 31 Cal.App.4th 494; *Hill v. Turpin* (11th Cir. 1998) 135 F.3d 1411.)

At Mr. Lightsey's trial, the court granted a motion by the defense to bar the prosecutor from mentioning that Mr. Lightsey was incarcerated in State Prison. (1 RT 108; 7 CT 1881.) The court ruled that the parties could mention that the defendant was in "custody," but not that he was in prison. (1 RT 108; 7 CT 1881) A statement that Mr. Lightsey was "in custody" was general enough that the jury was not likely to read anything into it beyond an understanding that Mr. Lightsey, like most defendants charged with serious crimes, was being held in jail pending his trial, without implying anything about a prior criminal record.

The prosecutor flouted the court's ruling not once, but twice, during the trial. First, the prosecutor elicited from Beverly Westervelt that Mr. Lightsey was being housed at "Wasco", which is a nearby California State Prison located in Kern County and well-known to Kern County residents including the jurors in this case. (20 RT 4491.) Despite a defense

objection to her misconduct, the prosecutor then elicited testimony from a second prosecution witness, Robert Rowland, that Mr. Lightsey was housed in a prison "protective housing unit" with "high profile" defendants or those who for "whatever" reason are targeted for death by other prison inmates. (21 RT 5182.) This misconduct undercut the court's protective order and nullified the defense's efforts to conceal this highly prejudicial evidence about Mr. Lightsey's past from the jury.

Notwithstanding the prosecutor's obvious and prejudicial violations of the court's order, the trial court denied the defense's two separate motions for mistrial due to the misconduct. (20 RT 4497, 4518.)

The prosecutor's misconduct and the trial court's failure to provide an effective remedy violated Mr. Lightsey's state and federal constitutional rights to raise a defense, to due process of law, and to a proportionate and reliable verdict of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.) The error also breached his federal constitutional due process "liberty interest" under the state prosecutorial misconduct rules. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.) As the errors cannot be shown to be harmless beyond a reasonable doubt, appellant's verdict and sentence of death must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

B. The Trial Court Erred In Not Granting A Mistrial When The Prosecution – In Direct Conflict With A Court Order – Elicited Testimony That The Mr. Lightsey Was A Prisoner.

The trial court in this case erred in denying the defense motion for a mistrial after the prosecutor's egregious misconduct in twice eliciting forbidden testimony from witnesses in violation of Judge Kelly's explicit order. (*People v. Batts, supra*, 30 Cal.4th 660, 697; *People v. Robinson, supra*, 31 Cal.App.4th 494.)

In *Batts*, the prosecutor violated a court order not to mention that a

witness was unavailable because he had been murdered, and instead elicited that testimony from a prosecution witness. (*Id.* at p. 669.) The trial court granted a mistrial motion because of the prosecutor's misconduct. This Court affirmed that the prosecutor's violation of the court order was "indefensible and violated defendants' due process rights to fair trial" and that the trial court imposed the "proper remedy" of declaring a "mistrial." (*Id.* at p. 669 [but holding that double jeopardy did not attach, so new trial was proper].)

The prosecution's violation of the trial court's order in the case at bar was equally indefensible. Given the severity and deliberateness of the misconduct and the prejudice to Mr. Lightsey from the introduction of inadmissible evidence that he had been sentenced to state prison in the recent past, a mistrial was a "proper remedy" in this case, and the court abused its discretion in denying one. (*Ibid.*)

People v. Robinson, supra, is equally instructive. There, the prosecutor violated court orders not to mention the details of a "felony conviction" of a defense witness or that he was "in custody" in prison. (*People v. Robinson, supra*, 31 Cal.App.4th 494, 504-505.) On appeal, the Court of Appeal reversed Robinson's convictions, holding that the prosecutor committed misconduct through its violations of the trial court's orders and other actions, thereby denying the defendant his constitutional right to a fair trial. (*Id.* at p. 505.) Mr. Lightsey's constitutional right to a fair trial was similarly violated by the prosecutor's misconduct in revealing that Mr. Lightsey had been convicted and sent to 'Wasco' State Prison and was housed in the 'protective housing unit' with other 'high profile' convicts. (*Ibid.*)As the error was prejudicial, Mr. Lightsey's convictions and judgment of death must be reversed under either the federal or state standard of review. (*Chapman v. California, supra,* 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d at p. 836.)

Indeed, this Court has repeatedly recognized that revealing a defendant's "felon status" and resulting prison incarceration may "affect the jury's verdict to which the status is irrelevant," as occurred in the case at bar. (See, e.g., *People v. Cunningham* (2001) 25 Cal.4th 926, 985 [noting great care must be taken prior to joining a case where a felon or prison status is an element of the offense, such as felon in possession of a firearm, to other crimes where that status is not at issue]; *People v. Robinson, supra*, 31 Cal.App.4th 494, 504-505; see also *Hill v. Turpin* (11th Cir. 1998) 135 F.3d 1411, 1414, 1419 [trial court erred in denying mistrial motion based on prosecutor's misconduct in violating court order to not mention defendant's invocation of right to silence].)

By disregarding the court's order and disclosing extremely prejudicial information about Mr. Lightsey's custody and prison status, the prosecution also violated Mr. Lightsey's rights to a fundamentally fair trial with due process of law, and a reliable and proportional verdict of death. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) The admission of this highly prejudicial evidence violated Mr. Lightsey's state and federal constitutional rights to raise a defense, to due process of law, and to a proportionate and reliable verdict of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.)

Given the severity of the misconduct and the strength of the defense's case, the error cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24). Even under the lesser standard for state law error, there is a "reasonable probability" that Mr. Lightsey would have obtained a more favorable result absent the error. (*People v. Watson, supra,* 46 Cal.2d at p. 836). Mr.

Lightsey's verdict and sentence of death must accordingly be reversed.

Even assuming that the prosecutor's misconduct was harmless beyond a reasonable doubt at the guilt phase, the Court must still find that the error was reversible as to the penalty phase in light of the higher standards of reliability applicable to capital verdicts. *(Woodson v. North Carolina; Gardner v. Florida; Andres v. United States* ["In death cases, doubts should . . . be resolved in favor of the accused"].) Given the prejudice of this error, this simply cannot be assured, requiring, at a minimum, reversal of Mr. Lightsey's sentence of death.

VI.

THE TRIAL COURT PREJUDICALLY ERRED IN FAILING TO PROPERLY INSTRUCT THE JURY REGARDING MR. LIGHTSEY'S ALIBI DEFENSE.

A. Introduction.

As previously demonstrated in Argument II, *supra*, during the morning where the murder charged in this case occurred, Mr. Lightsey was sitting in a Superior Court trial department. Numerous witnesses – judges, lawyers, sheriff deputies, and court clerks – saw Mr. Lightsey in Kern County Superior Court that morning. Accordingly, Mr. Lightsey had an unusually strong alibi for the murder based on the "physical impossibility" of his "guilt" as he was at "a location other than the scene of the crime at the relevant time." (*Noble v. Kelly* (2nd. Cir. 2001) 246 F.3d 93, 98, citing *Black's Law Dictionary*, 72 (7th ed. 1999).)

However, the trial court prejudicially erred in failing to give a requested defense pinpoint instruction on his alibi. This failure to fully instruct the jury on the law regarding Mr. Lightsey's alibi effectively gutted Mr. Lightsey's defense, and constituted a gross abuse of the trial court's discretion, especially when viewed together with the trial court's related error in excluding other evidence and argument regarding Mr. Lightsey's alibi. (See Argument II, *supra*.)

This error also violated Mr. Lightsey's federal constitutional rights to a fair trial, to due process of law, and to a proportionate and reliable verdict of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.) It further breached his federal constitutional state law "liberty interest" under California law to receive proper jury instructions. (U.S. Const., Amends. 5, 14; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) As the error in failing to instruct was prejudicial, Mr. Lightsey's sentence of death must be reversed. (*Chapman v. California, supra*, 386

U.S. 18, 24.)

B. The Trial Court Prejudicially Erred In Failing To Give The Pinpoint Instruction On Mr. Lightsey's Alibi Defense.

1. Evidence Supporting Alibi Defense.

As previously briefed in detail in Argument II, *supra*, the evidence was overwhelming, and essentially undisputed, that that Mr. Compton had been seen alive at 7:45 a.m. on July 7, 1993 and had missed an 11:30 medical appointment that day about fifteen minutes' drive from his house;[49] that Mr. Lightsey was with his attorney or in the courthouse from about 8 a.m. until at least 10:35 a.m.; and that Mr. Lightsey made a long-distance telephone call from his home at around 11:50 a.m. The prosecution presented additional evidence that Mr. Compton usually arrived at his medical appointments about fifteen minutes early and that he was preparing to take a shower just before he was killed - evidence which implied that he had been assaulted some time before 10:45 that morning. The defense then presented evidence that Mr. Lightsey was in court until closer to 11:00 and had spent perhaps fifteen minutes after that walking with his mother to her car and driving back to her house where his car was parked, and that it would not have been possible for him to be at Compton's house in time to have killed him before he would have showered.

2. The Proffered Pinpoint Instruction Was Correct.

Based on the alibi evidence, the trial court instructed the jury with CALJIC 4.50, which says:

> "The defendant in this case has introduced evidence for the purpose of showing that he was not present at the time and place of the commission of the alleged crime for which he is here on trial. If, after a review of all the evidence, you have a reasonable doubt that the

[49] Another witness, Alice Toole, testified that she had seen a man resembling Mr. Compton outside his house at around 9:30 a.m., but she was less certain of her identification. (15 RT 3391-3394)

> defendant was present at the time the crime was committed, you must him not guilty." (23 RT 6107.)

However, due to the unique facts presented in Mr. Lightsey's case the defense moved to supplement CALJIC 4.50 with Defense Special Jury Instruction 1, which read as follows:

> "Where it is claimed that the defendant was not at the scene at the time the alleged crime was to have been committed, the defendant is not required to prove the alibi beyond a reasonable doubt or by a preponderance of the evidence, rather the prosecution had the burden to prove beyond a reasonable doubt the defendant was present on the premises when the crime was committed."

The defense argued that the purpose of this instruction was "not to substitute in its place of 4.50. It's to basically explain it further, to tell the jury that it's not [Mr. Lightsey's] burden to prove beyond a reasonable doubt the alibi defense, and that is not mentioned anywhere." (28 RT 6068.) The prosecutor did not object to the giving of this instruction, specifically conceding that "I don't care if this instruction is given." (28 RT 6072.) Even with this concession by the prosecution, the court refused to give the instruction. (28 RT 6073.) Yet it cannot be denied that this instruction accurately stated the burden of proof for an alibi defense, correctly noting that the defense did not have to prove their alibi by either a preponderance of evidence standard or a beyond a reasonable doubt standard. Indeed, the language of this defense special was taken directly from the leading cases on alibi defenses.

For example, it is well settled that "it is not necessary to prove an alibi beyond a reasonable doubt or by a preponderance of the evidence." (*People v. Lewis* (1947) 81 Cal.App.2d 119, 123-124; see also *In re Cory,* (1964) 230 Cal.App. 2d 813,828.) Instead, the only evidentiary "burden" held "upon" defendants, is that they raise "a reasonable doubt" of their "guilt in the minds of the jury." (*People v. Williamson*, 168 Cal.App 2d

735, 741.) Accordingly, the instruction should have been given, as it "accurately stated the law and *pinpointed the theory of the defense*." (*People v. Adrian* (1982) 135 Cal.App.3d 335, 339, emphasis in original.)

3. Mr. Lightsey Had a Right to the Pinpoint Instruction.

Put another way, a court has a duty to give pinpoint instructions on "specific points developed through the evidence or specific theories which might be applicable to the particular case." (*People v. Johnson* (1967) 253 Cal.App.2d 396, 401 [but holding no such *sua sponte* duty].) Mr. Lightsey therefore had a right to have his jury instructed with this plainly accurate pinpoint instruction, because a defendant has the right to an instruction that directs attention to evidence and law that might raise a reasonable doubt concerning the defendant's guilt. (*People v. Rincon-Pineda* (1975) 14 Cal.3 864, 885 [failure to give pinpoint instruction erroneous]; *People v. Granados* (1957) 49 Cal.2d. 490,496 [court prejudicially erred in failing to give pinpoint instruction on defense]; *People v. Guzman* (1975) 47 Cal. App. 3d 380, 388 [error to refuse defense request for instruction relating to burden of proof on false identification defense].)

In this case the proposed defense jury instruction was appropriate because it clarified the burden on the prosecution as it relates to the alibi defense. While CALJIC 4.50 notes that a defendant can assert an alibi defense where he "has introduced evidence for the purpose" of proving such an alibi, it is silent as to whether he defense has any burden of proof when "introducing" such evidence. (CALJIC 4.50.) CALJIC 4.50 does go on to generally restate the "reasonable doubt" standard in deciding whether a defendant is or is not "guilty" when an alibi defense is asserted, but it is silent as to whether there is a burden of proof for the defendant when he or she "introduce[s] evidence" for such an alibi defense. (*Ibid.*)

Such a clarifying instruction as offered in the instant case would therefore have served to "'pinpoint' the crux" of Mr. Lightsey's "alibi"

defense, and would have more completely instructed the jury that the prosecution bears the ultimate burden of persuasion on that issue. (*People v. Adrian, supra,* 135 Cal.App.3d 335, 337.) Indeed, the whole point of a "pinpoint instruction" is to "embody an allocation of the ultimate burden of proof," as the proffered defense special instruction did in this case. (*Id.* at p. 339.)

Accordingly, the trial court erred in refusing the proffered pinpoint instruction. (*People v. Sears* (1970) 2 Cal.3d 180, 190 [defense has right to pinpoint instructions].)

C. The Trial Court's Error Violated Mr. Lightsey's Constitutional Rights To Raise A Defense, To Due Process Of Law, And To A Reliable And Proportional Verdict And Sentence Of Death.

Mr. Lightsey had a constitutional right to have his jury properly determine whether he was guilty beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358; see also Pen. Code, § 1096a.) Moreover, the constitutional right to a fair trial and the presumption of innocence mandates that he was "entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63 [reversal required where court failed to properly instruct on defense], citing *Stevenson v. United States* (1896) 162 U.S. 313 [same]; *People v. Branch* (1962) 205 Cal.App.2d 688, 692 [right to instruction on defense implicates constitutional right to "fair trial"], citing 118 A.L.R. 1303, 1310.)

The exclusion of the pinpoint instruction therefore violated Mr. Lightsey's constitutional rights to a presumption of innocence and a fair trial. The erroneous refusal of this instruction also violated Mr. Lightsey's rights to due process of law, and a reliable and proportional verdict of death. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Woodson v. North Carolina* (1976) 428 U.S.

280, 305.) The trial court's error in failing to properly instruct the jury therefore violated Mr. Lightsey's state and federal constitutional rights to a fair trial, to due process of law, and to a proportionate and reliable verdict of death, requiring reversal of his verdict and sentence of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.)

D. The Error Was Prejudicial.

Because the refusal of the requested instruction unconstitutionally deprived appellant of his constitutional right to due process and to raise a defense, reversal is required because the error cannot be shown to be "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24.) While CALJIC 4.50 did *generally* instruct that a defendant must only raise a reasonable doubt as to his guilt when raising an alibi defense, 4.50 is confusing as to what standard, if any, applies to the *defendant's* burden of proof in proffering evidence of such an alibi. This was especially important under the unique facts of the instant case, given that Mr. Lightsey's mental issues led him to challenge the accuracy of his own alibi being proffered by his defense counsel. (See Argument II, fn. 5, *supra*.)

The excluded defense pinpoint instruction would have made plain that Mr. Lightsey was "not required to prove the alibi beyond a reasonable doubt or by a preponderance of the evidence, rather the prosecution had the burden to prove beyond a reasonable doubt the defendant was present on the premises when the crime was committed." (Defense Special 1.) Put another way, Mr. Lightsey was prejudiced by the denial of the requested pinpoint instruction, because it would have clearly instructed the jury that Mr. Lightsey's defense attorneys were merely required to use this alibi to raise a reasonable doubt as to the prosecution's case, with no evidentiary burden of their own in proffering the defense.

The prejudice of the court's error is especially plain when viewed

cumulatively with its related error in excluding evidence and argument in support of the alibi defense, in particular given the overall strength of Mr. Lightsey's alibi defense and the lack of any forensic evidence linking him to the crime scene. (See Argument II, *supra.*) Particularly, when viewed together, these two related errors prejudicially violated Mr. Lightsey's constitutional rights to raise a defense and to due process of law. Accordingly, the error in failing to instruct the jury can hardly be seen as "harmless beyond a reasonable doubt." (*Chapman v. California, supra*, 386 U.S. 18, 24.)

Even under California's standard, reversal is therefore still required as there is "reasonable probability" that the error affected the verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Under California's standard of prejudice reversal is required even where the prosecution's evidence is "strong," because an error is harmless only where the evidence against a defendant is so "overwhelming" that the trial court's error could not as a matter of law have been prejudicial. (*People v. Valentine* (1986) 42 Cal.3d 170, 182-183 [trial court's error not harmless, even where prosecution presented 'strong' eyewitness evidence of guilt], citing *People v. Watson, supra*, 46 Cal.2d 818, 836.)

Under California's standard, a trial court's instructional error, as occurred in the instant case by failing to fully instruct with regard to the alibi defense, is also particularly likely to be prejudicial where there is a "degree of conflict in the evidence on critical issues." (*LeMons v. Regents of the University of California* (1978) 21 Cal.3d 869, 876.) Yet such a conflict in the evidence is precisely what occurred in the instant case. Due to this "degree of conflict in the evidence on critical issues," the error cannot be shown to be harmless, requiring reversal of appellant's convictions under either the state or the federal standard of review. (*LeMons v. Regents of the University of California, supra,* 21 Cal.3d 869,

876.)

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VII.

MR. LIGHTSEY'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT PREJUDICALLY ERRED IN FAILING TO INSTRUCT THE JURORS TO DISREGARD THE FACT THAT HE WAS VISIBLY SHACKLED THROUGHOUT HIS GUILT PHASE PROCEEDINGS.

A. Introduction

Mr. Lightsey was visibly shackled throughout his trial, and the trial court prejudicially erred in failing to give a curative admonition, such as CALJIC 1.04, not to consider Mr. Lightsey's shackles during their deliberations.[50] Specifically, the trial court failed to instruct the jurors with CALJIC 1.04 during the guilt phase of trial. (*People v. Duran* (1976) 16 Cal.3d 282, 291-92 [holding that the trial court committed reversible error in failing to "instruct the jury sua sponte that such restraints should have no bearing on the determination of defendant's guilt."])

This error violated Mr. Lightsey's federal constitutional rights to a fair trial with due process of law, and to a proportionate and reliable verdict of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.) It also breached his federal constitutional state law "liberty interest" under California law to receive proper jury instructions. (U.S. Const., Amends. 5, 14; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) As the error in failing to instruct was prejudicial, Mr. Lightsey's conviction must be reversed. (*People v. Duran, supra,* 16 Cal.3d 282.)

[50] Mr. Lightsey is not contesting the propriety or scope of his shackling on appeal, but Mr. Lightsey does however reserve the right to challenge the propriety and scope of his shackling in his habeas corpus proceedings based upon information outside of the appellate record.

B. The Trial Court Erred In Failing To Instruct With CALJIC 1.04.

1. The Shackles Were Visible.

The appellate record makes plain that Mr. Lightsey's shackles were obvious and visible to the jury: "He is shackled to a bolt in the floor. That takes care of the fact that he is in the custody of the Department of corrections." (6 RT 1166-1167.) Further, the fact that Mr. Lightsey was "bolted to the floor" prevented Mr. Lightsey from being able to stand for the jury when they entered the room. (20 RT 4279-4280.) Beginning in his pre-trial proceedings and extending through trial, Mr. Lightsey was "hand-cuffed" with separate waist "shackles" bolted to the floor.[51] (4/7/94 RT 13 [discussing shackling]; 3/23/95 RT 116-118 [linking of cuffs to shackles limiting use of notebook]; 8/2/94 RT 215 [limiting Mr. Lightsey from examining pleadings]; 4/5/95 RT 347 [limiting Mr. Lightsey from handling photos.)

This extensive network of shackles made so much "noise" when Mr. Lightsey moved that it "interrupt[ed] the Court with" the clanking of Mr. Lightsey's "chains." (3/23/95 RT 116.) As defense counsel noted when discussing alternatives for Mr. Lightsey's crime scene view, whenever Mr. Lightsey moved he was literally "dragging chains." (3 RT 640-641.)

2. The Trial Court Erred In Failing To Instruct With CALJIC 1.04.

The United States Supreme Court has held "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not

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[51] Prior to the empanelment of the jury, Mr. Lightsey's handcuffs were linked to his waist shackles. During trial, his arms were freed by unlinking his handcuffs from his waist shackles. (4/13/95 RT 540-541.)

adduced as proof at trial." (*Taylor v. Kentucky* (1978) 436 U.S. 478, 485 [98 S.Ct. 1930]; *Estelle v. Williams* (1976) 425 U.S. 501, 504-505 [holding that the appearance of a criminal defendant as being in custody in the presence of the jury is a "constant reminder of the accused's condition" which "may affect a juror's judgment."].) "It is manifest that the shackling of a criminal defendant will prejudice him in the minds of the jurors. When a defendant is charged with any crime, and particularly if he is accused of a violent crime, his appearance before the jury in shackles is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged." (*Duran, supra*, 16 Cal.3d 282, 290.)

California law is clear that when physical "visible restraints" are imposed, the "court shall[[52]] instruct the jury *sua sponte* that such restraints shall have no bearing on the determination of the defendant's guilt." (*People v. Duran, supra*, 16 Cal.3d 282, 291-292; *People v. Mar* (2002) 28 Cal.4th 1201, 1217 [holding that "In those instances when visible restraints must be imposed the court shall instruct the jury sua sponte that such restraints should have no bearing on the determination of the defendant's guilt."]; see also *People v. George* (1994) 30 Cal.App.4th 262, 272-273 [holding if visible restraints are used, the court has a sua sponte duty to instruct the jury that such restraints should have no bearing on the determination of the defendant's guilt."]; *People v. Jackson, supra,* 14 Cal.App.4th 1818, 1825-1826 [accord]; CALJIC 1.04 [same].)

CALJIC 1.04 states as follows:

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[52] Evidence Code § 11 declares that in a statute the word "'shall' is mandatory and 'may' is permissive. The term "shall" when used in statutory language is ordinarily construed as mandatory. (*See Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443; *Aktar v. Anderson* (1997) 58 Cal.App.4th 1166, 1182; *Sheyko v. Saenz* (2003) 112 Cal.App.4th 675, 697; *People v. Williams* (2003) 111 Cal.App.4th Supp. 1, 6.)

> "The fact that physical restraints have been placed on defendant must not be considered by you for any purpose. They are not evidence of guilt, and must not be considered by you as any evidence that [he] [she] is more likely to be guilty than not guilty. You must not speculate as to why restraints have been used. In determining the issues in this case, disregard this matter entirely."

Had the trial court instructed the jury with this admonition, it would have prevented the jury from considering Mr. Lightsey's shackles when making a determination as to his guilt or innocence. The trial court here was also plainly aware of its *sua sponte* duty to instruct the jury under *People v. Duran* (1976) 16 Cal.3d 282 , specifically noting at the beginning of trial that: "When visible restraints must be imposed, the court must instruct the jury *sua sponte* that the restraints should have no bearing on determining the defendant's guilt." (4/12/95 RT 507.) The Use Note to CALJIC 1.04 both at the time of Mr. Lightsey's trial and currently also makes clear that a "*sua sponte*" instruction is required. (*People v. George, supra*, 30 Cal.App.4th 262, 273, citing CALJIC 1.04 (1992 New) Use Note.)[53] The trial court also failed to so instruct at the penalty phase of trial. (See also Arg. XI.)

For all these reasons, it is plain that the trial court erred in failing to instruct with CALJIC 1.04 during Mr. Lightsey's guilt phase of trial. As the error was prejudicial, Mr. Lightsey's sentence of death must be reversed. (*Chapman v. California, supra,* 386 U.S. 18, 24.)

C. The Trial Court's Error at the Guilt Phase in Failing to Instruct the Jury to Disregard Defendant's Physical Restraint's Violated Mr. Lightsey's Constitutional Rights to Raise a Defense, to Due Process of Law, and to a Reliable and Proportional

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[53] The Use Note to CALJIC 1.04 states in part: "If the restraints are in view of the jury, the court has a *sua sponte* duty to instruct the jury that the restraints have no bearing on the determination of the defendant's guilt."

Verdict and Sentence of Death.

The United States Supreme Court in *Holbrook v. Flynn* (1986) 475 U.S. 560, 567 [106 S.Ct. 1340, 1345] articulated that "[c]entral to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendment's is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'"

The failure of the trial court to admonish the jury to disregard the physical restraints when making a determination of Mr. Lightsey's guilt "deprived [Mr. Lightsey] due process of law under the Fourteenth Amendment to the United States Constitution" and denied Mr. Lightsey a "fair and impartial jury." (*People v. Jacla* (1978) 77 Cal.App.3d 878, 888; *People v. Givan* (1992) 4 Cal.App.4th 1107, 1117, citing U.S. Const. Amend. VI: Cal. Const., art. I, § 16). "In those instances when visible restraints must be imposed the court shall instruct the jury sua sponte that such restraints should have no bearing on the determination of the defendant's guilt." *Duran, supra*, 16 Cal.3d at p. 291-92; *Givan, supra*, 4 Cal.App.4th 1107, 1117.) Such an instruction is also necessary to make sure a defendant's constitutional right to a "presumption of innocence" is not violated by a jury prejudiced by the "present situation of the accused." (*Taylor v. Kentucky* (1978) 436 U.S. 478, 485-489 [*People v. Jackson, supra*, 14 Cal.App.4th 1818, 1829)].

The trial court's error in failing to admonish the jury therefore violated Mr. Lightsey's state and federal constitutional rights to a fair trial, to due process of law, and to a proportionate and reliable verdict of death, requiring reversal of his verdict and sentence of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.)

D. The Error Was Prejudicial

"[I]f the jury is prejudiced by the appearance of shackles, the likelihood is that it becomes prejudiced against the defendant." (*People v. Jacla, supra*, 77

> Cal.App.3d 878, 888.) "In the absence of such an admonition, we can only speculate as to the effect upon the jury of seeing the appellant in shackles at the counsel table ... [o]f one thing we are confident, the failure to give the admonition did nothing to dispel the prejudice brought about by shackling the defendant." (*People v. Jacla, supra*, 77 Cal.App.3d 878, 889.)

This inherent prejudice is caused by the fact that "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant. [citation]." (*Estelle v. Williams* (1976) 425 U.S. 501, 507.) Specifically, the restraint of Mr. Lightsey such that he was unable to stand in the presence of the jury. The prejudice of the trial court's error is clear, because "it is manifest that the shackling of a criminal defendant will prejudice him in the minds of the jurors" because it is "likely to lead the jurors to infer that he is a violent person disposed to commit crimes" of a violent nature. (*Duran, supra*, 16 Cal.3d 282, 290.)

The government's case against Mr. Lightsey not strong in light of Mr. Lightsey's alibi defense that he was in the courthouse at the time of the murder for which he is charged and the complete lack of forensic evidence linking him to the crime scene. The shackling of Mr. Lightsey in the presence of the jurors undoubtedly prejudiced him in the minds of the jurors and such prejudice likely tipped the scales toward conviction. (*Duran, supra,* 16 Cal.3d 282, 290).

Given these facts, the trial court's error in failing to admonish the jury cannot be shown to be harmless beyond a reasonable doubt. (*People v. Jacla, supra,* 77 Cal.App.3d 878, 891, citing *Chapman v. California, supra,* 386 U.S. 18, 24; *People v. Duran, supra*, 16 Cal.3d 282, 296, fn. 15

[same]). But for the trial court's error, the jurors might have found Mr. Lightsey not guilty. Accordingly, Mr. Lightsey's conviction and sentence of death must be reversed.

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VIII.

THE TRIAL COURT'S RULINGS LIMITING THE SCOPE OF THE DEFENSE MENTAL HEALTH EXPERT'S TESTIMONY DURING THE PENALTY PHASE VIOLATED MR. LIGHTSEY'S RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS AND REQUIRE THE REVERSAL OF HIS JUDGMENT OF DEATH

A. Introduction

In the penalty phase of Mr. Lightsey's trial, the court ruled that Dr. Pierce, a psychologist testifying for the defense, was not permitted to testify in detail about the content of the materials he reviewed in forming his expert opinion that Mr. Lightsey suffered from "a severe emotional disturbance" based on a "paranoid delusional disorder and a narcissistic personality disorder." Further, Dr. Pierce was prevented from testifying about Mr. Lightsey's father's bizarre and delusional conduct, resulting in his forced commitment to a psychiatric ward, and how his symptoms related to Dr. Pierce's conclusions about Mr. Lightsey's profound mental illness.

By limiting the scope of Dr. Pierce's testimony, the trial court violated the relevant rules governing the scope of expert testimony. More important, however, the trial court's rulings violated Mr. Lightsey's rights under the Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the California Constitution to have his sentencing jury consider all relevant mitigating evidence offered for a sentence less than death. Given the nature of the excluded evidence and its importance to the defense that Mr. Lightsey did not warrant the death penalty because of his extremely serious mental illness, Mr. Lightsey's sentence of death must be reversed.

B. The Trial Court's Rulings Limiting The Scope Of Defense Mitigating Evidence

This matter first arose during Mr. Lightsey's testimony at the penalty phase. Mr. Lightsey testified that he disagreed with one of his former trial

counsel about the nature and quality of his representation at the preliminary examination. (30 RT 6399-6400.) According to Mr. Lightsey, he first invoked his right to represent himself at the preliminary examination, but the transcript of that proceeding was modified to change what he and other witnesses said during their respective testimony. (30 RT 6400-6401.) Mr. Lightsey explained that the prosecution delayed his trial by seeking to declare him incompetent to represent himself under Penal Code section 1368 and that gave the government the time and opportunity to have the transcript at issue modified. (30 RT 6401.)

The prosecutor objected that Mr. Lightsey's testimony about the 1368 proceeding and the modification of the preliminary examination transcript was irrelevant and the trial court sustained the objection. (30 RT 6401.) Defense counsel then asked if Mr. Lightsey had been examined by three psychiatrists before he was allowed to represent himself. (30 RT 6401.) The prosecutor objected again that this line of questioning and testimony was irrelevant and asked the court to address this matter out of the jury's presence. (30 RT 6401-6402.) The trial court sustained the objection and recessed the trial for further arguments on the issue. (30 RT 6402.)

After the jury was excused, the prosecutor argued that evidence regarding the examinations by Drs. Manohara and Velosa [two of the three psychiatrists appointed before trial to examine Mr. Lightsey and determine his competency to stand trial and/or waive his right to counsel] was irrelevant to the jury's penalty decision because those examinations were limited to whether Mr. Lightsey was competent to represent himself. (30 RT 6403, 6404.) According to the prosecutor, jurors were not entitled to hear details about these limited psychiatric evaluations in deciding whether Mr. Lightsey should live or die because those examinations could not be

used to mitigate punishment. (30 RT 6403, 6404.)

As an alternative, the prosecutor suggested that the defense introduce Dr. Burdick's report [the third psychiatrist appointed] because he conducted "a more general examination as to Mr. Lightsey's general competence to stand trial." (30 RT 6403-6404.) Finally, the prosecutor argued that it would be irrelevant and inappropriate for the defense to elicit testimony about the examinations by Drs. Manohara and Velosa because the defense intended not to call them as witnesses at the penalty phase. (30 RT 6404.)

In response to the trial court's inquiry about how the doctors' reports were relevant to the jury's penalty determination, defense counsel replied they were relevant under CALJIC No. 8.85, subdivision (d), concerning "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (30 RT 6406-6407.) After the trial court conceded this could be relevant to Mr. Lightsey's penalty, defense counsel added that he intended to lay a foundation for their admission through testimony from Mr. Lightsey that he was examined by the doctors and then from Dr. Pierce, his mental health expert, about these doctors' examinations as further support for his claim that Mr. Lightsey suffered from very serious mental illness and did not deserve the death penalty. (30 RT 6407.)

The prosecutor objected again and argued that Dr. Pierce could not testify about the hearsay statements contained in the doctors' reports pursuant to *People v. Nicolaus* (1991) 54 Cal.3d 551, that granted trial courts "discretion" to exclude the "incompetent hearsay" bases for an expert's opinion. (30 RT 6409-6410.) Although defense counsel said he did not intend to elicit detailed testimony from Dr. Pierce about the content of the psychiatric reports he reviewed in rendering his opinion (30 RT

6408, 6410-6411), defense counsel did argue that he wanted to elicit Dr. Velosa's diagnosis that Mr. Lightsey suffered from a "bipolar disorder manic type." (30 RT 6408.) Ultimately, the trial court ruled that defense counsel could elicit testimony establishing that Mr. Lightsey was examined by three psychiatrists who prepared reports that Dr. Pierce reviewed in forming his expert opinion, but not any testimony about the reports' content or the psychiatrists' respective diagnoses. (30 RT 6413-6414.)

Consistent with its earlier rulings sustaining the prosecutor's relevancy objections and limiting the scope of defense mitigating evidence, the trial court ruled also that Dr. Pierce could not render an opinion about Mr. Lightsey's father's conduct when he was committed to the psychiatric ward at the Kern County Hospital. (31 RT 6713-6714.) According to the trial court, this testimony was irrelevant to the "main theme" [presumably Dr. Pierce's diagnosis about Mr. Lightsey's mental health] and it sustained the prosecutor's relevancy objection. (RT 6714.)

During Dr. Pierce's testimony, the issue was revisited when defense counsel asked Dr. Pierce on direct examination whether he reviewed the reports of "others" who had examined Mr. Lightsey. Dr. Pierce answered that he reviewed the reports of other psychiatrists [Dr. Pierce was a psychologist], after forming his own psychiatric opinion about Mr. Lightsey. (31 RT 6721-6722.) When Dr. Pierce attempted to explain why these psychiatrists had examined Mr. Lightsey, the prosecutor objected that this questioning was improper, based on her earlier objections and the trial court's rulings sustaining those objections. (31 RT 6722.) The trial court sustained the objection and reminded defense counsel that he was permitted only to elicit "a general reference" to those examinations and not any details about what the psychiatrists said. (31 RT 6722.)

C. Applicable Law And Standard Of Review

In *Skipper v. South Carolina* (1986) 476 U.S. 1, 4, the United States Supreme Court reaffirmed its earlier holdings in *Lockett v. Ohio* (1978) 438 U.S. 586, and *Eddings v. Oklahoma* (1982) 455 U.S. 104, by holding *Eddings*According to the high court in *Skipper*, after a trial court refuses to admit defendant's relevant proffered evidence in mitigation, the only real question is whether the exclusion of the evidence from the sentencing hearing deprived the defendant of his right to place before the sentencer relevant evidence in mitigation of punishment. (*Skipper v. South Carolina, supra,* 476 U.S. at p. 4.)

When a State elects to try an indigent defendant in a criminal proceeding, it must provide the defendant with a fair opportunity to present his defense. (*Ake v. Oklahoma* (1985) 470 U.S. 68, 76.) This right is grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, [and] derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."
(*Ibid.*)

Continuing, the *Ake* court cited *Ross v. Moffitt* (1974) 417 U.S. 600, 612, for the proposition that "it has often reaffirmed that fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system,' (Citation.)." (*Ake v. Oklahoma, supra,* 470 U.S. at p. 77.)

According to the Supreme Court, once the State makes the defendant's mental condition relevant to his degree of criminal culpability and the punishment he might suffer, the adequate assistance of mental health experts is likely to be crucial to his defense. Because these mental

health professionals gather the appropriate facts about defendant's mental condition, analyze them for relevance to his behavior and the appropriateness of his punishment, and share those facts with the judge and the jury through the expression of their opinions about how the defendant's mental condition might have affected his behavior at the time in question, a trial court's ruling restricting the scope of their expert testimony calls into question the fairness of the proceedings and the reliability of the jury's verdict. (*Id.*, at pp. 80-81.)

According to the plurality in *Ford v. Wainwright* (1986) 477 U.S. 399, 411,

> "the Eighth Amendment prohibits the execution of insane persons, [and] certain procedural protections inhere in the sanity determination. '[I]f the Constitution renders the fact or timing of his execution contingent upon establishment of a further fact,' . . . 'then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being.''

Because the state scheme for determining the sanity of persons sentenced to death at issue in *Ford* failed "'to achieve even the minimal degree of reliability,' (Citation.)" required when a judgment of death is sought, the Supreme Court reversed petitioner's judgment of death. (*Id.,* at p. 413.) In reversing the judgment in *Ford*, the high court held

> "It is all the more important that the adversary presentation of relevant information [concerning whether a judgment of death is appropriate] be as unrestricted as possible. Also essential is that the manner of selecting and using the experts responsible for producing that 'evidence' be conducive to the formation of neutral, sound, and professional judgments as to the prisoner's ability to comprehend the nature of the penalty. Fidelity to these principles is the solemn obligation of a civilized society."

(*Id.,* at p. 417.)

Following its decision in *Ford v. Wainwright,* the Supreme Court decided in *Atkins v. Virginia* (2002) 536 U.S. 304, 317, that States should be allowed to develop appropriate ways to enforce the constitutional-based restrictions on their power to the "'execution of sentences.'" According to the Supreme Court, the national consensus against executing capital defendants found to be mentally retarded

> "unquestionably reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty" and that "suggests that some characteristics of mental retardation undermine the strength of the procedural protections that our capital jurisprudence steadfastly guards."

(*Ibid.*)

The high court noted that although mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial, they have diminished capacities "to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. [Fn. omitted.]" (*Id.,* at p. 318.) Because "there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan," their "deficiencies . . . do diminish their personal culpability." (*Ibid..*) As such, the execution of such offenders does not serve the twin social purposes of "'retribution and deterrence of capital crimes by prospective offenders'" advanced as justification for the death penalty. (*Ibid.*, citing *Gregg v. Georgia* (1976) 428 U.S. 153, 183, (joint opinion of Stewart, Powell, and Stevens, JJ.).)

Finally, the *Atkins* court concluded that

> "The risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty,' (Citation.), is enhanced, not only by the possibility of false confessions, [Fn. omitted.) but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."

(*Id.*, at pp. 320-321.)

It is well-settled in light of *Atkins* that defendants who suffer from mental retardation are far less criminally culpable than other defendants. *In People v. Danks* (2004) 32 Cal.4th 269, 321-322, Justice Kennard correctly recognized in her concurring and dissenting opinion that a diagnosis of paranoid schizophrenia is akin to mental retardation for purposes of capital punishment because that disorder destroys a defendant's capacity for rational thought. (See also *Williams v. Cain* (W.D.La., 1996) 942 F.Supp. 1088, 1094-1095, affd. in part & revd. in part (5th Cir. 1997) 125 F.3d 269 [recognizing that borderline mental retardation, paranoid-schizophrenic personality and other such mental illnesses "are all probative mitigating circumstances in a [capital] sentencing hearing."].)

In *People v. Carpenter* (1997) 15 Cal.4th 312, this Court considered whether the trial court erred by sustaining the prosecutor's objections to testimony by defendant's mental health experts. The Court held the rulings were consistent with the well-settled rule that trial courts retain considerable discretion in ruling on the scope of expert opinion testimony. (*Id.*, at p. 403.) In this regard, the Court held that an expert may generally base his opinion on any matter known to him, including hearsay, and may

on direct examination explain the reasons for his opinions, including the matters he relied upon in forming them. (*Ibid.*) But, a trial court may properly exclude expert's opinion testimony under Evidence Code section 352 if the expert's detailed explanation presents incompetent hearsay evidence. (*Ibid.*)

D. Dr. Pierce's Testimony And The Reports Of Drs. Burdick, Manohara, And Velosa

Drs. Burdick, Manohara and Velosa were the psychiatrists appointed by the trial court to determine if Mr. Lightsey was competent to stand trial and/or represent himself and each doctor wrote a report documenting his findings. Dr. Pierce, the defense mental health expert at the penalty phase, relied on the psychiatrists' reports "as part of the foundation for arriving at his" expert psychiatric opinion about Mr. Lightsey. (30 RT 6403, 6404; 31 RT 6721-6723.) Given the present argument that the trial court erred by limiting the scope of Dr. Pierce's testimony about these reports, Mr. Lightsey will discuss Dr. Pierce's testimony and each psychiatrist's report in detail.

1. Dr. Pierce's Testimony During The Penalty Phase

Dr. William Pierce, a clinical psychologist, testified that he was contacted by Mr. Lightsey's trial attorneys in June 1994 and asked to prepare Mr. Lightsey's psychosocial profile. (31 RT 6680.) Dr. Pierce examined Mr. Lightsey at Tehachapi State Prison on October 12 and 27, 1994. (31 RT 6680-6694.) He also reviewed a number of records [Bakersfield Police Department investigative reports, Kern County Coroner reports, the Reporter's Transcript of the preliminary examination, defense investigator reports, and three psychiatric evaluations prepared by Drs. Burdick, Manohara, and Velosa] and interviewed several family members before making his psychological diagnosis. (31 RT 6694-6695; 32 RT

6817-6818.)

At the time of Dr. Pierce's first examination, Mr. Lightsey was 41 years old. (31 RT 6695.) Although Mr. Lightsey was aware of the court's order appointing Dr. Pierce to examine him, he had forgotten about this important matter and was surprised by Dr. Pierce's appearance at the prison. (31 RT 6695.) Mr. Lightsey became more friendly after Dr. Pierce reminded him that he agreed to the examination by signing a form, but he remained very cautious and guarded during the interview. (31 RT 6695-6696.)

Mr. Lightsey immediately volunteered he had nothing to do with Mr. Compton's murder and insisted he was in court with his mother at the time the murder. (31 RT 6696.) Mr. Lightsey then launched into a tirade about how his constitutional rights were being violated. (31 RT 6696.) In other words, Mr. Lightsey was unable to stay focused and exhibited "fragmented [and "tangential"] thinking" with "loose association" by "jum[ping] from one topic to another," and "came across as overly verbose, using a lot of words, pressured speech . . . to get the words out." (31 RT 6696-6697.)

Mr. Lightsey also exhibited "labile thinking" that resulted in him "switch[ing] from being very angry to being very sad in a quick amount of time." (31 RT 6697.) This is called "labile affect" and is representative of a "person [who] doesn't control and modulate their affect very well." (31 RT 6697.) After complaining that "the system was against him," Mr. Lightsey "would invoke the wrath of God ["religiosity"], that vengeance is God and that he was being treated in a terrible way and God would protect him." (31 RT 6697-6698.) According to Mr. Lightsey, the "system was out not only to get him but also to destroy – to destroy his family" and that made him very sad and depressed. (31 RT 6698.)

Based on his examination of Mr. Lightsey, his interviews with

family members and his review of the records detailed above, Dr. Pierce concluded that

> "Mr. Lightsey was suffering from a severe emotional disturbance. I diagnosed him as having a paranoid delusional disorder and a narcissistic personality disorder with depressive features. [¶] His delusional paranoid disorder is what we call the persecutory type."

(31 RT 6695, 6723.)

According to Dr. Pierce, Mr. Lightsey's severe paranoid delusional disorder was based on

> "false belief[s] that a person has and that a person acts upon. Even in the face of contravening, contradicting evidence in his environment and by other people, the person still acts as if this was true. It's not a belief. It's a false belief, and it's a committed false belief.
>
> "The persecutory type refers to a person [who] believes that people are out to get him, that people are out to harass them that, that people are out to harm them. In his case the system was out to either destroy him and his family, and this is the predominant symptom that you see.
>
> "Now, what makes this a severe psychiatric disorder is that the person is consumed by this delusion, that everything gets fitted into this false belief system, and they act as if it's true. So that one's logic is disrupted, one's ability to test reality in a proper way is disrupted, because you're fitting everything into this false belief. That's his access [sic] one diagnosis. His axis two diagnosis which is – you diagnose long-standing either personality disorders or character disorders long term, over long period of time, maladjustments on axis two, and my diagnosis was narcissistic personality disorder with depressive features. . . . .
>
> "a [personality] style is not a disorder. When a

particular personality style becomes so maladapted that it interferes with social, occupational or other types of every day functioning, we call that a personality disorder. It becomes a diagnosable psychiatric symptom. So we're talking about a personality disorder.

"A person who comes across as extremely taken by themselves, having a grandiose sense of self-importance, looking out for themselves, some people might say, well, that's -- he's just a selfish person, a person that is -- gets extremely upset whenever they're criticized by anybody else, person who feels that they're entitled to some special treatment or that they have some special talents that should be regarded. This type of personality style, that when it's maladapted, develops into a narcissistic personality disorder.

"The reason I included depressive features with this is because one of the things that came across -- as I said before, this kind of underlining sense of despair and sadness that seemed to pop out every now and then.

"One of the ways I explain a narcissistic personality disorder is like this. People have what we call an ideal self, a sense of what you would really like to be. And you have a real self.

"Narcissistic personalities have over-grandiose, over-ideal self-imaging, how special they are. The difference between the reality of their real self and that ideal self when you look at it usually is depression, because you just can't own up on that. There has to be some feelings owned up on that. That's why I added into this the depressive features as to axis two."

(31 RT 6723-6726.)

Dr. Pierce concluded that Mr. Lightsey's childhood experiences greatly contributed to the development of his severe psychiatric,

psychological and emotional disturbances. (31 RT 6726.) Mr. Lightsey was a troubled, hyperactive child with hypothyroidism who was punished far more often than his siblings, but yet protected by his father. His father was a strict disciplinarian and regularly used physical punishment to enforce his rigid discipline. (31 RT 6704-6706.) Mr. Lightsey's mother believed Mr. Lightsey's father committed "child abuse" against all of her children, but she was unable to protect them because their father would turn his wrath and violence against her when and if she tried to intervene. (31 RT 6705-6706.)

When Mr. Lightsey was about 19 years old, his father was hospitalized for a back injury. At about this time, Mr. Lightsey's father began expressing bizarre thoughts about living forever and never having to be buried. (31 RT 6713.) After Mr. Lightsey's father was released from the hospital for his back injury, he began drinking more heavily and taking more pain medications. At the same time, he began committing more frequent and violent acts against his family, including once chasing his family around the house and threatening them with a knife. (31 RT 6713.) Ultimately, Mr. Lightsey's father was committed twice to the Kern County Psychiatric Facility ["Ward B"] after the police were called to intervene and protect his family and others from him. (31 RT 6713.)

Consistent with his self-edited and rose-colored view of his childhood and life, Mr. Lightsey never suggested to Dr. Pierce that his father's conduct was at all bizarre or psychotic. (31 RT 6714.) Instead, Mr. Lightsey minimized his father's behavior by claiming he was "engaged in a spiritual flushing and related this behavior to some grandiose spirituality that his father was experiencing." (31 RT 6714-6715.)

Mr. Lightsey closely identified with his father whom Dr. Pierce believed was psychotic. (31 RT 6728.) According to Dr. Pierce, Mr.

Lightsey experienced a very traumatic event when his father committed suicide by shooting himself with a shotgun. Mr. Lightsey discovered his father's body in his parents' bedroom. (31 RT 6716, 6726.) Mr. Lightsey denied his father's suicide and discovery of his body affected him very much, but this was one more example of Mr. Lightsey's distortion of reality and life in his own "fantasy world." Dr. Pierce believed that these events significantly contributed to the delusional paranoid disorder that has afflicted Mr. Lightsey for most of his life. (31 RT 6726-6727, 6733-6734.)

Other members of Mr. Lightsey's family reported to Dr. Pierce that Mr. Lightsey "went to pieces" after he discovered his father's body. Family members found him beating his head and fists against the garage door and screaming out that his father "never even said good-bye" to him. (31 RT 6717.)

Despite his severe reaction to his father's suicide, Mr. Lightsey appeared quickly to return to "his kind of happy go lucky self." (31 RT 6718.) Dr. Pierce believed that Mr. Lightsey's reversion to his former self was clinically significant because it suggested he had developed "a defensive system psychologically to defend one's self against the pain and the loss of this tragedy." (31 RT 6718-6719.) In other words, Mr. Lightsey was "distorting the reality to the point" where his reaction to the tragedy was that it was a minimal and not major event. (31 RT 6720.) This delusional thinking and distortion of reality also extended to the consequences of Mr. Lightsey's criminal behavior, as evidenced by his belief his prior crimes [mostly drug related] were of minimal consequence and merely a product of the system being out to get him. (31 RT 6711-6712, 6715-6716, 6729.)

Dr. Pierce tried to render an opinion about Mr. Lightsey's father's mental health because he believed that Mr. Lightsey's close relationship

and identification with his father had great effect on his mental illness and Dr. Pierce's diagnoses of that illness. (RT 6714.) But, the prosecutor objected that Dr. Pierce's opinion about Mr. Lightsey's father's mental health was irrelevant and the trial court sustained the objection. (RT 6714.)

2. Observations and Opinions From Prior Evaluations By Mental Health Experts That Were Excluded from Evidence at Trial.

a. Dr. Burdick's Report

Dr. Richard Burdick was appointed in March of 1994 to examine Mr. Lightsey, after one of his earlier attorneys asked the court to declare a doubt of Mr. Lightsey's competence.

Dr. Burdick attempted to examine Mr. Lightsey on March 23, 1994, pursuant to Penal Code section 1368. (2 Conf. CT 397.) Mr. Lightsey refused to answer any of Dr. Burdick's questions and the doctor conceded it was not possible from his "brief encounter to complete a formal psychiatric evaluation." (2 Conf. CT 398.) Regardless of his ability to conduct a thorough and competent evaluation, Dr. Burdick offered his opinion that Mr. Lightsey

> "was not behaving in a peculiar manner. His speech was organized and well modulated. He was obviously in control of his thoughts and was aware of the situation and was obviously making a free choice to not be cooperative to a psychiatric evaluation. He did indicate awareness spontaneously as I was leaving his presence that he knew he was to be seen for a 1368 evaluation. It would seem apparent at this point that this man is in control of his faculties and is not demonstrating a psychiatric illness at this point. Suggestions from the confinement staff of some of his behavior suggests that he is deliberately disruptive and a trouble maker but nothing to suggest from their comments that he was exhibiting psychotic behavior. From this brief

> encounter it is my opinion that the defendant is able to understand the nature and purpose of the proceedings taken against him and if he so chooses, he is capable of cooperating in a rational manner with counsel in presenting a defense."

(2 Conf. CT 398.)

b. Dr. Manohara's Report

Dr. Sakrepatna Manohara, along with Dr. Luis Velosa, was appointed by the court to examine Mr. Lightsey pursuant to Penal Code section 1368 on July 19, 1994. (2 Conf. CT 392; RT 8-2-1994, 22.) Dr. Manohara examined Mr. Lightsey for about an hour and wrote a report. Dr. Manohara reported that Mr. Lightsey claimed he was being "unjustifiably imprisoned" and "'railroaded' by the system." (2 Conf. CT 392.) Mr. Lightsey believed his "attorneys [we]re 'selling' him out" and detailed his claims of innocence. (2 Conf. CT 392.) Mr. Lightsey denied any past psychiatric history and initially denied any history of abusing alcohol or drugs, though he later admitted being arrested twice for driving under the influence and twice for being in possession of cocaine. (2 Conf. CT 392.) Mr. Lightsey also admitted being arrested for touching a child inappropriately while working a substitute teacher and for possession of cocaine, but denied he committed these offenses. (2 Conf. CT 392.)

Mr. Lightsey described his childhood as being "'great,'" he denied having "any childhood problems," and he said he was "very close" to his mother and father. (2 Conf. CT 392, 393.) Mr. Lightsey's said his father died in 1979, but refused to provide any details about his death. (2 Conf. CT 392.) Mr. Lightsey denied any "family history of mental illness." (2 Conf. CT 392.)

Mr. Lightsey was "generally cooperative ... [though he] was quite manipulative." (2 Conf. CT 393.) Mr. Lightsey referred to the Bible many

times and "[h]is speech was coherent but appeared to be circumstantial." (2 Conf. CT 393.) Mr. Lightsey blamed all of his problems on the "system" and alleged that he had an alibi at the time of the charged offense of murder [he was in the Superior Court with a bail bondsman]. (2 Conf. CT 393, 394.) According to Mr. Lightsey, he was charged with murder only because someone said he was in possession of stolen property belonging to the homicide victim. (2 Conf. CT 393.)

Mr. Lightsey did not exhibit any signs or symptoms of hallucinations and did not appear "really delusional although he was highly mistrustful of the system and the attorneys." (2 Conf. CT 393.) According to Mr. Lightsey, he was competent to defend himself. (2 Conf. CT 393.) Mr. Lightsey's concentration was "excellent" and his memory was "good," as reflected by the doctor's testing methods. (2 Conf. CT 393-394.)

Dr. Manohara believed that Mr. Lightsey's "fund of general information seemed to be fair" and his "remote memory is good." (2 Conf. CT 394.) The doctor also reported Mr. Lightsey answered several questions about "judgment" correctly, his appetite and sleep appear "good" and "[h]e showed appropriate affect to thought content." (2 Conf. CT 394.)

Mr. Lightsey's mood appeared "ang[ry] and frustrat[ed]" and "he 'fe[lt] sick' about being railroaded." (2 Conf. CT 394.) Mr. Lightsey discussed "Eastern religion" and felt he must exhibit "self control and to let go and let God take care of things." (2 Conf. CT 394.)

Dr. Manohara felt that Mr. Lightsey's "intellectual functioning seem[ed] average to above average" and "his interactions and defenses indicate[d] that he deal[t] with issues by externalizing or denying the problems." (2 Conf. CT 394.) Mr. Lightsey also seemed to like being

> "the center of attention" and "shows a grandiose sense of self importance. He tends to exaggerate

> achievements and talents. He also believes his problems are unique and can only be understood by other special people. He has a sense of entitlement and a sense of unreasonable expectation of especially favorable treatment. He might also have a lack of empathy."

(2 Conf. CT 394.)

The doctor diagnosed Mr. Lightsey with "Axis I – V code – Antisocial Behavior" and "Axis II – Narcissistic Personality Disorder." (2 Conf. CT 394.) Dr. Manohara opined that Mr. Lightsey

> "does not have any clear-cut psychotic disorder although he seems to be excessively mistrustful of the system. He does not have any diagnosable mental disorder on the Axis I based on the Diagnostic Statistical Manual of Mental Disorder Revised Edition, published by the American Psychiatric Association. However, he exhibit[ed] a personality disorder and use[d] a lot of rationalization in order to justify personal deficits or irresponsible behavior.
>
> "His intellectual functions are intact. He seems to have a fairly good grasp of the legal system. His personality disorder makes it difficult to work with him as an attorney but in my opinion, he is competent to stand trial. However, he is not competent to represent himself because of his lack of objectivity and his grandiose sense of self importance and his tendency to be circumstantial with a sense of entitlement. He may over-react to criticism with feelings of rage.
>
> "In my professional opinion, the above characteristics of his personality as well as his interactions with me during the interview make him incompetent to represent himself."

(2 Conf. CT 395.)

c. Dr. Velosa's Report

Dr. Velosa, also appointed in July 1994 by the court pursuant to

Penal Code section 1368, examined Mr. Lightsey on two occasions for a total of two hours at the Tulare County Jail on July 13 and 19, 1994. (2 Conf. CT 400, 401.)

In his report to the court, Dr. Velosa wrote that at the beginning of the interview on July 13, 1994, Mr. Lightsey was suspicious, vague and wanted to control the psychiatric examination. (2 Conf. CT 401.) Mr. Lightsey wanted to know why Dr. Velosa did not bring a tape recorder with him and Dr. Velosa explained that he was present to conduct a psychiatric examination and render a psychiatric report about Mr. Lightsey's competency to stand trial. (2 Conf. CT 401.) Mr. Lightsey replied "'Of course, I am competent and you are going to find me competent.'" (2 Conf. CT 401-402.)

Dr. Velosa noted that Mr. Lightsey intended on ''tell[ing] me his whole story.' His story and ideas were filled with irrelevant data, minutia, specific dates that were quite irrelevant as to the specific question I asked." (2 Conf. CT 402.) Mr. Lightsey avoided the doctor's questions about the current offense, but instead explained why the proceedings against him were

> "'unconstitutional and illegal.' He wants to prove that there is a conspiracy against him and that he is ready to go to 'the newspapers and T.V. and bring the whole matter out in the open.'"

(2 Conf. CT 402.)

During the examination, Mr. Lightsey exhibited "a manic pattern in his thinking. His ideas would jump very fast from subject to subject, oftentimes, even neglecting the question in point." (2 Conf. CT 402.) When the doctor asked Mr. Lightsey about the nature of his charges, Mr. Lightsey explained that he was charged with "'[m]urder, but that is political.'" (2 Conf. CT 402.)

When the doctor asked Mr. Lightsey to describe what happened at the time of the alleged offense, Mr. Lightsey began by saying

> "I bought my house. It cost me $140,000. I felt it was a beautiful house. I didn't think about who was my neighbor. In 1989, someone falsely accused me of lewd touching of a school kid. I successfully beat the charge. In October, 1992, the neighbors knew about the alleged molest. I tried to meet my neighbors. April 7, the phone rang. Texaco called me to work. It was 9:14 a.m. I never refused overtime. I got up. I had breakfast, I read the paper. I know everything. I know every single detail of everything that happened. I know this case very well. The night before, Beverly was sharpening the pencil. I started working with Superglue. I noticed Beverly's daughter biking. I fixed my lunch. I left my car. I was accused of touching her daughter. I was charged with touching. I lost my job. I did not receive proper representation. I went to court. They wanted to give me sixteen years. They got me stuck with twenty-four years. August 12, 1993, I was in Wasco [state prison] one month, in Folsom for one month, then they moved me to Tehachapi. I was in Wasco. We recovered this stolen property. They told me.'"

(2 Conf. CT 402.)

Dr. Velosa was confused by Mr. Lightsey's response so he asked him again about the circumstances of the charged murder. (2 Conf. CT 402.) Mr. Lightsey replied

> "'I was in court 7/7/93. They are accusing me because I was in possession of stolen property. Brian Ray was caught and charged with murder. They found a gun. He said the gun was mine. Brian put the finger on me.'"

(2 Conf. CT 402.)

Next, Dr. Velosa questioned Mr. Lightsey about what happened on

July 7, 1994, and Mr. Lightsey responded

> "'My advisor admitted to me that he was an atheist. The Bible said you are not to treat an atheist. Three weeks before this, I had two pages full of motions I wanted typed out. My advisor did not show. He waited until the last week. My institution denied my rights. My advisor said "Here, sign this." He didn't want to consult these issues with me. He was not helping. He refused to work with me. He said that I refused to talk to him, but that was a lie.'"

(2 Conf. CT 403.)

Dr. Velosa concluded on the basis of his psychiatric examination that Mr. Lightsey

> "suffer[s] from a psychiatric disorder which impairs his thinking process. The defendant at present is suffering from a psychiatric disorder best classified as bipolar disorder (manic type) or a paranoid disorder. The defendant at present is exhibiting psychotic symptoms characterized by a thought disorder in which the defendant experiences racing thoughts, looseness of associations, rambling of thoughts, sometimes without any logical connection. In addition, the defendant experiences paranoid thinking, persecutory delusions, a false belief that there is a conspiracy against him."

(2 Conf. CT 401.)

E. The Trial Court Violated Mr. Lightsey's Federal And State Constitutional Rights To Due Process And A Reliable Penalty Determination Under The Fifth, Sixth, Eighth And Fourteenth Amendments To The United States Constitution And Article I, Sections 1, 7, And 15 Of The State Constitution By Excluding The Reports Of Drs. Burdick, Manohara And Velosa And Dr. Pierce's Opinion About Mr. Lightsey's Father When He Was Committed To A Psychiatric Ward

1. The Trial Court Abused Its Discretion By Excluding The Doctors' Reports About Mr. Lightsey

In objecting to Dr. Pierce's testimony about the contents of the psychiatric reports he reviewed, the prosecutor argued that the reports

contained incompetent hearsay, citing *People v. Nicolaus, supra,* 54 Cal.3d at pp. 582-583, and that Dr. Pierce should not be permitted to testify about them because the prosecution had no opportunity to cross-examine the doctors about their reports or family members about the information they provided to the doctors. (30 RT 6409-6410.)

The fallacy of the prosecutor's argument and the trial court's error in adopting that argument are simply established. The contents of the reports at issue consisted of reliable matters because the prosecution earlier called these doctors as its witnesses, introduced their reports into evidence, and argued their reliability during the proceedings concerning whether Mr. Lightsey was competent to represent himself. Also, the prosecution had a full and fair opportunity to examine the psychiatrists about their conclusions and the information they relied on to render their respective conclusions and urged the court to consider these reports in deciding the question of Mr. Lightsey's competency to represent himself. Given the prosecution's embrace of these reports as accurate and reliable evidence, the trial court abused its discretion by excluding the reports during the penalty phase for the reasons advanced by the prosecution.

Expert testimony, like all other evidence, must be relevant and competent regarding a material issue. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 390.) According to the Court of Appeal in *Bowker*, a case cited in *People v. Nicolaus, supra,* 54 Cal.3d at p. 583, in support of its holding,

> "Evidence Code section 801 prescribes two specific preconditions to the admissibility of expert opinion testimony. The testimony must be of assistance to the trier of fact and must be reliable. [Citation.]"

(*People v. Bowker, supra,* 203 Cal.App.3d at p. 390.)

During the hearing to determine whether Mr. Lightsey was

competent to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806, the prosecution called Drs. Burdick, Manohara, and Velosa as its witnesses and moved to admit their reports into evidence. (RT 8-2-1994, 14-143.) Although the prosecutor argued that the doctors' focused on whether Mr. Lightsey was competent to stand trial, he also argued that their opinions and conclusions about Mr. Lightsey were sufficiently reliable and relevant to the question now before the court – whether Mr. Lightsey had the capacity to intelligently and knowingly waive his right to counsel. (RT 8-2-1994, 147-148.) According to the prosecutor, it was "quite clear" that Drs. Manohara and Velosa were correct in deciding that Mr. Lightsey had the requisite capacity and ability to make that waiver. (RT 8-2-1994, 147-149.)[54]

Even though the prosecutor noted that Drs. Manohara and Velosa disagreed about the specific nature of Mr. Lightsey's mental disorder, he did not dispute the doctors' conclusions that Mr. Lightsey indeed "suffers from mental disorders" and urged the court to consider their opinions and make its own "determination" about the nature of the disorder. (RT 8-2-1994, 148-150.)[55] Also, the prosecutor argued that all the doctors'

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[54] Dr. Burdick did not render an opinion about whether Mr. Lightsey had the capacity to make an intelligent and knowing waiver of the right to counsel, but did conclude that Mr. Lightsey "is in control of his faculties" and capable of communicating with and rationally cooperating with counsel. (RT 8-2-1994, 73-76.)

[55] The prosecutor did mention in passing that "[t]here is a dispute as to whether or not he [Mr. Lightsey] suffers from some type of mental disorder." (RT 8-2-1994, 149.) Though Dr. Burdick testified that Mr. Lightsey did not exhibit any "psychiatric illness" during their brief encounter, the doctor admitted that his opinion was far from certain because he did not "complete [or conduct] a formal psychiatric evaluation." (2 Conf. CT 398; RT 8-2-1994, 72-75.)

accurately and correctly recognized that Mr. Lightsey sufficiently understood the charges against him, the possible consequences of those charges, and the relevant defense[s] to those charges. (RT 8-2-1994, 149.) Further, the prosecutor posed many, many objections during Mr. Lightsey's cross-examination of the doctors and concluded that the examination of the doctors was sufficient to present the court with reliable evidence to decide whether Mr. Lightsey was competent to waive counsel. (RT 8-2-1994, 48-143, 147-151.) Finally, even the trial court recognized that all three psychiatrists were reliable and accurate regarding their assessments of Mr. Lightsey and his abilities. (RT 8-2-1994, 159.)

In *Green v. Georgia* (1979) 442 U.S. 95, 96, the capital defendant was prevented at his trial from introducing evidence from his codefendant's separate trial that had been elicited and used by the prosecution to establish that the codefendant alone had murdered the victim. After the prosecution succeeded in excluding this evidence on state-law based hearsay grounds, defendant was convicted and sentenced to death. The Supreme Court reversed the penalty judgment and held

> "Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial, [Citation.], and substantial reasons existed to assume its reliability. Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to

> base a sentence of death upon it. [Fn omitted.] In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.' [Citation.]. [Fn. omitted.] Because the exclusion of Pasby's testimony denied petitioner a fair trial on the issue of punishment, the sentence is vacated and the case is remanded for further proceedings not inconsistent with this opinion."

(*Green v. Georgia, supra*, 442 U.S. at p. 97.)

In *People v. Weaver* (2001) 26 Cal.4th 876, 980-981, the defense's mental health expert testified he developed a diagnostic tool called the "Vietnam Era Stress Inventory (VESI)" that he believed helped diagnose whether an individual suffered from war-induced post traumatic stress disorder. The expert administered the VESI to the defendant and tape recorded his responses. The trial court excluded the videotapes as unreliable because the defendant made them to support his claim of insanity, and there was no basis from which to conclude with any degree of certainty that his statements on the tapes were true. The Supreme Court affirmed the trial court's ruling and agreed the tapes were self-serving and unreliable because the prosecution was unable to test the statements' truth through cross-examination. In rejecting the defendant's claim that the trial court's exclusion of the tapes violated his rights to due process and a reliable penalty determination, the *Weaver* court held that *Green v. Georgia* does not negate the state's rules of evidence by allowing capital defendants to introduce all evidence offered for a sentence less than death.

In Mr. Lightsey's case, the prosecution called all three doctors as its witnesses in pretrial proceedings on Mr. Lightsey's competence to represent himself and moved to admit their reports into evidence. The prosecution had an unlimited opportunity to question the doctors during their lengthy testimony and object to anything they wrote or said that it

believed was objectionable or improper, and the prosecution urged the trial court – indeed, the same judge later who presided over Mr. Lightsey's trial – to consider the evidence from the doctors in deciding whether Mr. Lightsey was competent to waive counsel. Finally, the trial court relied in significant part on the doctor's testimony and reports in deciding that Mr. Lightsey was competent to waive counsel and represent himself. Under the circumstances, the trial court abused its discretion by excluding the doctors' reports and thereby violated not only the rules governing the scope of expert testimony, but also Mr. Lightsey's federal and state constitutional rights to due process and to have his sentencing jury consider all relevant evidence he proffered for a sentence less than death. (*People v. Bowker, supra,* 203 Cal.App.3d at p. 390; *Skipper v. South Carolina, supra,* 476 U.S. at p. 4; *Green v. Georgia, supra*, 442 U.S. at p. 97.)

2. The Trial Court Abused Its Discretion By Excluding Dr. Pierce's Testimony Regarding Mr. Lightsey's Father's Mental Illness

Similarly, the trial court abused its discretion by excluding Dr. Pierce's expert opinion regarding whether Mr. Lightsey's father's conduct was symptomatic of mental illness around the time of his involuntary commitment to the psychiatric facility at the Kern County Hospital. (31 RT 6713-6714.)

There is widespread acknowledgement and "clear evidence" that genetic influences and a person's background contribute greatly to the etiology of mental illness.[56] This genetic and environmental predisposition is especially strong when a parent, like Mr. Lightsey's father, has a significant and serious mental illness [psychosis] that requires an

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[56] See http://www.smd.qmul.ac.uk/statgen/dcurtis/lectures/pgenfunc.html.

involuntary commitment to a "psychiatric ward." (31 RT 6713, 6728.)[57]

According to Dr. Pierce, Mr. Lightsey's "delusional paranoid disorder" is a severe personality disorder that is akin in severity to "a severe form of psychosis or severe form of personality disorder that would rise to the level of a mental illness that's organically based such as schizophrenia or something of [that] nature." (31 RT 6727, 6761, 6814.) Further, Dr. Pierce testified that Mr. Lightsey's background and family history, including his "father's psychotic break" and "suicide," were not only mitigating circumstances in Mr. Lightsey's case, but also greatly contributed to his severe personality disorder and the commission of the charged crimes against Mr. Compton. (31 RT 6734-6735, 6818.)

Given the recognized genetic and environmental causes of serious mental illness and Dr. Pierce's belief that Mr. Lightsey was greatly affected by his father's behavior, Dr. Pierce's opinion testimony about Mr. Lightsey's father's symptomatic behavior and mental illness at the time of his involuntary psychiatric commitment was very relevant evidence as to Mr. Lightsey's own mental illness. (30 RT 6406-6407; 31 RT 6713-6714.) (See also *Eddings v. Oklahoma, supra,* 455 U.S. at pp. 115-116, discussing the relevance and importance of parental conduct, behavior, and mental health to the development and existence of mitigation evidence during the penalty phase.) Accordingly, the trial court abused its discretion and evidenced its fundamental misunderstanding of the defense's right to present mitigating evidence by sustaining the prosecutor's relevancy objection to Dr. Pierce's expert opinion testimony about Mr. Lightsey's father's psychiatric commitment. (See *People v. Hart* (1999) 20 Cal.4th

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[57] See http://www.schizophrenia.com/research/hereditygen.htm; http://www.schizophrenia.com/research/surg.general.2002.htm#etiology.)

546, 637-638, *In re Gay* (1998) 19 Cal.4th 771, 816, and *Eddings v. Oklahoma, supra,* 455 U.S. at pp. 115-116)

F. The Trial Court's Rulings Limiting Dr. Pierce's Testimony Were Prejudicial And Require The Reversal Of Mr. Lightsey's Judgment Of Death

The erroneous limitation on Dr. Pierce's testimony violated Mr. Lightsey's federal and state constitutional rights to due process and a reliable penalty determination under the Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the California Constitution which require that his right to present the jury with all relevant evidence proffered as a basis for a sentence less than death be as unrestricted as possible. (See *Skipper v. South Carolina, supra,* 476 U.S. at p. 4; *Ake v. Oklahoma, supra,* 470 U.S. at pp. 76, 77, 80-81.)

The importance of mental health expert opinion testimony in Mr. Lightsey's case was manifest. Major mental illness is well recognized as a basis for finding diminished culpability and reduced ability to assist effectively in one's own defense that militate against the death penalty. (See 31 RT 6866; *Ford v. Wainwright, supra,* 477 U.S. 413, 417; *People v. Danks, supra,* 32 Cal.4th at pp. 321-322; *Williams v. Cain, supra,* 942 F.Supp. at pp. 1094-1095.)[58] In Mr. Lightsey's case, such evidence would also have explained and mitigated his bizarre and self-defeating behavior before the judge and jury.

The trial court instructed the jury about expert opinion testimony

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[58] The record is replete with instances of Mr. Lightsey's acting out and interfering with his counsel's ability to defend him. (See for example 26 RT 5518-5520; 30 RT 6398, 6399, 6409, 6432, 6438, 6445, 6449; 31 RT 6556-6558; 32 RT 6821, 6833, 6856-6862, 6865-6866, 6967-6969.)

during the penalty as follows:

> "A person is qualified to testify as an expert if he has special knowledge, skill, experience, or education sufficient to qualify him as an expert on the subject to which his testimony relates.
>
> "A duly qualified expert may give an opinion on questions in controversy at a trial.
>
> "To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion.
>
> "You may also consider the qualifications and credibility of the expert.
>
> "You are not bound to accept an expert opinion as conclusive. But should give it the weight to which you think you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable."

(32 RT 6912-6913.)

Given the instruction on expert opinion testimony that told the jury essentially that Dr. Pierce's opinion testimony was only as good as the information upon which it was based, it was necessary and critical to Mr. Lightsey's penalty defense that the jury be allowed to consider Dr. Pierce's opinion and the reasons for it without unreasonable limitation.

In her penalty phase argument, the prosecutor exploited the exclusion of evidence, attacking Dr. Pierce's competence, credibility, and ethics. (RT 6838-6840.) The prosecutor argued that Dr. Pierce was nothing more than a well-paid, hired gun who testifies only for the defense in capital and other first degree murder cases. (RT 6838-6839.) Consistent with her other challenges to Dr. Pierce's competency and ethics, the prosecutor also argued that Dr. Pierce's refusal to agree with her suggestion that Mr. Lightsey suffered from an antisocial personality disorder was <u>only</u>

because he did not want to testify in a way harmful to Mr. Lightsey. (RT 6840.)

Here, Drs. Manohara and Velosa had evaluated Mr. Lightsey's competency to stand trial and represent himself. (2 Conf. CT 392, 400.)[59] Mr. Lightsey provided them with information about his case and his deep-seated belief that he was falsely accused of murder and he was being misrepresented by a series of different counsel. (2 Conf. CT 392, 402.) Both doctors recognized the stream of manic and pressured thinking that caused Mr. Lightsey to ramble on and avoid answering the questions put to him. (2 Conf. CT 393, 402.) Mr. Lightsey provided both doctors with his alibi theory and conspiracy allegations and both doctors noted Mr. Lightsey's exaggerated sense of self-importance and believed his grasp on reality was tenuous at best. (2 Conf. CT 393-394, 402-404, 405.) Though the doctors may not have identified the specific personality disorders afflicting Mr. Lightsey, they agreed that Mr. Lightsey was severely mentally disturbed, they agreed that he lacked insight into his mental health problems, and they believed that it would be highly problematic to defend him because of his profound mental illness. (See 2 Conf. CT 395, 405.)

The reports from Drs. Manohara and Velosa supported Dr. Pierce's diagnosis and, given the nature of the instruction to the jury and the prosecutor's argument, it was necessary to Mr. Lightsey's defense that the jury hear the details from the reports supporting Dr. Pierce's opinion testimony. As emphasized in cases like *Atkins v. Virginia, People v. Danks* [Justice Kennard's concurring and dissenting opinion], and *Williams*

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[59] Dr. Burdick's opinion about Mr. Lightsey cannot reasonably be construed as the product of an evaluation, since Mr. Lightsey refused to speak with him for more than a minute or two.

v. Cain, the reports from Drs. Manohara and Velosa were highly relevant because they supported and buttressed Dr. Pierce's opinion that Mr. Lightsey's mental illness and lack of insight into his own personality disorders and inability to assist with his defense rendered him less culpable and less deserving of the death penalty. Because the reports from Drs. Manohara and Velosa were relevant and reliable evidence and Dr. Pierce's opinion about Mr. Lightsey's father's conduct at the time of his psychiatric commitment would have heightened the overall reliability and weight of Dr. Pierce's opinion testimony, the erroneous exclusion of that evidence was not harmless beyond a reasonable doubt and Mr. Lightsey's judgment of death must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Fudge* (1994) 7 Cal.4th 1075, 1117; *Skipper v. South Carolina, supra,* 476 U.S. at pp. 7-9.)

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IX.

MR. LIGHTSEY'S SENTENCE OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT PREJUDICALLY ERRED IN ALLOWING THE JURY TO CONSIDER AN INVALID AND UNCONSTITUTIONAL 'FACTOR (B)' AGGRAVATOR DURING ITS PENALTY PHASE DELIBERATIONS.

A. Introduction

Under California's capital sentencing scheme, a sentence of death must be based on only valid 'aggravators.' (Pen. Code, § 190.3.) In Mr. Lightsey's case, however, the jury used an invalid aggravator to sentence him to death, requiring reversal of his sentence. Specifically, the prosecution argued in aggravation that merely clenching one's fists at one's side could constitute both the crime of resisting arrest under Penal Code section 148[60] and an implied threat of violence. The trial court agreed and instructed the jury that such a fist-clenching could appropriately be used to sentence Mr. Lightsey to death as "the use or attempted use of force or violence or the express or implied threat to use force or violence." (Pen. Code, § 190.3(b).)

Such behavior does not qualify as a violent act aggravator. (*People v. Quiroga* (1993) 16 Cal.App.4th 961, 966; *Houston v. Hill* (1987) 482 U.S. 451, 461; *Duran v. City of Douglas, Ariz.* (9th Cir. 1990) 1372, 1378.) The trial court therefore prejudicially erred in allowing consideration of this conduct as aggravation. (*People v. Boyd* (1985) 38 Cal.3d 762, 772-777.)

The error violated Mr. Lightsey's federal constitutional rights to a fair trial with due process of law, and to a proportionate and reliable verdict

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[60] The prosecution originally argued that Mr. Lightsey's standing with fists clenched at his side also constituted felony assault by an inmate (Pen. Code, § 4501), before withdrawing this even more implausible claim. (29 RT 6309-6310.)

of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.) It also breached his federal constitutional state law liberty interest right to due process to only have valid 190.3 aggravators be used to sentence him to death. (U.S. Const., Amends. 5, 14; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) As the facts and circumstances of this invalid aggravator were not available for consideration under another validly available sentencing factor, the sentence of death was unconstitutional and must be reversed. (*Brown v. Sanders* (2006) __ U.S. __, 126 S.Ct. 884, 892.)

B. Mr. Lightsey's Sentence Of Death Must Be Reversed Because It Was Infected And Made Unreliable By the Jury's Consideration Of An Invalid Factor B Aggravator.

1. Factual Basis Used For Aggravator and Objections By Defense.

Viewed in the light most favorable to the verdict, the factual basis for the improper aggravator can be summarized as follows: On April 2, 1995, Mr. Lightsey was an inmate in the Lerdo pre-trial detention facility for Kern County awaiting trial in the case at bar. (29 RT 6271.) Mr. Lightsey was housed in a two-person cell, but his cellmate had been apparently released earlier that day. (29 RT 6272, 6276; see also 29 RT 6352.) Kern County Deputy Sheriff Cristobal Juarez then entered and inspected Mr. Lightsey's cell, discovering an extra set of inmate clothing. (29 RT 6272, 6276-6277.)[61] (Inmates were only authorized one pair of socks, underwear, etc.) (29 RT 6272.)

Wakened from a nap in his cell bed during this discovery, Mr. Lightsey explained that he had told Deputy Juarez that the extra set of

[61] See also 8 CT 2240 (6/26/95 M.O. discussing Deputy Juarez's testimony.)

inmate clothing belonged to his cellmate who had just been released. (29 RT 6276-6277, 6354-6355.) Nevertheless, Deputy Juarez angrily ordered Mr. Lightsey to get up from his bed and stand against the wall, purportedly so Deputy Juarez could search Mr. Lightsey's bed for further contraband. (29 RT 6272-6273.)

Mr. Lightsey failed to respond with alacrity, much to the displeasure of Deputy Juarez. (32 RT 6272-6273.) When Mr. Lightsey did get up after a second request, he stood in the cell with his fists "clenched" by his sides and his feet spread, but never raised his hands, otherwise threatened Deputy Juarez, or made any verbal threats or even implied verbal threats. (29 RT 6274, 6277-6278.)[62] Based on Mr. Lightsey's failure to respond to his commands with alacrity and Mr. Lightsey's poor attitude, Deputy Juarez wrist-locked and handcuffed Mr. Lightsey and threw him to the ground.[63]

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[62] Though Deputy Juarez originally implied that Mr. Lightsey had raised his fists, i.e. "squared off" against the guard, he later conceded that Mr. Lightsey had only clenched his fists at his side and *never* raised his hands. (29 RT 6277-6278.)

[63] Mr. Lightsey denied that version of events, instead testifying that he had been thrown from his bed, hand-cuffed, and beaten without warning for mouthing off to the correctional officers that "I hate abusive cops," after Deputy Juarez wrote him up for a laundry violation for possession of the extra clothing. (29 RT 6355; see also 30 RT 6450-6451.) Mr. Lightsey also testified that Deputy Juarez then beat and kicked him while he was down, causing injuries to his wrist and ribs, though the deputy denied he had beat Mr. Lightsey. (29 RT 6354-6358; see also 29 RT 6275, 6278-6279.) Deputy Juarez did, however, concede that Mr. Lightsey had to be taken to the infirmary after being handcuffed and thrown to the ground. (29 RT 6279.)

Rather implausibly, Deputy Juarez testified that this was just standard operating procedure and jailhouse deputies always took wrist-locked inmates to the infirmary, though he provided no additional evidence of such an unusual policy. (29 RT 6279.) Given the frequency in which jail

(29 RT 6275, 6278.)

Trial counsel vigorously argued, and the prosecution and trial court conceded, that in order to use an unadjudicated prior act in aggravation under factor (b), it must be _both_ a violation of criminal law *and* an act of violence or implied threat of violence (29 RT 6311-6312); see also *People v. Boyd, supra*, 38 Cal.3d 762, 772 [factor (b) aggravators must constitute "criminal activity."]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1259 [same];

Trial counsel moved to strike Officer Juarez's testimony as irrelevant to the penalty determination, because, even if believed, it would not amount to a valid factor (b) aggravator.[64] (29 RT 6308; see also 8 CT 2240 [6/26/95 M.O.]) Persuasively, trial counsel noted that if it had been such a violent act of resistance, the notoriously aggressive Kern County District Attorney's Office would have prosecuted Mr. Lightsey. (29 RT 6309-6310.)

The trial court, however, improperly denied the motion to strike. (29 RT 6315.)

Trial counsel then renewed his objections a second time during in camera deliberations on the penalty phase jury instructions, arguing that Mr. Lightsey's conduct was neither a violent assault nor resistance to arrest.

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inmates are wrist-locked and placed in handcuffs, this would seem to be an unusually and unnecessarily time-consuming and expensive policy unique to Kern County, assuming such a policy actually existed, which is doubtful. Certainly no documentary evidence of such a policy was ever introduced by the prosecution at trial. For the purposes of this appeal, however, this argument assumes Deputy Juarez's version of events is true.

[64] Filing a motion to strike the testimony used to prove an invalid factor (b) aggravator is sufficient to preserve the issue for appellate review, even without a previous objection. (*People v. Boyd, supra*, 38 Cal.3d 762, 776, fn. 7.)

(31 RT 6793-6796.) Trial counsel cogently demonstrated that at most it was just a "failure to obey" an order and not an implied act of violence. (31 RT 6794.) The trial court again overruled this defense objection. (31 RT 6797.)

The trial court then specifically instructed the jury that they could use Mr. Lightsey's purported "[r]esisting Officer Juarez in the performance of his duties" to sentence him to death. (11 RT 2290 [modified CALJIC 8.87].)[65]

This ruling was prejudicially erroneous and constituted an abuse of the trial court's discretion, requiring reversal of Mr. Lightsey's death sentence.

2. The Act Did Not Constitute Resisting Arrest.

In order to be a valid factor (b) aggravator, an unadjudicated act must be "limited to conduct that demonstrates the commission of an actual crime, specifically the violation of a penal statute." (*People v. Walker* (1988) 47 Cal.3d 605, 639 ["ambiguous" threat did not amount to actual violation of solicitation to murder statute].) In the instant case, the prosecution proposed that Mr. Lightsey's actions constituted the "violation" of the "penal statute" of resistance to arrest. (*Ibid.*)

Yet section 148 only punishes anyone "who willfully resists, delays, or obstructs" a peace officer "in the discharge" of the officer's duties. (Pen. Code, § 148(a).) This law is not so broad that it covers the above-described actions of Mr. Lightsey. At its core, Mr. Lightsey's misconduct was in failing to respond to a jailer's command to get up and face the wall with sufficient "alacrity." Merely failing to respond to officer commands "with

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[65] See also 33 RT 6925-6926 [CALJICs 16.102 and 16.103, defining resisting arrest]

alacrity" does not constitute resisting arrest. (*People Quiroga, supra,* 16 Cal.App.4th 961, 966.)

In *Quiroga*, the defendant behaved far worse than Mr. Lightsey and yet no resistance to arrest was found by his actions. (*Ibid.*) In that case, as in Mr. Lightsey's case, the defendant initially refused to obey an officer's commands, but then eventually complied after repeated orders and physical pressure was applied by the officer. (*Ibid.*) Specifically, Mr. Quiroga at first refused an officer's lawful commands to sit down on a couch and then only reluctantly did so after heaping verbal abuse on the officer, implicating "officer safety" concerns. (*Id.* at p. 964.) While continuing to argue with the officer, Mr. Quiroga also made furtive gestures of reaching into his pocket. (*Ibid.*)

Even after eventually sitting down on the couch, Mr. Quiroga continued to make furtive gestures, as if grabbing something between the couch cushions, and continued to yell at the officer. (*Ibid.*) When ordered to stand up from the couch, he repeatedly refused to do so and the officer finally "pulled on his arm" to get him to comply. (*Ibid.*) These actions were far more extreme than Mr. Lightsey's mere slowness to get off his bed and passive standing with his fists clenched.

Nevertheless, the appellate court held that Mr. Quiroga's above-described actions were only a "failure to respond with alacrity to police orders" and did not implicate section 148. (*Id.* at p. 966.)[66]

Moreover, for purposes of analyzing whether a resistance to arrest

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[66] The *Quiroga* court *also* subsequently held that the defendant's later unrelated actions at the police station did constitute resistance to arrest, but that portion of the ruling involved *over a half an hour of repeated refusals* to obey lawful police orders and is not germane to the case at bar. (*People v. Quiroga, supra,* 16 Cal.App.4th 961, 967-969.)

has occurred it must be recalled that "the First Amendment protects a significant amount of verbal criticism and *challenge* directed at police officers." (*Houston v. Hill, supra*, 482 U.S. 451, 461, emphasis added; see also *City of Douglas, Ariz., supra*, 904 F.2d 1372, 1378 [same].)

Accordingly, no criminal violation of section 148 occurred via Mr. Lightsey's failure to respond to Deputy Juarez's commands with alacrity or enthusiasm. (*People Quiroga, supra,* 16 Cal.App.4th 961, 966.) Mr. Lightsey's acts in the instant case could therefore not be used as a valid aggravator, because even if Mr. Lightsey's acts could somehow be construed as an implied threat of violence, which they cannot, a "threat of violence which is not in itself a violation of a penal code is not admissible under factor (b)." (*People v. Pensinger, supra,* 52 Cal.3d 1210, 1259.)

3. The Act Did Not Carry An Implied Threat of Violence.

Even assuming Mr. Lightsey's actions did somehow violate section 148, under the facts outlined in Deputy Juarez's testimony they constituted neither an act of "violence," nor even an "implied" threat of violence. (Pen. Code, § 190.3(b).) The use of this aggravator was therefore improper. (*People v. Boyd, supra*, 38 Cal.3d 762, 776-777 [admission of evidence of nonviolent escape attempt erroneous].)

This Court has expressly recognized that activities constituting resistance to arrest can only serve as valid 'factor (b)' aggravators where they involve "*violent* episodes of resistance. [citation]." (*People v. Livaditis* (1992) 2 Cal.4th 759, 775, emphasis added.) In *Livaditis*, this Court conceded that non-violent forms of resistance to arrest could not serve as valid factor (b) aggravators, but held that the resistance in that case could appropriately be used as an aggravator because Mr. Livaditis "forcibly" resisted and inflicted "subsequent batteries" involving "force or

violence" against the officers. (*Id.* at pp. 775-777.)

Mr. Lightsey's passive actions were hardly part of a "course of criminal activity which includes force or violence" and could therefore not serve as a valid 'factor (b)' aggravator. (*Id.* at p. 776.) Mr. Lightsey never directly threatened Deputy Juarez with violence. Nor did he ever raise his fists to imply violence. Nor did Mr. Lightsey ever make any verbal threats to Deputy Juarez, implied or otherwise. He was only slow to respond and a disrespectful inmate. In short, there was no implied threat of violence, making this an invalid factor (b) aggravator and its admission an abuse of the trial court's discretion. (*People v. Livaditis, supra,* 2 Cal.4th 759, 775.)

C. The Error Violated Mr. Lightsey's Constitutional Rights To A Fair Trial, Due Process, And A Reliable And Proportionate Verdict.

The improper use of this invalid aggravator improperly caused the jury to unconstitutionally add this incident to "death's side of the scale," thereby rendering the penalty determination unreliable and disproportionate, as well as violating Mr. Lightsey's rights to due process of law. (*Stringer v. Black* (1992) 503 U.S. 222, 232; see also *California v. Brown* (1987) 479 U.S. 538, 543 [discussing heightened need for reliability in capital cases; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [same].) Given the heightened need for reliability in capital cases and the jury's use of an invalid aggravator to sentence Mr. Lightsey to death, the death verdict is simply too uncertain to be allowed to stand. (*Woodson v. North Carolina, supra,* 428 U.S. 280, 305; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358.)

Put another way, the use of this invalid aggravator caused an "infection" of the capital sentencing process in Mr. Lightsey's case, thereby undermining its reliability. (*Stringer v. Black, supra*, 503 U.S. 222, 231.)

This violated the well-settled rule that a capital sentence requires a heightened degree of reliability and is subject to close appellate scrutiny. (*Johnson v. Mississippi* (1988) 486 U.S. 578; *Zant v. Stephens* (1983) 462 U.S. 872; *Woodson v. North Carolina, supra*, 428 U.S. 280.)

Moreover, the fact that other available aggravators were available in Mr. Lightsey's case does not absolve the error. As the United States Supreme Court has recently announced in a new rule: "[a]n invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances," which was not the case in Mr. Lightsey's trial. (*Brown v. Sanders, supra*, __ U.S. __, 126 S.Ct. 884, 992, emphasis in original.)

In addition, the violation of Mr. Lightsey's state law right to have only valid section (b) aggravators used against him in the penalty phase also violated his state law "liberty interest" to due process of law. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.) It also violated Mr. Lightsey's state constitutional right to due process of law. His sentence of death is therefore invalid on these separately raised and independently prejudicial state and federal constitutional grounds as well.

Mr. Lightsey may have failed to respond to Deputy Juarez's commands with alacrity. Mr. Lightsey may have been disrespectful to Deputy Juarez. Mr. Lightsey may even have been a headache to the jailors in his cellblock. However, Mr. Lightsey did *not* deserve to have slowness to respond to Deputy Juarez be used as a means of sending him to his death

As the error violated his state and federal constitutional rights to due process of law and a reliable and proportionate verdict, Mr. Lightsey's

sentence of death must be reversed. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.)

D. The Error Requires Reversal Of Appellant's Sentence Of Death.

1. Per Se Reversal Is Required.

As the U.S. Supreme Court has now held in *Brown v. Sanders* the error in considering an invalid aggravator "render[s] the sentence unconstitutional" without any showing of prejudice, "unless one of the other sentencing factors enables" the jury to consider the same "facts." (*Brown v. Sanders, supra*, __ U.S. __, 126 S.Ct. 884, 992, emphasis in original.)

Put another way, "when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." (*Brown v. Sanders, supra*, __ U.S. __, 126 S.Ct. 884, 892, citing *Stringer v. Black, supra*, 503 U.S. at 232.)

In Mr. Lightsey's case, there were no other aggravating factors that would allow the jury to properly consider the same "facts" as this incident with Deputy Juarez, making Mr. Lightsey's sentence of death "unconstitutional" as a matter of law and per se reversible without any showing of actual prejudice. (*Ibid.*)

2. The Error Was Prejudicial.

Even if the old rule of harmless error analysis somehow still applied to Mr. Lightsey's case, this error could hardly be shown to be harmless beyond a reasonable doubt. (*Stringer v. Black, supra*, 503 U.S. 222, 230; *Chapman v. California, supra*, 38 U.S. 18, 24.) The prosecution made this incident one of the centerpieces of both her opening statement and closing

arguments in favor of sentencing appellant to death.[67] During opening statements, she stressed that Mr. Lightsey was worthy of death because he had "threatened" a correctional officer while awaiting trial. (29 RT 6235.)

During closing arguments she returned to this theme with a vengeance, arguing that "when Lightsey squared up to Officer Juarez, clenched his hand at his sides as Officer Juarez demonstrated, then that is an implied threat to use force or violence, and you can consider that as a factor in aggravation." (32 RT 6836-6837.)

Beyond arguing that this act of "violence" made Mr. Lightsey worthy of death, she also hammered home the theme that it made him a severe "danger to correctional officers," because it showed his was someone who was "willing to fight with a correctional officer." (32 RT 6849.) She repeated this argument more than once, stressing that merely clenching one's fists without doing anything more made Mr. Lightsey a "potential danger" to "correctional officers," and requiring him to be sentenced to death, rather than merely life without the possibility of parole (LWOP). (32 RT 6850.)

A prosecutor's "heavy emphasis" on an invalid aggravator during "closing arguments" is one of the main tools to analyze the prejudice of the admission of such an invalid aggravator. (*People v. Walker, supra*, 47 Cal.3d 605, 640 [error harmless where no emphasis on invalid aggravator during closing arguments].) Here the prosecution's "heavy emphasis" on the invalid aggravator during closing arguments was extremely prejudicial because she forcefully stressed that anything short of a sentence of death would place correctional officers at too great of a risk, requiring the jurors to forego showing mercy to Mr. Lightsey. (*Ibid.*; see also 32 RT 6849,

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[67] The Prosecution also used the incident as a grounds for denying the

6850.) But for the improper use of this invalid aggravator, the jury therefore may well have shown mercy to appellant and sentenced Mr. Lightsey to mere LWOP.

As Shakespeare reminds us, the "'quality of mercy is not strain'd, It droppeth as the gentle rain from heaven Upon the place beneath.' So too, in [a] analysis of prejudice, we must remind ourselves that the possibility of mercy, like the possibility of gentle rain, is not predictable with certainty." (*Mayfield v. Woodford* (9th Cir. 1991) 270 F.3d 915, 938 [conc. opn.], citing William Shakespeare, *The Merchant of Venice*, act IV, sc. 1.) This axiom is especially apt in the case at bar given the substantial mitigating evidence introduced in the form of Mr. Lightsey's profound mental impairments, evidence supporting lingering doubt due to his unusually strong alibi defense, and his mitigating and tragic social history.

As the improper aggravator may have affected Mr. Lightsey's verdict, his sentence of death must accordingly be reversed under long-held principles of "*in dubiis benigniora sunt semper prefenda.*" (Dig.[68] 50.17.56.) As the United States Supreme Court has explained, this venerable legal maxim mandates that in "all cases of doubt the most merciful construction of facts should be preferred." (*Coffin v. United States* (1895) 156 U.S. 432, 454.)

Given the uncertainty and unpredictability of the jury's mercy deliberations during the penalty phase and the prejudice caused by the error, the use of this invalid 'factor (b)' aggravator simply cannot be shown

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defense motion to modify the death penalty. (33 RT 6987.)

[68] "Dig." Refers to the 'Digesta' of Byzantine emperor Justinian I, circa 530 A.D. The 'Digesta' was a comprehensive legal code that was prepared on his orders and became the basis for many of the fundamental legal principles still present in Anglo-American common law.

to be "harmless beyond a reasonable doubt" and Mr. Lightsey's sentence of death must be reversed. (*Chapman v. California, supra*, 38 U.S. 18, 24.) Even under California's lesser standard, the prosecution's reliance on this invalid aggravator as one of the primary arguments for death makes plain that there was a "reasonable possibility" that the jury would have returned a life sentence absent the error. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) Accordingly, Mr. Lightsey's sentence of death must be reversed.

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X.

THE TRIAL COURT'S DENIAL OF MR. LIGHTSEY'S REQUEST TO ADDRESS THE JURY BEFORE HIS PENALTY VERDICT WAS ANNOUNCED VIOLATED HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO ALLOCUTION AND REQUIRES THE REVERSAL OF HIS JUDGMENT OF DEATH

A. Introduction

The right to allocution has a lengthy history dating back to England's common law in the 17th Century. When the State of New York enacted its Constitution in 1777, it included the English common law among its provisions and later codified that law in its 1850 draft Code of Criminal Procedure. When California's first Code of Criminal Procedure was drafted in 1850, the Legislature adopted almost verbatim the provisions from New York's draft Code, including the common law right to allocution. Though not without some controversy, courts in California have held that California's Legislature codified California's common law right to allocution in Penal Code sections 1200 and 1201 when it enacted those provisions in 1872.[69]

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[69] Penal Code section 1200 provides as follows:

"When the defendant appears for judgment he must be informed by the Court, or by the Clerk, under its direction, of the nature of the charge against him and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him."

Penal Code section 1201 provides as follows:

"He or she may show, for cause against the judgment:

"(a) That he or she is insane; and if, in the opinion of the court, there is reasonable ground for believing him or her insane, the question of insanity shall be tried as provided in Chapter 6 (commencing with Section

Well over forty years ago, the United States Supreme Court recognized the vitality and continued importance to criminal defendants of the right to allocution. Though the Supreme Court has held that criminal defendants do not have a constitutional right to be asked whether they have anything to say before their sentencing judgment is pronounced, the Supreme Court has never addressed the different question presented by Mr. Lightsey's case. That is, whether a trial court violates a defendant's federal constitutional right to due process when it denies his or her request to address the jury and/or court before the sentencing judgment is pronounced. Given the Supreme Court's failure to resolve this question, many lower federal and state courts have considered the history and importance of the common law right to allocution and relevant authority from the Supreme Court and concluded that allocution is a fundamental right guaranteed to all criminal defendants by the right to due process. For the reasons discussed below, Mr. Lightsey respectfully requests that this Court reconsider its prior rulings and join other federal and state courts in extending the right to allocution to capital defendants in California.

B. The Trial Court's Order Removing Mr. Lightsey From The Courtroom During The Penalty Phase, The Court's Subsequent Order Allowing Him To Return, And The Court's Denial Of His Request To Allocute Before The Jury's Penalty Verdict Was

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1367) of Title 10 of Part 2. If, upon the trial of that question, the jury finds that he or she is sane, judgment shall be pronounced, but if they find him or her insane, he or she shall be committed to the state hospital for the care and treatment of the insane, until he or she becomes sane; and when notice is given of that fact, as provided in Section 1372, he or she shall be brought before the court for judgment.

"(b) That he or she has good cause to offer, either in arrest of judgment or for a new trial; in which case the court may, in its discretion, order the judgment to be deferred, and proceed to decide upon the motion in arrest of judgment or for a new trial."

Announced

Just before the lunch recess on June 29, 1995, after the close of evidence in the penalty phase, the trial court ordered Mr. Lightsey removed from the courtroom and placed in a back room where he could monitor the proceedings via television. (32 RT 6875, 6879, 6880.) According to the court, it decided to remove Mr. Lightsey because of his "interruptive and numerous interruptive remarks . . . [that] interfer[red] with his own counsel and his own expert witness." (32 RT 6875, 6879, 6939.) The court ordered further that Mr. Lightsey would be bound and gagged with duct tape, if he engaged in disruptive conduct in the back room. (32 RT 6881.)

When the proceedings reconvened at 2:00 PM on June 29, 1995, the trial court announced that it was going to replace Juror Chapin because of his "heart problem." (32 RT 6879-6883.) The court discussed jury instructions with counsel and advised jurors of Mr. Lightsey's status and the need to select an alternate juror, counsel gave their closing arguments, and the court instructed the jury. (32 RT 6884-6932.) The jury began its deliberations in the late afternoon and deliberated until the evening recess on June 29, 1995. (32 RT 6932-6936.) Jurors resumed deliberations at 9:00 AM on June 30, 1995, and at 10 AM, advised the trial court that they had reached a penalty verdict. (32 RT 6932-6939.)

After advising counsel that the jury had reached a verdict, the court allowed defense counsel to talk with Mr. Lightsey. The judge said he could be present for the reading of the verdict if he wished, but only if he promised not to "make any outbursts or interfere with the proceedings." (32 RT 6939-6940.) Though counsel could not guarantee Mr. Lightsey's compliance with the court's conditions, the court allowed his return to the courtroom. (32 RT 6940.)

After Mr. Lightsey was back in court, defense counsel advised the

court that Mr. Lightsey wanted "to make a statement to the jury." (32 RT 6941-6944.) The court refused by saying

> "He's made too many statements to this jury.
>
> We have a juror in this case that had to be excused because of the stress that that juror was put under by, amongst other things, Mr. Lightsey's conduct and his remarks. And I'm not going to allow him to impose any further anxieties or stresses on these jurors. So that request is denied.
>
> "Anything further?"

(32 RT 6945.)

> Mr. Lightsey answered the court's query by saying, "[y]ou can't blame me for that elderly man's heart condition." (32 RT 6945.) The court responded
>
> "Mr. Lightsey, you're here with the representation through your counsel that you're going to not blurt out things such as you have done. You understand that?"

(32 RT 6945.)

> Mr. Lightsey replied
>
> "Yes. I just resent the accusation that you blame me for the elderly man's --"

(32 RT 6945.)

After cutting off Mr. Lightsey in mid-sentence, the court ruled "All right. Take him out of here. Put him back into the jury room. We'll proceed with a verdict reading here without his presence."(32 RT 6945.)

C. Applicable Law And Standard Of Review

In *Boardman v. Estelle* (9th Cir.1992) 957 F.2d 1523, the United States Court of Appeals for the Ninth Circuit considered whether the California state court violated defendant's federal constitutional right to due process by denying his <u>request</u> to the address the court before sentencing. The Court of Appeals concluded that because sentencing is a critical stage

of the criminal process to which due process guarantees apply and the right to allocution is akin to a defendant's right to present a defense, it held that the California court violated the defendant's right to due process by denying his request to address the court prior to sentencing. (*Id.,* at pp. 1525-1528.) According to the Court of Appeals,

> "The requirements of due process 'cannot be ascertained through mechanical application of a formula,' but are determined by '"history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess."' [Citation.] In the context of criminal law, the backbone of that democratic faith is the right of a criminal defendant to defend himself against his accusers; and it has long been recognized that allocution, the right of the defendant to personally address the court, {Fn. omitted.] is an essential element of a criminal defense. Specifically, the right of allocution 'contemplates an opportunity for the defendant to bring mitigating circumstances to the attention of the court.' [Citation.]"

(*Id.,* at p. 1526.)

The *Boardman* court discussed the history of the right to allocution and noted that as early as 1689, English courts held that the denial of allocution required the reversal of the penalty judgment. (*Ibid.*) Though recognizing that most of the reasons for allocution under English common law – that most crimes were subject to the death penalty and defendants had no right to counsel or to testify in their own behalf – are no longer fully applicable because criminal trials have evolved significantly over time, the Court of Appeals held

> "the interests supporting the right of a defendant personally to address his sentencer have remained constant. In this regard, the [United States] Supreme Court found in 1961 that allocution is still a vital part

of the sentencing process."[70]

(*Ibid.*.)

In *Hill v. United States* (1962) 368 U.S. 424, a case decided the year after *Green,* the Supreme Court held that a judge's failure to ask a criminal defendant if he or she had anything to say before sentence was pronounced was "not an error of Constitutional dimension." (*Boardman v. Estelle, supra,* 957 F.2d at p. 1526.) According to the Court of Appeals, the decision in *Hill*, however, left open the different and more specific question of whether a trial court's denial of the defendant's request for allocution violates his federal constitutional right to due process. (*Id.,* at pp. 1526-1527.) In attempting to answer this unresolved question, the *Boardman* court looked to Supreme Court decisions after *Hill* to determine if the high court has provided any "hint[s]" about how it would rule on this question. (*Id.,* at p. 1527.)

The *Boardman* court first looked to *United States v. Behrens* (1963) 375 U.S. 164, 164-167, and noted that Justice Black's opinion for the court provided that allocution is "a right 'ancient in the law,' which the defendant must be allowed to invoke just prior to sentencing [Citation.]" and Justice Harlan's concurring opinion provided that allocution is an "'elementary right'" embodied in Rule 32 of the Federal Rules of Criminal Procedure. (*Boardman v. Estelle, supra,* 957 F.2d at p. 1527.) Similarly, the *Boardman* court looked to *McGautha v. California* (1971) 402 U.S. 183, 217-219, and recognized that "[t]he Court assumed without deciding that the Constitution does require that the trial court permit a defendant to speak at sentencing if he so requests. [Citation.]" (*Boardman v. Estelle, supra,* 957 F.2d at p. 1527.) Based on these cases, the Court of Appeals

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[70] See *Green v. United States* (1961) 365 U.S. 301, 304.

concluded that the high court would view the right to allocution as a basic fundamental right guaranteed by the federal Constitution.

Beyond these and other decisions from the United States Supreme Court,[71] the *Boardman* court also looked to decisions from its sister Circuit Courts of Appeals in concluding that the right to allocution is a fundamental, constitutional right guaranteed by due process. (See *Boardman v. Estelle, supra,* 957 F.2d at pp. 1529-1530, citing *Ashe v. North Carolina* (4th Cir.1978) 586 F.2d 334; *United States v. Moree* (5th Cir.1991) 928 F.2d 654, 656; *United States v. Jackson* (11th Cir.1991) 923 F.2d 1494, 1496; but see *United States Flemming* (11th Cir. 1988) 849 F.2d 568, 569.)

In *United States v. Chong* (D.Hawaii 1999) 104 F.Supp.2d 1232, the United States District Court considered the Government's written motion arguing that defendant's right to allocution under the Federal Rules of Criminal Procedure had been abrogated by the Federal Death Penalty Act. In its alternative oral motion, the Government asked that defendant's allocution be limited to a plea for mercy and he be prevented from discussing any facts the Government believed were in controversy, unless he agreed to testify and be subject to cross-examination. Even though the decision in *Boardman* involved a noncapital defendant, the district court believed that the case's analysis and holding were compelling and should apply to capital defendants with equal force. After carefully considering

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[71] The *Boardman* court also considered the Supreme Court's decisions in *Adams v. United States ex rel McCann* (1942) 317 U.S. 269, 279-280, and *Faretta v. California* (1975) 422 U.S. 806, 815, in rejecting the State's argument that a defendant waives any right to allocution by agreeing to be represented by counsel. (*Boardman v. Estelle, supra,* 957 F.2d at pp. 1527-1528.)

the relevant authorities and noting that some courts have reached a different conclusion for capital defendants because they have the right to testify in their own behalf, the district court concluded it was

> "not so sanguine that the right to allocute can be equated with the opportunity to testify under oath and subject to cross-examination. The Court observes that the fear of cross-examination might compel capital defendants to forego addressing the jury and offering pleas for mercy, expressions of remorse, or some explanation that might warrant a sentence other than death. Moreover, the Court sees no reason why a capital defendant should have a lesser right to explain his position and ask for mercy by being sworn and subject to cross-examination than a non-capital defendant, who has an unfettered right to allocute. [Fn. omitted.] Therefore, the Court is not persuaded that these authorities have identified a relevant distinction."

(*Id.,* at p, 1236.)[72]

In addressing the Government's oral motion to limit the defendant's allocution to a plea for mercy, the district court noted that California attempted to limit allocution in *Boardman* by claiming there should be no

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[72] In his concurring and dissenting opinion in *State v. Colon* (2004) 272 Conn. 106, 402-410 [864 A.2d 666, 842-846], Justice Katz extensively cited to the decision in *Chong* and "conclud[ed] that the common-law right of allocution entitles a capital defendant personally to address the sentencing jury and plead for mercy without subjecting himself to cross-examination." Further, Justice Katz recognized that the purposes of capital sentencing schemes are furthered by the right of allocution because it protects the defendant's interest in "receiving individualized consideration in the face of the death penalty. [Fn. omitted.]" (*Id.,* at pp. 408-409.) Finally, Justice Katz noted that the right to allocution is not unlimited, but should involve a plea for mercy and facts already in evidence, combined with a limiting instruction [like the one in *Chong*] to preserve the reliability and accuracy of the capital sentencing proceeding. (*Id.,* at p. 409, fn. 6.)

such right if the defendant has committed highly offensive crimes. (*Ibid.*) After finding that the *Boardman* court correctly dismissed this argument as offensive to civilized notions of due process, the district court held that because

> "allocution is of constitutional importance, and that factual matters pertaining to Defendant's guilt will have been resolved during the guilt phase of the trial, the Court hereby DENIES the Government's request to limit Defendant's allocution to non-factual matters such as a plea for mercy."

(*Ibid.*)[73]

Unlike in *Boardman* and *Chong* and other such federal and state cases adopting their analysis and holding, this Court has refused repeatedly to find that capital defendants in California have a right to allocution. In *People v. Robbins* (1988) 45 Cal.3d 867, 888-890, defense counsel requested twice during the penalty phase that defendant be allowed to personally address the jury without having to take the stand and be subject to cross-examination. The trial court denied the requests and defendant was sentenced to death.

On appeal, defendant argued that the trial court's refusal to allow him to address the jury violated his federal constitutional right to due process under *Ashe v. North Carolina, supra,* 586 F.2d at p. 336. This Court rejected defendant's claim by finding that even if *Ashe* was correct

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[73] The district court did require that a limiting instruction be given to remind jurors that defendant's statement was not under oath and subject to cross-examination. For that reason, it cautioned that defendant should consider carefully what to say in allocution because jurors likely would give greater weight to the testimony of witnesses who were sworn and subject to cross-examination. (*United States v. Chong, supra,* 104 F.Supp.2d at p. 1234, fn 5, and p. 1236, fn. 9.)

about there being a constitutional right to allocution, it was distinguishable because involved a noncapital defendant who generally did not have the opportunity to testify about the penalty he felt was appropriate. Because capital defendants in California have the right to testify in their own behalf during the penalty phase, this Court held

> "we fail to see the need, much less a constitutional requirement, for a corresponding 'right to address the sentencer without being subject to cross-examination' in capital cases."

(*People v. Robbins, supra,* 45 Cal.3d at page 889.)

As further support for his claim, the defendant in *Robbins* cited the decision in *Harris v. State* (1986) 306 Md. 344, 509 A.2d 120, where the Maryland Supreme Court held that capital defendants have the right to address their sentencing jury without subjecting themselves to cross-examination. This Court found that *Harris* too was distinguishable because it was based only on Maryland's common law and rules of court and defense counsel made an offer of proof about what defendant planned to say, something this Court concluded was of great significance to the decision in *Harris*. (*People v. Robbins, supra,* 45 Cal.3d at pp. 889-890.) Because the defendant in *Robbins* failed to show that his claimed right to allocution was based on California's "'common law'" and defense counsel failed to make an offer of proof about what defendant proposed to say, this Court held that even the *Harris* court would have rejected the defendant's claim. (*People v. Robbins, supra,* 45 Cal.3d at p. 890; see also *People v. Clark* (1993) 5 Cal.4th 950, 1036-1037 [analyzing the decision in *Boardman v. Estelle, supra,* 957 F.2d 1523, and finding that if correct, it, like *Ashe v. North Carolina, supra,* 586 F.2d at p. 336, should be limited to noncapital defendants]; *People v. Lucero* (2000) 23 Cal.4th 692, 717-718; *People v. Cleveland* (2004) 32 Cal.4th 704, 766.)

In *In re Shannon B.* (1994) 22 Cal.App.4th 1235, 1242-1246, the Court of Appeal considered the history of allocution in California and concluded that it is a right guaranteed by this state's common law and was codified in Penal Code sections 1200 and 1201 when those provisions were enacted by the Legislature in 1872. (See also *People v. Ornelas* (2005) 134 Cal.App.4th 485, 487-488.)[74]

More recently, in *People v. Evans* (2006) 135 Cal.App.4th 1178, 1182-1186, the Court of Appeal revisited the decision in *Shannon B,* and rejected its holding that Penal Code sections 1200 and 1201 codified the right to allocution in California. Because it concluded that these statutes do not provide for a right to allocution, the *Evans* court rejected defendant's claim that his rights under these statutes were violated when the court denied his request to allocute at sentencing.

In Evan's related claim, he argued that the trial court violated his federal constitutional right to due process by denying his request to speak at sentencing. In addressing this claim, the *Evans* court recognized that the United States Supreme Court still has not decided whether "due process is violated when the [criminal] defendant requests, and is denied, the opportunity to speak. [Citations.]" (*People v. Evans, supra,* 135 Cal.App.4th at pp. 1185-1186.) Based on that recognition, the *Evans* court elected not to follow the decision in *Boardman v. Estelle,* 957 F.2d 1523. Even though it decided not to follow *Boardman,* the *Evans* court held that

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[74] In *People v. Lucero, supra,* 23 Cal.4th at pp. 717-718, this Court recognized the holding in *Shannon B.*, but noted there is a split of authority in the Courts of Appeal about whether noncapital defendants in California are entitled to allocution as a matter of right. Although it acknowledged this split of authority, this Court did not reject the analysis or holding in *Shannon B.* about the origins of the right to allocution in California.

defendant suffered no prejudice from the denial of his request to allocute [see *Chapman v. California* (1967) 386 U.S. 18, 24] because there was no possibility he would have received a lesser standard. (*People v. Evans, supra,* 135 Cal.App.4th at p. 1186.)

D. The Trial Court's Refusal To Grant Mr. Lightsey's Request To Allocute Before The Jury Violated His Federal And Statutory Rights To Allocution And Requires The Reversal Of His Penalty Judgment

As recognized in *United States v. Chong, supra,* 104 F.Supp.2d at p. 1236, there is no reason for treating capital defendants different than noncapital defendants regarding their federal constitutional right to allocution, especially because disparate treatment might negatively affect the individualized nature, accuracy and reliability of the capital sentencing proceeding. In *People v. Lucero, supra,* 23 Cal.4th at pp. 717-718, the defendant claimed it violated his right to equal protection under the law to deny capital defendants like him the right to allocution, but grant this right to noncapital defendants in California. In rejecting defendant's claim, this Court concluded that

> "no court has held that in a noncapital case a trial court must, on its own initiative, offer the defendant allocution. Thus, here the trial court did not violate defendant's right to equal protection when it did not, on its own initiative, make defendant such an offer."

(*People v. Lucero, supra,* 23 Cal.4th at p. 718.)

Though the *Lucero* court correctly recognized that Courts of Appeal in California are split about whether noncapital defendants have the right to allocution with or without a request and whether Penal Code sections 1200 and 1201 codify that right, it remains that the Courts of Appeal in *People v. Skinner* (1966) 241 Cal.App.2d 752, 756-758 [court erred by failing to offer allocution in noncapital case, reversal required], *In re Shannon B., supra,*

22 Cal.App.4th 1235 [court erred by denying request for allocution in juvenile case pursuant to Pen. Code § 1200, but not prejudicial], and *People v. Ornelas, supra,* 134 Cal.App.4th 485 [court erred by failing to offer allocution in noncapital case, but not prejudicial], together can be read to find that Courts of Appeal in California have held that trial courts must advise noncapital defendants in California about their right to allocution. Given all these decisions, it must be concluded that the trial court violated Mr. Lightsey's right to equal protection of the law under the Fourteenth Amendment to the United States Constitution by denying his request to allocute before the penalty jury's verdict was pronounced.

Similarly, the decisions in *Boardman v. Estelle, supra,* 957 F.2d 1536, and *United States v. Chong, supra,* 104 F.Supp.2d at p. 1236, and their rationale from relevant decisions of the United States Supreme Court about the right of allocution and its importance demand the conclusion that the trial court also violated Mr. Lightsey's right to due process under the Fourteenth Amendment to the United States Constitution by denying his request to address the jury. Accordingly, the inquiry must turn to prejudice.

It beyond dispute that the Eighth Amendment to the United States Constitution demands that capital sentencing decisions be individualized and reliable and the defendant may not be barred from introducing any relevant mitigating evidence deemed necessary to his or her penalty defense. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4-8; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112-116; *Lockett v. Ohio* (1978) 438 U.S. 586, 597-605 (plur. opn. by Burger, C.J.).) It follows that the Eighth Amendment also requires that a jury and its individual members must not be prevented from considering any such relevant mitigating evidence in deciding defendant's penalty. (*McKoy v. North Carolina* (1990) 494 U.S. 43, 435-441; *Skipper v. South Carolina, supra*, 476 U.S. at p. 4; *Eddings v.*

Oklahoma, supra, 455 U.S. at p. 114, 102 S.Ct. at p. 877.) Finally, as urged by Justice Katz in his forceful and persuasive dissenting opinion in *State v. Colon, supra,* 272 Conn. at pp. 408-409, the right to allocution furthers, rather than hinders, the goals of individualized consideration, accuracy and reliability in a capital sentencing proceeding by allowing the defendant personally to urge the jury to grant him mercy for the reasons only he or she can best articulate. (See also *State v. Lord* (1991) 117 Wash.2d 829, 897 [822 P.2d 177, 216], allocution involves a plea for mercy and allows defendant to present information in mitigation, but not testify about contested issues before the jury].)

Mr. Lightsey's penalty jury deliberated only briefly before announcing they had reached a verdict of death. Though Mr. Lightsey testified under oath at the penalty phase of his trial and was subject to cross-examination, an inspection of the entire record establishes that he struggled throughout his trial to address the jury, but his attempts to do so were consistently thwarted by the court, counsel, and/or the bailiff. Dr. Pierce concluded that Mr. Lightsey was seriously mentally ill and opined that he did not deserve the death penalty for that reason. Because Mr. Lightsey was prevented from addressing the jury in allocution, the jury was denied the opportunity to see first hand the nature and extent of his mental illness in deciding whether to give effect to the doctor's opinion he should not be put to death.

It takes no stretch of the imagination to conclude that Mr. Lightsey's allocution would have involved his claims that he did not commit the crimes against Mr. Compton and he was being "railroaded" by the criminal justice system in Kern County, the same things he tried to express many times throughout his trial but was prevented from fully articulating. As such, Mr. Lightsey's allocution would have consisted of information

considered and rejected by the jury that found him guilty of the charged offenses and not matters contested by the prosecution at this stage of the proceedings. Because it was necessary to Mr. Lightsey's penalty defense that the jury see for themselves just how profoundly mentally disturbed he was in order to give effect to Dr. Pierce's testimony and spare him from the death penalty, the trial court's refusal to allow allocution is not harmless under the federal or state standards of review and requires that his judgment of death be reversed. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

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XI.

MR. LIGHTSEY'S SENTENCE OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT PREJUDICALLY ERRED IN FAILING TO INSTRUCT THE JURORS TO DISREGARD THE FACT THAT HE WAS VISIBLY SHACKLED THROUGHOUT HIS PENALTY PHASE PROCEEDINGS.

A. Introduction

As previously demonstrated in Argument VII 3, Mr. Lightsey was visibly shackled throughout his guilt phase proceedings. The trial court prejudicially erred in failing to give a curative admonition using CALJIC 1.04 to not consider the shackles during their deliberations. This error was repeated in the penalty phase, where the trial court again failed to instruct the jurors with CALJIC 1.04. Yet as the United States Supreme Court recently reaffirmed, the risk of a jury being prejudiced by seeing a defendant in shackles is even more of a problem during the penalty phase of a capital murder trial. (*Deck v. Missouri* (2005) 544 U.S. 622 [125 S. Ct. 2007, 2012] [reversing death sentence due to shackling errors].) Increasing the inherent prejudice of the trial court's error, Mr. Lightsey testified in shackles during the penalty phase, something that did not occur during the guilt phase. (29 RT 6338-6522.)

This error also violated Mr. Lightsey's federal constitutional rights to a fair trial, to due process of law, and to a proportionate and reliable verdict of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.) It also breached his federal constitutional state law liberty interest under California law to receive proper jury instructions. (U.S. Const., Amends. 5, 14; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) As the error in failing to instruct was prejudicial, Mr. Lightsey's sentence of death must be reversed. (*Deck v. Missouri, supra,* 544 U.S. 622 [125 S. Ct. 2007, 2015-2016], citing *Chapman v. California, supra*, 386

U.S. 18, 24.)

B. The Trial Court Erred In Failing To Instruct The Jury With CALJIC 1.04.

1. The Shackles Were Visible.

As previously briefed in more detail in Argument VII, *supra*, Mr. Lightsey's shackles were obvious and visible to the jury. Mr. Lightsey was "shackled to a bolt in the floor." (6 RT 1166-1167.) From his pre-trial proceedings through his penalty phase, Mr. Lightsey was "hand-cuffed" and had waist "shackles" bolted to the floor. (4/7/94 RT 13 [discussing scope of shackling]; 3/23/95 RT 116-118 [linking of cuffs to shackles prevents Mr. Lightsey from being able to get into his notebook, writing notes to his attorney]; 8/2/94 RT 215 [linking of cuffs to shackles stops Mr. Lightsey from grabbing pleadings to examine]; 4/5/95 RT 347 [linking of cuffs to shackles stops Mr. Lightsey from handling photos; 3/23/95 RT 115.)[75]

This system of shackles and cuffs was so bulky that they made "noise" so loud that it was "interrupting the Court with" Mr. Lightsey's "chains." (1 RT 116.) Mr. Lightsey also tried to stand up at least once before the jury, making it more than obvious that the jurors could see his extreme shackling. (2 RT 348.) As the Court noted when discussing options for Mr. Lightsey's crime scene view, whenever Mr. Lightsey moved he was literally "dragging chains." (3 RT 640-641.)

As the trial court put on the record during the penalty phase of trial, it continued to have "him in the usual secure shackles that he been in during the proceedings here in the courtroom" during the guilt phase of trial. (33

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[75] Prior to the empanelment of the jury, Mr. Lightsey's handcuffs were linked to his waist shackles. During trial, his arms were freed by unlinking his handcuffs from his waist shackles. (4/13/95 RT 540-541.)

RT 6941.) This shackling of a system was also made even more obvious during the penalty phase when Mr. Lightsey gave testimony from the witness chair while in shackles. (29 RT 6338 – 30 RT 6522.)

2. CALJIC 1.04 Was Required.

As already demonstrated in Argument VII *supra*, California law is well-settled that when "visible restraints" are imposed, the "court shall instruct the jury *sua sponte* that such restraints shall have no bearing on the determination of the defendant's guilt." (*People v. Duran, supra*, 16 Cal.3d 282, 291-292; *People v. Mar* (2002) 28 Cal.4th 1201, 1217 [accord]; see also *People v. George* (1994) 30 Cal.App.4th 262, 272-273; *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1825-1826; CALJIC 1.04; ABA Standards (1968) Trial by Jury, § 4.1(c).)

The trial court was, in fact, aware of its duty to instruct the jury under *People v. Duran* (1976) 16 Cal.3d 282, specifically noting at the beginning of trial that that: "When visible restraints must be imposed, the court must instruct the jury *sua sponte* that the restraints should have no bearing on determining the defendant's guilt." (3 RT 507.) Both currently and at the time of Mr. Lightsey's trial, the Use Note for CALJIC 1.04 also made plain that the instruction must be given *sua sponte.* (*People v. George, supra*, 30 Cal.App.4th 262, 273, citing CALJIC 1.04 (1992 New) Use Note.) For unexplained reasons, the trial court failed to do at the guilt phase of trial. (See also Arg. VII.)

The trial court committed an even more egregious error in *also* failing to give this same instruction at the penalty phase. Though California case law has not directly addressed the issue of whether CALJIC 1.04 is required in the penalty phase, it is well-settled that such an instruction is necessary at *any* trial proceedings before a jury, including

bifurcated proceedings such as a penalty phase and not just in the guilt phase of a trial. (*People v. Givan* (1992) 4 Cal.App.4th 1107, 1117 [*Duran* rule applies to bifurcated enhancement proceedings], citing *Solomon v. Superior Court* (1981) 122 Cal.App.3d 532, 535; see also *Duckett v. Godinez* (9th Cir. 1995) 67 F.3d 734, 739 [shackling rules apply to penalty phase of trial], citing *Elledge v. Dugger* (11th Cir. 1987 823 F.3d 1439, 1451; *Deck v. Missouri* (2005) 544 U.S. 622 [125 S.Ct. 2007, 2015-2016] [same].)

The need for a curative instruction was especially great in Mr. Lightsey's case because he testified in chains, and such a "spectacle" raises "grave concerns" about the possible prejudicial impact on a jury. (*People v. Jackson, supra*, 14 Cal.App.4th 1818, 1829, citing *People v. Givan, supra*, 4 Cal.App.4th 1107.) Because of the court's failure to give CALJIC 1.04 at either phase of the trial, the jury was *never* advised not to consider the chains they saw and heard on Mr. Lightsey every day as evidence of his guilt or as evidence that he should be condemned to death.

For all these reasons, it is plain that the trial court erred prejudicially in failing to instruct with CALJIC 1.04 during the penalty phase of Mr. Lightsey's trial. Mr. Lightsey's sentence of death must be reversed. (*Chapman v. California, supra,* 386 U.S. 18, 24)

C. The Trial Court's Error Violated Mr. Lightsey's Constitutional Rights to Raise a Defense, to Due Process of Law, and to a Reliable and Proportional Verdict and Sentence.

The trial court's error in this case also violated Mr. Lightsey's Eight Amendment "'acute need' for reliable decision-making when the death penalty is at issue." (*Deck v. Missouri, supra,* 544 U.S. 622 [125 S. Ct. 2007, 2014], citing *Monge v. California* (1998) 524 U.S. 721, 732.)

The trial court's error in failing to admonish the jury therefore violated Mr. Lightsey's state and federal constitutional rights to a fair trial, to due process of law, and to a proportionate and reliable verdict of death, requiring reversal of his verdict and sentence of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.)

D. The Error Was Prejudicial.

The prejudice of the trial court's error is clear, because "it is manifest that the shackling of a criminal defendant will prejudice him in the minds of the jurors" in that it is "likely to lead the jurors to infer that he is a violent person disposed to commit crimes" of a violent nature. (*Duran, supra*, 16 Cal.3d 282, 290.) This likelihood is particularly prejudicial in the penalty phase of a trial, where the jurors are weighing whether a defendant should get life without parole or death, due to the "inherently prejudicial" nature of shackles. (*Deck v. Missouri, supra,* 544 U.S. 622 [125 S. Ct. 2007, 2015-2016], citing *Holbrook v. Flynn* (1986) 475 U.S. 560, 568.)

This inherent prejudice is caused by the fact that "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant. [citation]." (*Estelle v. Williams* (1976) 425 U.S. 501, 507.) The risk is that the "use of shackles can be a 'thumb on death's side of the scale.'" (*Deck v. Missouri, supra,* 544 U.S. 622 [125 S. Ct. 2007, 2014], citing *Sochor v. Florida* (1992) 504 U.S. 527, 532.) In the present case, the spectacle of Mr. Lightsey, chained and handcuffed, interrupting his counsel and the court and trying, more and more desperately, to state his delusional case of fraud and forgery directly to the jury, was as effective as any argument by the prosecutor in convincing the jurors that he was out of control and physically dangerous.

Given these facts, the trial court's error in failing to admonish the jury cannot be shown to be harmless beyond a reasonable doubt. (*People v.*

Jacla (1978) 77 Cal.App.3d 878, 891, citing *Chapman v. California, supra,* 386 U.S. 18, 24; *People v. Duran, supra*, 16 Cal.3d 282, 296, fn. 15 [same]). But for the trial court's error, the jurors might well have come with a verdict of life without parole, especially given the substantial mitigating evidence introduced in the form of Mr. Lightsey's profound mental impairments, evidence supporting lingering doubt due to his unusually strong alibi defense, and his mitigating and tragic social history.

Mr. Lightsey's sentence of death must accordingly be reversed.

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XII.

THE TRIAL COURT'S FAILURE TO RULE ON TWO OF THE GROUNDS RAISED IN MR. LIGHTSEY'S MOTION FOR NEW TRIAL REQUIRES THAT HIS CASE BE REMANDED TO THE TRIAL COURT FOR RENEWED HEARINGS ON THIS MOTION.

A. Introduction

On jurisdictional grounds, the trial court refused to even *consider*, much less grant or deny, two of the three grounds raised in Mr. Lightsey's new trial motion.[76] Specifically, the trial court failed to rule on the following issues raised in the motion: (a) "the testifying District Attorney was guilty of prejudicial misconduct before the jury" and that (b) the court "erred in the decision of a question of law" by denying appellant's section 995 motion. (8 CT 2357.) This failure to rule was erroneous, not subject to an abuse of discretion analysis as no discretion was ever exercised, and requires reversal of appellant's guilt phase convictions and sentence of death, and the remanding of the case to the trial court for consideration of the two unadjudicated issues.

This error violated Mr. Lightsey's state and federal constitutional rights to due process of law and a proportionate and reliable verdict of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.) In addition, the error breached his federal constitutional state law "liberty interest" right to have his new trial motion properly considered. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.) As the error cannot be shown to be harmless beyond a reasonable doubt, appellant's sentence of death must be reversed. (*Chapman v. California, supra,* 386 U.S. 18, 24.)

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[76] The trial court also considered and denied the first of Mr. Lightsey's three grounds for relief in his motion for new trial. Specifically, the Court found sufficient evidence to support the "verdicts and findings of the jury" in this case. (33 RT 6978; 8 CT 2357.) This ruling is not the subject of this

B. **The Trial Court Erred By Failing To Rule On Two Of The Grounds Raised In Mr. Lightsey's Motion For New Trial.**

1. **Mr. Lightsey's Gagging During The New Trial Motion.**

The trial court conceded that it was aware that it had the "duty" to rule on Mr. Lightsey's new trial motion, even though it later failed to exercise this duty as to the two grounds discussed in this argument. (33 RT 6962.) However, during the hearing at the motion for new trial, the trial court became exasperated and frustrated with the behavior of Mr. Lightsey, and his continued direct comments to the court questioning the court's integrity and ability to properly rule on the new trial motion. (33 RT 6962-6964.)

Specifically, Mr. Lightsey accused the court of pre-judging the motion and conspiring to deny it without proper consideration. (3 RT 6962-6963.) Mr. Lightsey directly addressed the court by name in this regard, yelling out "Mr. Kelly, Mr. Kelly you said [so] twice!" (33 RT 6963.) Mr. Lightsey also imitated the trial court, pantomiming: "Mr. Lightsey, I'm not going to grant you a new trial." (33 RT 6964.)

Mr. Lightsey further argued that the failure of transcripts to show such a previous plan by Judge Kelly proved a conspiracy of forgery, and tried to file an in pro per recusal motion against Judge Kelly, which was ignored as Mr. Lightsey was represented by counsel. (33 RT 6963-6964.) Based on these direct comments, the trial court had Mr. Lightsey bound and gagged with duct tape. (33 RT 6964.) The exasperated trial court explained that it thought this extreme action was necessary to avoid having to hear what it called Mr. Lightsey's "ramblings" during proceedings on his new trial motion. (33 RT 6964.)

Mr. Lightsey can only speculate as to whether the trial court's

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argument.

exasperation, justified or otherwise, may have caused the court to consider the new trial motion with less focus than it deserved.[77] As will be demonstrated, however, the record is clear that the trial court, at the prompting of the prosecution, failed to rule on two of Mr. Lightsey's grounds for a new trial, neither granting nor denying relief on either of these two grounds. As will be demonstrated, these two failings were prejudicially erroneous.

2. The Earlier Recusal of Deputy District Attorney John Somers and Trial Counsel's Claim That He Committed Misconduct as a Witness at Trial.

In their new trial motion, trial counsel argued that Mr. Lightsey must be granted a new trial based on the misconduct of Kern County Deputy District Attorney John Somers when he testified at trial. (8 CT 2357.) Mr. Somers had been Mr. Lightsey's original prosecutor in the case at bar and had appeared as Mr. Lightsey's prosecutor at several municipal court proceedings, including the arraignment of Mr. Lightsey. (1 Supp. CT 3 [11/29/03 M.O -- Arraignment]; 1 Supp. CT 4 [11/30/93 M.O. – Arraignment]; 1 Supp. CT 10 [1/5/94 M.O. – Motion to Recuse].) Mr. Somers had *also* been Mr. Lightsey's prosecutor in the unrelated case in which Mr. Lightsey had appeared in court on the day of the homicide charged in the instant case. (1 RT 14-21, 24-25, 2 CT 635-637.)

Mr. Somers was subsequently removed as prosecutor in the instant case, pursuant to the defense's recusal motion, and was replaced by Deputy District Attorney Lisa Green. (1 CT 10, 276-277; 2 CT 622-647; 1/5/94 RT 1-27.) The basis of recusal was that Mr. Somers was a material witness, because he was in the court with Mr. Lightsey on the morning of the

[77] Or, indeed, the court's role in bringing about the painful spectacle at the sentencing hearing by its stubborn refusal to acknowledge Mr. Lightsey's

homicide charged in the instant case. (1 Supp. CT 277; 1 RT 14-21; 2 CT 635-641, 644-645; see also Arguments II & VI, *supra.*)

Mr. Somers was then called as a defense alibi witness at both the preliminary examination and at trial. (2 CT 452-458; 25 RT 5459-5486.) In their new trial motion, defense counsel argued that Mr. Somers had committed misconduct by untruthfully and inconsistently testifying, thereby denying Mr. Lightsey crucial, unusually unbiased and believable evidence in support of his alibi defense. (8 CT 2357, 2361.) Specifically, Mr. Lightsey argued that Mr. Somers had testified untruthfully on at least two occasions during trial, thereby wrongfully gutting appellant's otherwise strong alibi defense. (*Ibid.*)

At the hearing at the new trial motion, however, new prosecutor Ms. Green argued that this was an improper basis for granting relief on a new trial motion. (33 RT 6974-6975.) More specifically, she argued that only the trial prosecutor, i.e. herself and not Somers, could be accused of misconduct in a new trial motion. (33 RT 6975, 6978-6979.) Ms. Green cited three cases to argue that the misconduct of Mr. Somers was not cognizable on a motion for new trial because he was not the "prosecutor who [was] actually prosecuting the case," but instead a testifying prosecutor. (8 CT 2349, citing *People v. French* (1939) 12 Cal.2d 720; *People v. Zirbes* (1936) 6 Cal.2d 425; *People v. Glenn* (1950) 96 Cal.App.2d 859.)

None of these three cases stand for the proposition advanced by Ms. Green. In *Zirbes*, the motion for new trial was based on the "alleged misconduct of one of the jurors," not misconduct by the prosecutor. (*People v. Zirbes, supra*, 6 Cal.2d 425, 428.) Likewise, in *Glenn* the

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obvious mental incompetence.

motion for new trial was based on "newly discovered evidence" and jury "instructions given and refused," not prosecutorial misconduct. (*People v. Glenn, supra*, 96 Cal.App.2d 859, 870.)[78] In *French*, this Court's ruling *did* involve a motion for new trial based on the "misconduct" of the prosecuting attorney. (*People v. French, supra*, 12 Cal.2d 720, 763-764.) However, this Court was silent as to whether a *testifying* prosecutor, such as Mr. Somers, could be the subject of a prosecutorial misconduct based motion for new trial under section 1181, subdivision (5). (*Ibid.*)

Indeed, this matter appears to be an issue of first impression, as appellate counsel has been unable to find any published opinions dealing with a motion for new trial based on a recused prosecutor, summoned as a defense witness, who then actually testifies in favor of the prosecution, and is accused of misconduct for testifying falsely.

More to the point, even if such misconduct is not included in the statutory grounds listed in section 1181, "the statute should not be read to limit the constitutional duty of trial courts to ensure that defendants be accorded due process of law." (*People v. Fosselman* (1983) 33 Cal.3d 572, 582 [IAC can be raised via motion for new trial, even though not a statutory grounds for such relief].) As a state "Legislature has no power, of course, to limit this constitutional obligation by statute," a trial court can and should consider any grounds raised via a motion for new trial that involves a violation of the due process right to a "fair trial." (*Ibid.*)

The trial court therefore erred in failing to even consider or rule upon Mr. Lightsey's claim of prosecutorial misconduct. His guilt

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[78] It appears Ms. Green mistakenly relied on the annotated codes whose summaries of the new trial portion of the cases were misleading, and never actually looked at the two cases themselves. (See, e.g., West's Ann.Cal.Penal Code § 1181, pp. 50, 53 [containing misleading summaries

"judgment" and sentence of death must accordingly be "reversed" and the "cause remanded to the superior court with directions to vacate the order denying the motion for new trial and to reconsider the motion." (*Id.* at p. 584.)

3. Trial Counsel's Argument That Mr. Lightsey's 995 Motion Had Been Wrongfully Denied.

Trial counsel also vigorously argued to the trial court that Mr. Lightsey had been unlawfully committed by the magistrate for the charged crimes, in violation of the principles laid out in section 995. (See 5 CT 1471-1522 [original 995 motion], 6 CT 1592-1601 [reply to opposition to 995 motion], 6 CT 1604-1708 [supplemental memorandum]; 1 RT 1-131 [hearing on motion]; 2 RT 425-426 [ruling on motion].) They then raised the issue again in an interlocutory Petition for Writ of Prohibition with the Fifth District Court of Appeal. (6 CT 1752-1768; 1 Supp. CT 45; 22 Supp. CT 6455-6788.) Trial counsel then renewed the issue with additional pleadings and argument as part of their motion for new trial.[79] (8 CT 2357.)

As she did with the defense argument involving Deputy District Attorney Somers, Ms. Green argued that a wrongful "denial of a 995 motion" was not a valid issue to raise on a motion for new trial. (33 RT 6975.) More specifically, she successfully argued that the argument related to an error of law, but only "misdirections to the jury" or decisions during trial proceedings could be raised as an error of law on a defense motion for new trial. (33 RT 6975.) In addition, citing *People v. Overstreet* (1986) 42

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of *Glenn* and *Zirbes*].)

[79] This denial of a section 995 motion issue was raised separately and independently of their request for the trial court to conduct its own independent reweighing of the strength of the evidence at trial. (8 CT 2357, 2367.)

Cal.3d 892, the prosecution argued that this issue was not cognizable pursuant to a motion for new trial, because a ruling on a section 995 motion does not occur at "trial" and is therefore not a error in a "decision of law arising during the course of trial." (8 CT 2348.)

However, *Overstreet* does not say this at all. Instead, it holds that "the word 'trial' has long been held to refer to the process culminating in the determination of guilt." (*Overstreet, supra*, 42 Cal.3d 891, 896 [holding trial does not apply to post-verdict proceedings such as sentencing].) However, the "process culminating in the determination of guilt" presumably also includes a section 995 motion before the trial judge. (*Ibid.*)

Admittedly, the meaning of the word "trial" is not fully defined in the provisions of section 1181 regarding errors "arising during the course of trial." (Pen. Code, § 1181(5).) However, any "ambiguity must be resolved in favor" of Mr. Lightsey under standard rules of "statutory construction," and his motion was therefore properly raised pursuant to subdivision (5) of section 1181. (*People v. Overstreet, supra*, 42 Cal.3d 891, 895.)

In any event, even if Mr. Lightsey's claim did not fall under the statutory guidelines, the trial court should still have ruled on the merits of the motion, as a motion for new trial can be made on nonstatutory grounds. (*People v. Sherrod* (1997) 59 Cal.App.4th 1168, 1174-1175 [denial of continuance]; *People v. Fosselman, supra,* 33 Cal.3d 572, 582 [IAC].) In *Sherrod,* as in Mr. Lightsey's case, a new trial motion claimed that the trial court erroneously denied a pre-trial motion.

On appeal, the *Sherrod* court confirmed that a motion for new trial can be raised on nonstatutory claims involving pre-trial motions, such as the denial of a motion for continuance. (*People v. Sherrod, supra,* 59

Cal.App.4th 1168, 1174-1175.) Likewise, the trial court in Mr. Lightsey's case should have ruled on the merits of his section 995 claim, because it is the "obligation of the trial judge to assure that a criminal defendant is afforded a bona fide and fair adversary adjudication. [citation]," including adjudications of pre-trial motions. (*Id.* at p. 1174.)

The trial court therefore erred in failing to rule on Mr. Lightsey's claim that his section 995 motion had been wrongfully denied, and his guilt "judgment" and sentence must be "reversed" and the "cause remanded to the superior court with directions to vacate the order denying the motion for new trial and to reconsider the motion." (*People v. Fosselman, supra,* 33 Cal.3d 572, 584.)

C. The Error Violated Appellant's Constitutional Rights To Due Process Of Law, An Impartial Jury, And A Proportional And Reliable Verdict.

The failure to rule on these two grounds on appellant's new trial motion also violated Mr. Lightsey's right to due process and a reliable and proportional death sentence, because a new trial motion is a critical part of California's trial structure and the failing in this regard both rendered the trial unfair and removed a key pillar of reliability from the proceedings. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.)

As this Court has held, a motion for new trial is guaranteed under "constitutional" principles of "due process" of law. (*People v. Fosselman, supra,* 33 Cal.3d 572, 582; see also *People v. Oliver* (1975) 46 Cal.App.3d 747, 751-752 [new trial motion should be granted on constitutional grounds wherever defendant denied due process right to "fair trial.") Accordingly, a failure or excessive delay in ruling on a new trial motion implicates federal constitutional rights to due process of law. (*Codispoti v. Howard* (3rd Cir.

1978) 589 F.2d 135, 142; *Heiser v. Ryan* (3rd Cir. 1994) 15 F.2d 29, 307 [accord].)

This erroneous removal of the reliability-enhancing new trial motion protections from this death penalty case also violated Mr. Lightsey's federal constitutional rights to a proportionate and reliable verdict. (*Zant v. Stephens, supra,* 462 U.S. 872, 890; *Eddings v. Oklahoma, supra,* 455 U.S. 104, 110-112; *Lockett v. Ohio, supra,* 438 U.S. 586, 601-605; *Woodson v. North Carolina, supra*, 428 U.S. 280, 303-305.)

The violation of Mr. Lightsey's state law right to have a hearing and ruling on his new trial motion also violated his state law "liberty interest" to due process of law. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.) It also violated his state constitutional right to due process of law.

As these separate and independently prejudicial errors violated Mr. Lightsey's state and federal constitutional rights, his sentence of guilt verdict and sentence of death must be reversed, and the case remanded to the trial court for renewed proceedings on the two unadjudicated new trial motion issues. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.)

D. The Error Was Prejudicial, Requiring Reversal Of Appellant's Guilt Convictions And Sentence Of Death And The Remanding Of The Case To The Trial Court For Consideration Of The Two Unadjudicated Issues.

The constitutional error in failing to rule on these two grounds for a new trial cannot be shown to be harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 38 U.S. 18, 24.)

1. Misconduct by Deputy District Attorney Somers.

It is also plain that the trial court's error in failing to rule on the new trial motion regarding the misconduct of Deputy District Attorney Somers

was prejudicial. As discussed in detail in Arguments II and VI, *supra*, and also in his motion for new trial, Mr. Lightsey had an unusually strong alibi, since he was in court on another case and, indeed, on the record in reported proceedings in that case three times during the morning of July 7, 1993, the same morning the homicide occurred in the instant case. (8 CT 2359.)

a. Suspicious Change of Testimony

Deputy District Attorney Somers was in that same courtroom, as he was Mr. Lightsey's prosecutor in that case, and was therefore in an unique position to serve as a defense alibi witness, and one, moreover, inherently believable as having no pro-defense bias. (8 CT 2359-2361.) Mr. Lightsey argued in his new trial motion that Mr. Somers had wrongfully stolen this alibi defense from him by untruthfully testifying at trial on two occasions. First, Somers testified that he had seen Mr. Lightsey "walking [into] the courtroom for the second calling" of the case, even though the other prosecution witnesses testified that Mr. Lightsey had instead been waiting in the court coffee shop during this second calling of case. (8 CT 2361.) Second, Mr. Somers testified untruthfully when he recanted his testimony from the preliminary hearing that the bail refund hearing on July 7 started "about 10:45" a.m. Somers's preliminary hearing testimony was powerful evidence of Mr. Lightsey's innocence, because the other evidence in the case showed that the attack on Mr. Compton must have occurred before 11:00 a.m. (8 CT 2361; see also 17 RT 3736; 19 RT 4261.)

The record amply supports this argument. Mr. Somers did everything in his power to 'fix' his earlier PX testimony, to the detriment of Mr. Lightsey's alibi defense, in order to help out his colleague Ms. Green. At trial, Mr. Somers also recanted his earlier testimony that Mr. Lightsey's final hearing (the 'third calling' of Mr. Lightsey's case) did not *start* until 10:45 a.m. on the day of the homicide. (25 RT 5466.) Instead, he testified

that Mr. Lightsey had already *completed* the hearing and left the courtroom prior to 10:40 a.m., supposedly giving Mr. Lightsey enough time to race to Mr. Compton's house and kill him prior to 11:00 a.m. or so. (26 RT 5484.)

Even when impeached with his earlier testimony from the preliminary examination confirming that he earlier said the hearing began at 10:45 a.m., he insisted on sticking to his new version of events. (25 RT 5466-5474.) Yet the transcript of the preliminary examination, which is also before this Court, confirms that Mr. Somers testified there that he thought the 'third calling' of Mr. Lightsey's case didn't *begin* until "10:45" a.m. (2 CT 457 [PX RT].)

At trial, Mr. Somers also recanted his earlier testimony that Mr. Lightsey had been present at the first calling of the case at around 9:00 a.m. (25 RT 5468-5469.) (Extensive evidence had been introduced that Mr. Compton was still alive at 8:30 a.m. that day, or even later. See Argument II.)

Yet at the preliminary examination, Mr. Somers testified that Mr. Lightsey must have been there or a bench warrant would have been issued for him. (2 CT 455 [PX RT]; see also 25 RT 5469.) Mr. Somers had also testified in the hearings on the motion to recuse him that Mr. Lightsey had been present in the courtroom between 8:30 and 9:00 a.m., because he was sure he would have remembered if Mr. Lightsey's name had been called but he was not present in the court. (2 CT 638 [Motion to Recuse RT]; 1/5/94 RT 17 [same]; see also 2 CT 455 [Impeachment of Mr. Somers at PX with earlier testimony from motion to recuse hearing].)

In short, at trial Mr. Somers repeatedly 'tailored' his testimony to fit the prosecution's theory of the case and his misconduct was therefore quite plain. A reasonable trial court might therefore have granted the motion for new trial if it had been properly considered and ruled upon.

b. Issues Involving Kern County District Attorney

The misconduct in this case warrants particular attention because of the Kern County District Attorney's history of overzealous prosecutions and its reputation for engaging in misconduct. In particular, the Child Molest Unit in which Mr. Somers worked had a very unsavory reputation for unethical conduct at the time of Mr. Lightsey's trial.

As the Fifth District Court of Appeal announced in a published opinion widely known in Kern County at the time of Mr. Lightsey's trial, the local District Attorney's Office had repeatedly engaged in "gross misconduct" in its prosecution of those believed to be involved in child molestation, such as Mr. Lightsey. (See, e.g., *People v. Pitts* (1990) 223 Cal.App.3d 606, 690 [discussing rampant misconduct in the child molest unit during 'sex ring scandals' involving false prosecutions of the innocent].)[80] Combined with the obvious inconsistencies in Mr. Somers' testimony, this general bad reputation make Mr. Lightsey's claims of misconduct very credible indeed.

c. Summation

Given all these factors, the trial court's error in failing to rule on the motion based on Mr. Somers' misconduct simply cannot be shown to be "harmless beyond a reasonable doubt" and Mr. Lightsey's verdict and sentence of death must be reversed. (*Chapman v. California, supra*, 38 U.S. 18, 24.)

2. Denial of Section 995 Motion By The Trial Court.

In their new trial motion pleadings, defense counsel argued that the

[80] See also Hume, Edward, *Mean Justice: A True Account of a Town's Terror, a Prosecutor's Power, a Betrayal of Innocence* (1999) Simon & Schuster [best-selling nonfiction book discussing misconduct by Mr. Somers, Ms. Green, and others in Kern County District Attorneys' Office].)

trial court "erred in the decision of a question of law" by denying their section 995 motion and referred the court to the "previously briefed" filings. (8 CT 2357.) Specifically, trial counsel reargued the issues "briefed in the Motion pursuant to Penal Code Section 995 and the Petition for Writ of Prohibition." (11 RT 2367.)

Mr. Lightsey will not repeat in detail the well-supported arguments contained in the many hundreds of pages of pleadings, exhibits, and oral argument transcripts introduced by trial counsel in both the Kern County Superior Court and the Fifth District Court of Appeal on why his commitment by the magistrate was illegal and the denial of his section 995 motion was improper. (See 5 CT 1471-1522 [original 995 motion], 6 CT 1592-1601 [reply to opposition to 995 motion], 6 CT 1604-1708 [supplemental memorandum]; 1 RT 1-131 [hearing on motion], 2 RT 425-426 [ruling on motion]; 6 CT 1752-1768 [Petition for Writ of Prohibition]; 1 Supp. CT 45, 6455-6788 [Exhibits].) These well-reasoned materials are before this Court and incorporated by reference into this claim.

a. Use of Multiple Hearsay and Wrong Standard of Review.

Briefly summarizing, however, Mr. Lightsey demonstrated during both his section 995 proceedings before the trial court and his interlocutory proceedings before the Fifth District Court of Appeal, that the magistrate erred in two fundamental ways. First, the magistrate allowed multiple, not just double but sometimes triple, hearsay to be used as evidence. (1 RT 6-9, citing Pen. Code, § 872(b), *Whitman v. Superior Court* (1991) 54 Cal.3d 1063; see also 5 CT 1471-1511; 6 RT 1604-1707, 1752-1761 [same]; 22 Supp. CT 6455 – 23 Supp. CT 6783 [same].)

While section 872 allows a police officer to give hearsay evidence at the preliminary examination of what people have told the officer himself, it

does not "sanction a form of double or multiple hearsay." (*Whitman v. Superior Court, supra,* 54 Cal.3d 1063, 1074 [reversing commitment order].) Accordingly, "multiple level hearsay is inadmissible at a preliminary examination even when offered by an otherwise qualified investigating officer." (*Montez v. Superior Court* (1992) 4 Cal.App.4th 577, 586 [reversing commitment order]; *Shannon v. Superior Court* (1992) 5 Cal.App.4th 676, 684-686 [same].) An investigating officer can therefore only testify "about otherwise inadmissible hearsay statements made to *him* by persons *he* has interviewed." (*Tu v. Superior Court* (1992) 5 Cal.App.4th 1617, 1622 [reversing commitment order in capital murder trial], emphasis in original.)

Yet at Mr. Lightsey's preliminary examination, multiple hearsay (in the form of a notebook that discussed what others had said) was introduced regarding the guns and other goods found with Mr. Lightsey that had been forwarded to Detective Boggs from Mr. Compton's sister-in-law and nephew. (1 RT 14, 17-30.) Detective Boggs also forwarded double hearsay from Patrol Services Technician White and D.A. Investigator Gottesman. (1 RT 31-32, 39.) Double, even triple, hearsay came in via Detective Boggs from Mr. Lightsey's associates Jeff Mahan, Brian Ray, Karen Lehman, and Beverly Westervelt. (1 RT 33-35, 39-42.)

Second, the magistrate used too low a burden of proof to hold over Mr. Lightsey. Rather than requiring "probable cause," the magistrate used a much lower "is a possibility" standard, thereby violating Mr. Lightsey's state law and federal constitutional rights. (1 RT 7, citing *Hicks v. Oklahoma, supra*, 447 U.S. 343; see also 1 RT 122.)

b. Prejudice of the Wrongful Denial.

Both errors were extremely prejudicial. Mr. Lightsey introduced a

great deal of evidence supporting his alibi defense (1 RT 49-64, RT 118-120; 6 CT 1592-1601), and the magistrate would not have been able to hold him over but for the errors in considering multiple hearsay and applying the wrong standard of proof. Substantial evidence was therefore presented in the new trial motion that Mr. Lightsey was denied "a substantial right at the preliminary examination," rendering "the ensuing commitment illegal" and entitling Mr. Lightsey "to dismissal of the information." (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 523, citing *Jennings v. Superior Court* (1967) 66 Cal.2d 867.)

It is also plain that the error in failing to dismiss the Information prejudiced Mr. Lightsey at his subsequent trial. (*People v. Pompa-Ortiz, supra,* 27 Cal.3d 519, 522 [claim of error in denying 995 motion normally requires showing of prejudice at trial, unless raised in pretrial proceedings].) The prejudice showing for a new trial motion is less than the showing of prejudice required on appeal. At a hearing on a motion for new trial, a mere "denial of a fair trial" itself requires reversal "without the defendant having to show it is reasonably probable that a more favorable result would have been reached in the absence of the error." (*People v. Sherrod, supra,* 59 Cal.App.4th 1168, 1170-1171 [noting standard of prejudice is lower on motion for new trial, and only requires showing of denial of due process right to fair trial].) Accordingly, a trial court "may grant a new trial if it determines that the defendant has been denied a fair trial," as that constitutes prejudice even without a showing that the defendant meets the *Watson* standard of prejudice. (*People v. Sherrod,* supra, 59 Cal.App.4th 1168, 1175, citing *People v. Oliver, supra,* 46 Cal.App.3d 747, 751-752.)

In addition, it was also prejudicially impossible for Mr. Lightsey to

absolve the errors from the preliminary examination through testimony at trial, because that preliminary examination was the *last time* that Deputy District Attorney Somers backed Mr. Lightsey's alibi defense. Given Mr. Somers perjurious change of testimony, Mr. Lightsey was therefore prejudiced by not being able to later rely on the original truthful pro-defense testimony by Mr. Somers given in the preliminary examination. At a minimum, Mr. Lightsey was therefore denied a "fair trial." (*People v. Sherrod*, supra, 59 Cal.App.4th 1168, 1175.) Accordingly, the trial court's error in failing to rule on this section 995 claim cannot be shown to be harmless.

E. Conclusion

The trial court prejudicially erred in failing to rule on two of the grounds raised in Mr. Lightsey's motion for new trial. This misconduct violated Mr. Lightsey's state and federal constitutional rights to an impartial jury, due process of law, and a reliable and proportional sentence of death. (U.S. Const., Amends. 5, 6, 8, and 14; Cal. Const., art. 1, §§ 7, 15, 17 and 28.)

Accordingly, the judgment and sentence must be reversed and the cause remanded to the superior court with directions to vacate the order denying the motion for new trial and to reconsider the motion. (*People v. Fosselman, supra,* 33 Cal.3d 572, 584.)

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XIII.

THE AUTOMATIC APPEAL PROCESS IN CALIFORNIA IS TOO TAINTED BY POLITICAL CONSIDERATIONS TO ENSURE MR. LIGHTSEY'S CONSTITUTIONAL RIGHTS ARE RESPECTED, REQUIRING PER SE REVERSAL OF HIS SENTENCE OF DEATH.

A. Introduction

Our founding fathers, relying on the venerable teachings of Montesquieu, were well-aware that "there is no liberty" without a truly "independent judiciary." (*The Federalist No. 78* [Alex. Hamilton], at p. 523, citing Montesquieu, *Spirit of the Laws*.) Such independence ensures that courts serve as a "citadel of the public justice and the public security." (*Id.* at p. 524.) This right to an independent and impartial judiciary cannot be fulfilled during Mr. Lightsey's appellate proceedings before this honorable Court due to systemic flaws in California's automatic appeal process. Specifically, such independence cannot be guaranteed under California's automatic appeal process for capital sentences due to the current political bias toward imposition of the death penalty.

Due to this politicization of the capital review system, California's automatic appeal process violates Mr. Lightsey's federal and state constitutional rights. (U.S. Const., Amends. 5, 6, 8, 14; Cal. Const., art. I, §§ 1, 7, 9, 15, 16, 17, and 24.) This pro-death bias constitutes a "structural defect" requiring per se reversal even without an individualized showing of prejudice for Mr. Lightsey. (*People v. Brown* (1993) 6 Cal.4th 322, 332, citing *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [lack of impartial court is fundamental error].)

B. The Politicization Of The Automatic Appeal Process In California.

1. Rejection of the Federal System in 1849 California Constitution.

Recognizing the soundness of Montesquieu's teachings, the United States Constitution provides for federal judges to be appointed for life. The populist California Constitution of 1849, however, provided for direct election of judges by the People. This system is inherently problematic for California because the resulting lack of independence for judges from political pressures raises the specter of overpoliticization of the often emotionally charged capital review system.

Put another way, a primary "reason for the reluctance to reverse in criminal cases—even in the face of serious procedural error—is that criminal appeals are often the subjects of political campaigns, and always in the same way: American judges are never criticized for affirming convictions, only for reversing them." (Mathieson and Gross, *Review for Error* (2003) 2 Law, Probability & Risk 259, 267 and fn. 30 [noting the successful campaign to recall Chief Justice Rose Bird was "a classic example" of the politicization of the process of judicial review].)

Recognizing this danger, this honorable Court's Chief Justice has made ongoing and commendable efforts to "protect the neutrality of judges and minimize politicization of the judicial branch" by his proposed amendments to "Article VI of the California Constitution," including "increase[ing] judges' terms from six to 10 years." (McCarthy, *Bench, Bar Mull Overhaul of State Court System* (April 2005) California Bar Journal, at pp. 1, 7.) Though these efforts are both praise-worthy and appropriate, they also represent persuasive acknowledgement that politics can easily affect California's judiciary.

2. The Judicial and Capital Review Reforms of the 1930s.

Nor was the Chief Justice's efforts the first attempt to reform our system. In the mid-1930s, direct elections of appellate judges were replaced with the current system of retention elections as part of an attempt

to regain some independence for the judiciary. (Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections* (1988) 61 So.Cal.L. Rev. 1969, 1971-1972 [hereafter "Grodin"].)

In this same spirit of reform, the automatic appeal process was introduced by California's Senate during the same period as these retention election reforms, due to the illegal execution of a prisoner whose appeal was still pending. (*People v. Massie* (1998) 19 Cal.4th 550, 567, citing Special Com. To Investigate the Execution of Rush Griffen, Rep. (May 28, 1935) Sen. J. (1935 Reg. Sess.) p. 2427.) Horrified, the People of this State, through their legislators, then instituted the automatic appeal process in order to protect "California's interest in assuring a 'reliable' penalty determination in capital cases." (*People v. Massie, supra*, 19 Cal.4th 550, 570.)

These two related judicial reforms were designed to ensure that California's automatic appeal process can fully and properly "protect" our State's "interests in the fairness of its [capital] determinations." (*Massie v. Sumner, supra*, 624 F.2d 72.) As it must under both state and federal constitutional principles, our State therefore instituted this system to avoid the impropriety of "allowing the state to conduct an illegal execution of a citizen." (*Ibid.*, citing *Commonwealth v. McKenna* (1978) 383 A.2d 174.)

3. The *Bird* Court and the Failure of the Reforms.

While these reforms worked reasonably well at first, over the years the political bias inherent in our system of judicial elections systematically eroded the independence of the judiciary, at least in the narrow field of the adjudication of capital cases.

As United States Supreme Court Justice Stevens stated:

"The 'higher authority' to whom present-day capital

> judges may be 'too responsive' is a political climate in which judges who covet higher office--or who merely wish to remain judges--must constantly profess their fealty to the death penalty . . .. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges to King George III."

(*Harris v. Alabama* (1995) 513 U.S. 504, 519-520 (dis. opn. of Stevens, J.).)

By 1986 it became crystal clear that the retention election and automatic appeal system could not even remotely begin to guarantee the independence of the judiciary in their capital review functions. Three sitting California Supreme Court justices—Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso—were voted out of office primarily because of the Court's reversal rate in death penalty cases. Between 1979 and 1986, the Bird court had reversed 95 percent of the death cases it reviewed. (See Poulos, *Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California* (1990) 23 U.C. Davis L. Rev. 160, 209 [hereafter "Poulos"].)

Pro-death penalty forces spent millions of dollars to oust the three justices. (Grodin, *supra,* at p. 1981, citing reports on file with the California Fair Political Practices Commission.) Exit polls showed that 64 percent of those who voted against Chief Justice Bird's confirmation said that did so because of her position on the death penalty. (*Id.,* at p. 1980, fn. 30.) This Court itself has stated that Justices Bird, Grodin, and Reynoso were "the objects of a strenuous and well publicized campaign to unseat them at the impending retention election. It coalesced around the high percentage of death penalty reversals. . ." (*People v. Cox* (1991) 53 Cal.3d 618, 696.)

In recent times, our executive branch also improperly increased pressure against true judicial independence. For example, "Governor George Deukmejian served as a vigorous public spokesman for the forces seeking to oust the incumbent Supreme Court justices in the 1986 election. When his view prevailed, he was able to appoint successors whose positions on controversial issues more closely matched his own." (*Geary v. Renne* . . . [9th Cir. 1990] 911 F.2d [280,] . . . 290-291, n.8 (conc. opn. of Reinhardt & Kozinski, JJ.)

Deukmejian then publicly threatened Associate Justices Cruz Reynoso and Joseph Grodin that he would oppose them in their retention elections unless they voted to uphold more death sentences. Deukmejian carried out his threat [and] opposed the retention of all three justices and all lost their seats after a campaign dominated by the death penalty. (Bright and Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases (1995) 75 Boston Univ. L. Rev. 759, 760-761.)

In 1987, a "fully reconstructed California Supreme Court met for the first time. Given the retention election, the Governor's views on capital punishment, and the reputation of the new appointees as 'conservative-to-moderate, with views on capital punishment not greatly different from those of the Governor, observers anticipated that the 'Lucas court' would dispense a different brand of justice than what was delivered by the Bird court, especially in death penalty cases. The prediction proved to be true." (Poulos, *supra,* at pp. 220-221.)

In a 1988 radio broadcast, Governor Deukmejian gleefully announced: "I have now had an opportunity to appoint five new justices to the state supreme court" and noted that "Chief Justice Rose Bird upheld only four death sentences in nine years. In just the last year and a half, the

new supreme court, under the leadership of Chief Justice Malcolm Lucas has affirmed 43 cases." (Poulos, *supra,* at p. 220, fn. 336 [quoting from transcript of radio broadcast].)

This political shift by this Court was later analyzed by Professor Gerald Uelmen, former dean of Santa Clara University School of Law, who reviewed the capital sentencing record of this Court for the prior decade. Professor Uelmen contrasted this Court's death judgment review from 1979 through 1986 with its record from 1987 through 1989. He found the disparity to be so dramatic as to suggest the existence of "two courts." He explained:

From 1979 through 1986, the Supreme Court of California reviewed sixty-four judgments of death. Five of them, or 7.8 percent, were affirmed. From 1987 through March of 1989, the Supreme Court of California reviewed seventy-one judgments of death. Fifty-one of them, or 71.8 percent, were affirmed. In two short years, the California affirmance rate for state supreme court review of death judgments moved from the third lowest in the United States to the eighth highest. The revolution that demarcates this dramatic shift was the retention election of November, 1986, in which the voters of California removed Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso. (Uelmen, *Review of Death Penalty Judgments by the Supreme Court of California: A Tale of Two Courts* (1989) 23 Loy. L.A. L. Rev. 237, 238-244.)

More recently, in the years immediately preceding and shortly after Mr. Lightsey's trial, this Court's affirmance rate rose yet again. Between 1990 and 1996 the affirmance rate was 93.5 percent. Even with this strong affirmation rate, it was still apparently politically necessary for the current Chief Justice of this Court to pointedly distinguish himself from former Chief Justice Rose Bird during his retention election of 1998:

> "Hoping to win the Republican Party endorsement in September, the George campaign is trying to fend off conservative opposition by portraying the incumbent as an ideological opposite of Bird, who was ousted by voters twelve years ago because of her liberal opinions. One of George's brochures heralds his 'conservative record' and refers critically to Bird or the court she led no fewer than eight times. The brochure says the George court 'has restored common sense and individual responsibility to our civil justice system by overturning numerous Rose Bird-era precedents. George's campaign also wants to remind voters of Bird's penchant for overturning death sentences, while playing up the George Court's 90 percent rate for upholding capital convictions. . . ."

George's campaign tactics, meanwhile, have caused some uneasiness among those worried about politicization of the judiciary. Santa Clara University Law Professor Gerald Uelmen . . . described George in a recent *Los Angeles Times* opinion piece as a 'thoughtful judge who has risen above politics.' But waving an anti-Bird banner, added Uelmen, allows George to be perceived as a judge who is 'willing to compromise his independence to win and election.' (Egelko, *George Goes Bird Hunting,* California Lawyer (June 1998), p. 17; emphasis added.)

Like his predecessors in earlier elections, Governor Davis also directly intervened in the issue of capital review politics in 1998 noting that: "Any judge I appoint will understand my strong support for public safety, long-standing commitment to the death penalty . . . ." (Weinstein, *Sparring for Best Crime-Fighting Honors,* Los Angeles Times, October 12, 1998, Part A, p. 3.) This statement, coupled with his public support of Justices George and Ming Chin prior to their retention election suggests that former Governor Davis would have opposed any justice of this Court who faced a retention election if it appeared that that justice did not

consistently profess fealty for the death penalty.

As former Governor Davis' press secretary, Michael Bustamante said, "No one [knew] better than Gray the importance of selecting judges who represent the governor's point of view." (Offbeat, *Judicial Litmus,* LA Weekly, July 9, 1999.) During the 1998 gubernatorial campaign, Governor Davis stated, "I'm going to make clear to people who want to be a judge that they are an extension of me. . . They're supposed to represent my view of the world." (Ostrom, *Davis Has Always Managed to Maintain His Focus,* San Jose Mercury News, September 20, 1998.)

> "The Governor [made] no secret of the fact that he strongly supports the death penalty, and he thinks it's important that those he appoints understand where he's coming from on that issue." (Off-Beat, *Judicial Litmus,* LA Weekly, July 9, 1999, citing Bustamante.)

Similarly, current Governor Schwarzenegger has shown his political fealty towards the death penalty, noting that he feels it "is a necessary and effective deterrent to capital crimes," even if he has been more circumspect about making public threats towards this Court. (Source: Campaign website, JoinArnold.com, Aug 29, 2003.)

Moreover, recent studies have consistently found that empirical data comparing the death penalty sentencing rates of various states (including California) with rates of relief in state appellate courts, as well as rates of relief at state and federal levels combined, indicates that California's automatic appeal system remains politicized. (See Sanger, *Comparison of the Illinois Commission Report on Capital Punishment With the Capital Punishment System in California* (2003) 44 Santa Clara L. Rev. 101, 106; Blume and Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study* (1999) 72 S. Cal. L. Rev. 465.)

As observed by Sanger: "a study also found that California conflicts with the federal courts more than any other state. The California Supreme Court's reversal rate is 10%, the lowest in the country, while the federal courts have reversed 62% of the death sentences affirmed by the California Supreme Court, the highest rate nationally." (Sanger, *supra,* 44 Santa Clara L. Rev. at p. 106.)

Blume and Eisenberg statistically analyzed states' rates of obtaining death penalties and compared these rates with statistics of relief at both the state appellate level, and with statistics of relief that included both state appellate and federal review. They found "no correlation between states' rates of obtaining death penalties and state courts' reversing capital convictions or sentences." (Blume and Eisenberg, *supra,* 72 S. Cal. L. Rev. at p. 467.) In other words, state appellate courts maintained the same rate of reversal without regard to either high death-obtaining levels or low death-obtaining levels. Conversely, Blume and Eisenberg's data showed that, when including federal review,

> "States that obtain death penalties at a high rate tend to have them overturned at a high rate. This finding is consistent with the view that high death-obtaining rates correspond to death penalties being imposed in less death-worthy cases. Courts understandably overturn more capital sentences in such cases." (*Id.* at p. 503.)

When considering that this correspondence did not appear in their state appellate decision data, Blume and Eisenberg concluded that:

> "It may be that the independence of federal judges led them to be more likely to grant relief in marginal death sentence cases than state judges. This could lead to the observed correlation between grants of relief in the BJS [Bureau of Justice Statistics, which includes data from both federal and state courts] data and the rates of death-obtaining behavior. That this

> effect does not emerge in the state court appellate data may show that state judges know they face traditional elections or retention elections at some point in their career. More than a decade ago California's experience proved that the selection method did not provide insulation from politicization of the death penalty. Only the life tenure and independence of federal judges may provide the luxury of assessing death penalty cases based on their death-worthiness." (*Id.* at p. 497.)

Meaningful appellate review with non-arbitrary and non capricious decision-making is a constitutional requirement for every capital sentencing jurisdiction, including California. In each of the cases affirming that the state courts were providing meaningful appellate review, the Supreme Court has regularly looked at the affirmance rates of the state court.

In the first opinions assessing the meaningfulness of the appellate scrutiny—the 1976 capital decisions—the Supreme Court emphasized the frequency with which death judgments had been reversed. In *Gregg v. Georgia, supra*, 428 U.S. 153, the lead opinion noted "[I]t is apparent that the Supreme Court of Georgia has taken its review responsibilities seriously" and recited various principles that the state court regularly relied upon as a basis for scrutinizing, and occasionally invalidating, death sentences. (*Gregg*, 428 U.S. at pp. 205-206, opn. of Stewart, Powell, and Stevens, JJ.) In *Profitt*, the lead opinion observed that the Florida Supreme Court, "like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated 8 of the 21 death sentences that it has reviewed to date." (*Profitt v. Florida* (1976) 428 U.S. 242, 253 (opn. of Stewart, Powell, and Stevens, JJ.) And in *Jurek v. Texas* (1976) 428 U.S. 262, the lead opinion observed that Texas "has thus far affirmed only two judgments imposing death sentences under its post-Furman law." (*Jurek*, 428 U.S. at

p. 270 (opn. of Stewart, Powell, and Stevens, JJ.)

The concerns for the states' affirmance rates have continued. In *Pulley v. Harris* (1984) 465 U.S. 37, the Supreme Court was confronted with California's appellate review process and held that intercase proportionality review—an appellate court's comparison of the sentence in the case before it with the sentence imposed for others convicted of the same crime—is not constitutionally required. (*Id.*, at pp. 43, 45.) The Supreme Court did not overlook, however, that the California Supreme Court's opinions included "many reversals in capital cases." (*Id.*, at p. 42, fn. 5.) In fact, the Court observed that it was "aware of only one case besides this one in which the [state] court affirmed a death sentence." (*Ibid.*) And in *Barclay v. Florida* (1983) 463 U.S. 939, Justices Stevens and Powell expressly cast their concurring votes because the Florida Supreme Court's reversal record refuted contention that he state court failed to provide meaningful appellate review. Justice Stevens explained:

> "[T]he question is whether, in its regular practice, the Florida Supreme Court has become a stamp for lower court death-penalty determinations. It has not. On 212 occasions since 1972 the Florida Supreme Court has reviewed death sentences; it has affirmed only 120 of them. The remainder have been set aside, with instructions either to hold a new sentencing proceeding or to impose a life sentence." (*Id.*, at p. 973 (conc. opn. of Stevens, J.).)

Yet California can no longer show such meaningful review of capital sentences through its affirmation statistics. As previously demonstrated, in the years preceding Mr. Lightsey's trial the affirmance rate was instead 93.5 percent. These high affirmation rates have continued to the present day and have become well-known and a topic of much concern:

> "the Supreme Court itself has been reprimanded by the state's voters in the 1980s for appearing too

> 'activist,' especially in the area of capital punishment. Less than two decades ago, the voters of ousted three sitting Supreme Court Justices--Chief Justice and Justices Joseph Grodin and Cruz Reynoso--in a heated election whose result startled many veteran observers. *That experience remains fresh in the minds of jurists* who want to avoid being seen as stepping into controversies too willingly." (Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons From the California Recall Experience* (2004) 92 Cal. L. Rev. 927, 939, emphasis added.)

Similarly, arbitrariness and susceptibility to political influence have been identified as "disturbing" aspects of the imposition of the death penalty in not just California but throughout much of the United States. (International Commission of Justice, *Administration of the Death Penalty in the United States,* issued June 1, 1996.) Focusing on the influence of electoral politics on judge and district attorneys, the ICJ report considered that "the prospect of elected judges bending to political pressures in capital punishment cases is both real as well as dangerous to the principle of fair and impartial tribunals." Specifically, the ICJ found that "among elected judges, those who covet higher office—or those who merely wish to retain their status as judges—must constantly proclaim their fealty to the death penalty." (*Ibid.*) It also concluded that the administration of death sentences in this country is "arbitrary, and racially discriminatory, and prospects of a fair hearing for capital offenders cannot . . . be assured." (*Ibid.*) The qualities of arbitrariness and susceptibility to political influence are characteristic of this Court's capital case jurisprudence, which must be considered to be outside accepted international legal and social norms. (*Ibid.*)

E. Conclusion

Given these political realities in California and the resulting systemic faults in the automatic appeal process, this Court simply cannot serve as a true "citadel of the public justice and the public security" when it comes to reviewing sentences of death. (*The Federalist No. 78*, at p. 524.) This failure is systemic and applies to the politicized system in place, and it is not meant as a criticism of the actions of the particular individual honorable justices of this Court.

However, this breakdown in the automatic appeal system in California violates Mr. Lightsey's federal and state constitutional rights. (U.S. Const., Amends. 5, 6, 8, 14; Cal. Const., art. I, §§ 1, 7, 9, 15, 16, 17, and 24.) As this failure is a "structural defect," per se reversal is required. (*Arizona v. Fulminante, supra,* 499 U.S. 279, 309; *People v. Brown, supra,* 6 Cal.4th 322, 332.)

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XIV.

MR. LIGHTSEY'S VERDICT AND SENTENCE OF DEATH MUST BE REVERSED BECAUSE THEY WERE OBTAINED IN VIOLATION OF INTERNATIONAL LAW.

A. Introduction

Our High Court has recently reaffirmed that international law is a key factor in reviewing the legality of capital sentences. (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21 [holding executing the mentally retarded not in accordance with international law].) Rather than being a sign of dependence on foreign law, this ruling was actually a recognition that international law protecting human rights is by and large a creation of the United States itself as the leader of the free world and what President Kennedy referred to as the "first revolution[aries]" in the spread of human freedom.[81] Embracing such international law is therefore nothing more than embracing our own legal heritage and the efforts we have made to internationalize "the survival and success of liberty" throughout the world.[82] In recent times, our citizens have also repeatedly served abroad to stop violations of international human rights law in Bosnia, Kosovo, Afghanistan, Iraq and elsewhere, and it is only fit and proper that this commitment to liberty continue to be reflected in our own legal system.[83]

As will be demonstrated, Mr. Lightsey was denied his internationally guaranteed rights to a fair trial by an independent tribunal and his right to minimum guarantees for the defense under principles established by the Universal Declaration of Human Rights, the International Covenant on

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[81] John F. Kennedy, 1961 Inaug. Add., *Inaugural Addresses of the Presidents of the United States* (1989) U.S. Gov. Printing Office.
[82] *Ibid.*
[83] Indeed, both Mr. Lightsey's lead trial counsel and lead appellate counsel conducted combat tours overseas serving such interests.

Civil and Political Rights (ICCPR), and the American Declaration of the Rights and Duties of Man (American Declaration).[84] In analyzing these claims, it must first be recalled that the bodies that created these principles, the United Nations and the Organization of American States, were in fact largely created at the instigation of U.S. foreign policy efforts and accordingly reflect our own legal and constitutional values.

It is therefore only logical that the violations of Mr. Lightsey's rights under the California and federal constitutions discussed elsewhere in this brief also violated principles of international law and provisions of treaties which are co-equal with the United States Constitution and binding upon the judges of the courts of all the states, including California, under the provisions of the Supremacy Clause. (U.S. Const., art. VI, cl. 2.)[85]

B. The United States And This State Are Bound By Treaties And By Customary International Law.

1. Background.

The two principal sources of international human rights law are treaties and customary international law. The United States Constitution accords treaties equal rank with the Constitution and federal statutes as the supreme law of the land.[86]

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[84] Mr. Lightsey wishes to thank the California Appellate Project for its very substantial contribution to this argument.

[85] In addition, these contentions are being raised here as the first step in exhausting administrative remedies in order to bring Mr. Lightsey's claim in front of the Inter-American Commission on Human Rights on the grounds that the defects in the judgment are violations of the American Declaration of the Rights and Duties of Man.

[86] Article VI, section 1, clause 2 of the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the

Customary international law is equated with federal common law.[87] International law must be considered and administered in United States courts whenever questions of a right that depends upon it are presented for determination. (*The Paquete Habana* (1900) 175 U.S. 677, 700.) To the extent possible, courts must construe American law so as to avoid violating principles of international law. (*Murray v. The Schooner, Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 102.)

When a court interprets a state or federal statute, the statute "ought never to be construed to violate the law of nations, if any possible construction remains...." (*Weinberger v. Rossi* (1982) 456 U.S. 25, 33.) The United States Constitution also authorizes Congress to "define and punish ... offenses against the law of nations," thus recognizing the existence and force of international law. (U.S. Const. Article I, section 8.) Courts within the United States have responded to this mandate by looking to international legal obligations, both customary international law and conventional treaties, in interpreting domestic law. (*Trans World Airlines, Inc. v. Franklin Mint Corporation* (1984) 466 U.S. 243, 252.)[88]

Constitution or Laws of any State to the Contrary notwithstanding."

[87] Restatement Third of the Foreign Relations Law of the United States (1987) pp. 145, 1058. See also *Eyde v. Robertson* (1884) 112 U.S. 580.

[88] See also *Oyama v. California* (1948) 332 U.S. 633, which involved a California Alien Land Law that prevented an alien ineligible for citizenship from obtaining land and created a presumption of intent to avoid escheat when such an alien pays for land and then transfers it to a U.S. citizen. The court held that the law violated the equal protection clause of the United States Constitution. Justice Murphy, in a concurring opinion stating that the U.N. Charter was a federal law that outlawed racial discrimination, noted, "Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. [The Alien Land Law's] inconsistency with the Charter, which has been duly ratified and adopted by the United States, is

International human rights law has its historical underpinnings in the doctrine of humanitarian intervention, which was an exception to the general rule that international law governed regulations between nations and did not govern rights of individuals within those nations.[89] The humanitarian intervention doctrine recognized intervention by states into a nation committing brutal maltreatment of its nationals, and as such was the first expression of a limit on the freedoms of action states enjoyed with respect to their own nationals.[90]

This doctrine was further developed in the Covenant of the League of Nations. The Covenant contained a provision relating to "fair and human conditions of labor for men, women and children." The League of Nations was also instrumental in developing an international system for the protection of minorities.[91] Additionally, early in the development of international law, countries recognized the obligation to treat foreign nationals in a manner that conformed to minimum standards of justice. As the law of responsibility for injury to aliens began to refer to violations of "fundamental human rights," what had been seen as the rights of a nation eventually began to reflect the individual human rights of nationals as

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but one more reason why the statute must be condemned." (*Id.* at p. 673.) See also *Namba v. McCourt* (1949) 185 Or. 579, 204 P.2d 569, invalidating an Oregon Alien Land Law: "The American people have an increasing consciousness that, since we are a heterogeneous people, we must not discriminate against any one on account of his race, color or creed.... When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55, subd. C, and see Article 56): 'Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.' (59 Stat. 1031, 1046.)" (*Id.*, at p. 604.)

[89] See generally, Sohn and Buergenthal, International Protection of Human Rights (1973) p. 137.

[90] Buergenthal, International Human Rights (1988) p. 3

well.[92] It soon became an established principle of international law that a country, by committing a certain subject matter to a treaty, internationalized that subject matter, even if the subject matter dealt with individual rights of nationals, such that each party could no longer assert that such subject matter fell exclusively within domestic jurisdictions.[93]

2. Treaty Development.

The internationalization of human rights protections was further forged by the reaction to the Nazi horrors of World War II. More recently, this internationalization of human rights protections was accelerated by modern outrages such as the death of over a hundred thousand civilians in Bosnia and Herzegovina at the hands of Republika Srpska "Chetnik" forces described as "genocidal" by the International Criminal Tribunal for the Former Yugoslavia, which only ended when the United States preemptively militarily intervened on humanitarian grounds.[94] This failure of international law to protect fundamental human rights resulted in the establishment of modern day Nuremberg Tribunals in the form of the International Tribunal for the Former Yugoslavia in The Hague and the War Crimes Chamber in Sarajevo.[95]

Yet even before such recent developments, international human

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[91] *Id.*, pp. 7-9.

[92] Restatement Third of the Foreign Relations Law of the United States (1987) Note to Part VII, vol. 2 at p. 1058.

[93] Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco (1923) P.C.I.J., Ser. B, No. 4.

[94] See, e.g., American Bar Association, *Practical Guide to War Crimes Prosecution in Bosnia and Herzegovina,* Erik Larson, *Analysis of the Substantive Provisions of War Crimes Laws*, pp. 11-19.

[95] *Ibid.*, citing Statute of the International Criminal Tribunal for the former Yugoslavia, U.N. Sec. Council, Res. 827 (adopted May 25, 1993), as amended by Res. 1166, 1329, 1411, 1431, 1481; 2003 BiH Criminal Code, Ch. 19.

rights provisions were included in the United Nations Charter that entered into force on October 24, 1945. The U.N. Charter proclaimed that member states of the United Nations were obligated to promote "respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[96] By adhering to this multilateral treaty, state parties recognize that human rights are a subject of international concern.

In 1948, the UN drafted and adopted both the Universal Declaration of Human Rights[97] and the Convention on the Prevention and Punishment of the Crime of Genocide.[98] The Universal Declaration is part of the International Bill of Human Rights,[99] which also includes the International Covenant on Civil and Political Rights,[100] the Optional Protocol to the

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[96] Article 1(3) of the U.N. Charter, June 26, 1945, 59 Stat. 1031, T.S. 993, became effective October 24, 1945. In his closing speech to the San Francisco United Nations conference, President Truman emphasized that: "The Charter is dedicated to the achievement and observance of fundamental freedoms. Unless we can attain those objectives for all men and women everywhere -- without regard to race, language or religion -- we cannot have permanent peace and security in the world."

[97] Universal Declaration of Human Rights, adopted December 10, 1948, U.N. Gen.Ass.Res. 217A (III). It is the first comprehensive human rights resolution to be proclaimed by a universal international organization (hereinafter "Universal Declaration").

[98] Convention on the Prevention and Punishment of the Crime of Genocide, adopted December 9, 1948, 78 U.N.T.S. 277, became effective January 12, 1951 (hereinafter "Genocide Convention"). Over 90 countries have ratified the Genocide Convention, which declares that genocide, whether committed in time of peace or time of war, is a crime under international law. (See generally Buergenthal, International Human Rights, *supra*, p. 48.)

[99] See generally Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills" (1991) 40 Emory L.J. 731.

[100] International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 717, became effective March 23, 1976 (hereinafter

ICCPR,[101] the International Covenant on Economic, Social and Cultural Rights,[102] and the human rights provisions of the UN charter. These instruments enumerate specific human rights and duties of state parties and illustrate the multilateral commitment to enforcing human rights through international obligations.

Additionally, the United Nations has sought to enforce the obligations of member states through the Commission on Human Rights, an organ of the United Nations consisting of forty-three member states, which reviews allegations of human rights violations. The United States has also acknowledged the mandatory nature of such United Nations human rights provisions. For example, in May 1993 President Clinton tied renewal of China's MFN status to progress on specific human rights issues in compliance with the Universal Declaration.[103]

ICCPR).

[101] Optional Protocol to the International Covenant on Civil and Political Rights, adopted December 16, 1966, 999 U.N.T.S. 302, became effective March 23, 1976.

[102] International Covenant on Economic, Social and Cultural Rights, adopted December 16, 1966, 993 U.N.T.S. 3, took effect January 3, 1976.

[103] President Clinton's executive order of May 28, 1993 required the Secretary of State to recommend to the President by June 3, 1994 whether to extend China's MFN status for another year. The order imposed several conditions upon the extension including a showing by China of adherence to the Universal Declaration of Human Rights, an acceptable accounting of those imprisoned or detained for non-violent expression of political and religious beliefs, humane treatment of prisoners including access to Chinese prisons by international humanitarian and human rights organizations, and promoting freedom of emigration, and compliance with the U.S. memorandum of understanding on prison labor. (See Orentlicher and Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China* (1993) 14 Nw. J. Int'l L. & Bus. 66, 79.) Though President Clinton decided on May 26, 1994 to sever human rights conditions from China's MFN status, it cannot be ignored that the principal practice of the United States for several years was to use MFN status to

Beyond being a member of the United Nations, the U.S. is also the leading founder of the thirty-two member Organization of American States (OAS). The OAS Charter, a multilateral treaty that serves as the Constitution of the OAS, entered into force in 1951. It was amended by the Protocol of Buenos Aires, which came into effect in 1970. Article 5(j) of the OAS Charter provides, "[t]he American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex."[104] In 1948 the Ninth International Conference of American States proclaimed the American Declaration of the Rights and Duties of Man, a resolution adopted by the OAS, and thus, its member states. The American Declaration is today the normative instrument that embodies the authoritative interpretation of the fundamental rights of individuals in this hemisphere.[105]

The OAS also established the Inter-American Commission on Human Rights, a formal organ of the OAS, which is charged with observing and protecting human rights in its member states. Article 1(2)(b) of the Commission Statute defines human rights as the rights set forth in the American Declaration, in relation to member States of the OAS who, like the United States, are not party to the American Convention on Human Rights. In practice, the OAS conducts country studies, on-site investigations, and has the power to receive and act on individual petitions that charge OAS member states with violations of any rights set out in the

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influence China's compliance with recognized international human rights. (See Kent, *China and the International Human Rights Regime: a Case Study of Multilateral Monitoring, 1989-1994* (1995) 17 H. R. Quarterly, 1.)

[104] OAS Charter, 119 U.N.T.S. 3, took effect December 13, 1951, amended 721 U.N.T.S. 324, took effect February 27, 1970.

[105] Buergenthal, International Human Rights, *supra*, pp. 127-131.

American Declaration.[106] Because the Inter-American Commission, which relies on the American Declaration, is recognized as an OAS Charter organ charged with protecting human rights, the necessary implication is to reinforce the normative effect of the American Declaration.[107]

The United States has acknowledged international human rights law and has committed itself to pursuing international human rights protections by becoming a member state of the United Nations and of the Organization of American States. As an important player in the drafting of the UN Charter's human rights provisions, the United States was one of the first and strongest advocates of a treaty-based international system for the protection of human rights.[108] The United States renewed its commitment in the late 1960s and through the 1970s by becoming a signatory to numerous international human rights agreements and implementing human rights-specific foreign policy legislation.[109]

The United States has also ratified three comprehensive multilateral human rights treaties. The Senate gave its advice and consent to the International Covenant on Civil and Political Rights and the senior President Bush deposited the instruments of ratification on June 8, 1992. The International Convention Against All Forms of Racial

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[106] Buergenthal, International Human Rights, *supra*. As previously indicated, this appeal is a necessary step in exhausting Mr. Lightsey's administrative remedies in order to bring his claim in front of the Inter-American Commission on the basis that the violations Mr. Lightsey has suffered are violations of the American Declaration of the Rights and Duties of Man

[107] Buergenthal, International Human Rights, *supra*.

[108] Sohn and Buergenthal, International Protection of Human Rights (1973) pp. 506-509.

[109] Buergenthal, International Human Rights, *supra*, p. 230.

Discrimination[110] and the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[111] were subsequently ratified on October 20, 1994. These instruments are now binding international obligations for the United States. It is a well-established principle of international law that a country, through commitment to a treaty, becomes bound by international law.[112] All of these treaties were ratified and in effect at the time of Mr. Lightsey's trial and comprise part of "the supreme Law of the Land" which is binding upon "the Judges of every State." (U.S. Const, art. VI.)

3. Customary International Law

Customary international law arises out of a general and consistent practice of nations acting in a particular manner out of a sense of legal obligation.[113] The United States, through signing and ratifying the ICCPR, the Race Convention, and the Torture Convention, as well as being a

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[110] International Convention Against All Forms of Racial Discrimination, 660 U.N.T.S. 195, took effect January 4, 1969 (hereinafter Race Convention). The United States deposited instruments of ratification on October 20, 1994. (See, http://www.hri.ca/fortherecord1997/documentation/reservations/cerd.htm.) More than 100 countries are parties to the Race Convention. (*Ibid.*)

[111] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, became effective on June 26, 1987. The Senate gave its advice and consent on October 27, 1990, 101st Cong. 2d Sess., 136 Cong. Rev. 17, 486 (October 27, 1990) (hereinafter Torture Convention). The United States deposited instruments of ratification on October 21, 1994. (See http://www.un.org/Depts/Treaty/final/ ts2/newfiles/part_boo/iv_boo/iv_9.html.)

[112] Buergenthal, International Human Rights, *supra*, p. 4.

[113] Restatement Third of the Foreign Relations Law of the United States, section 102. This practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state and empirical evidence of the

member state of the OAS and thus being bound by the OAS Charter and the American Declaration, recognizes the force of customary international human rights law. The substantive clauses of these treaties articulate customary international law and thus bind our government. When the United States has signed or ratified a treaty it cannot ignore this codification of customary international law and has no basis for refusing to extend the protection of human rights beyond the terms of the U.S. Constitution.[114]

Customary international law is "part of our law." (*The Paquete Habana*, *supra*, 175 U.S., at p. 700.) According to 22 U.S.C. section 2304(a)(1), "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[115] Moreover, the International Court of Justice, the principal judicial organ of the United Nations, lists international custom as one of the sources of international law to apply when deciding disputes.[116] These sources confirm the validity of custom as a source of international law.

United States courts accept the provisions of the Universal Declaration as customary international law. In *Filartiga* v. *Pena-Irala* (2d Cir. 1980) 630 F.2d 876, the court held that the right to be free from torture "has become part of customary international law as evidenced and defined by the Universal Declaration of Human Rights ...." (*Id.* at 882.) The United

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extent to which the customary law rule is observed.

[114] Newman, Introduction: The United States Bill of Rights, International Bill of Rights, and Other "Bills" (1991) 40 Emory L.J. 731 at 737.

[115] 22 U.S.C. section 2304(a)(1).

[116] *Statute of the International Court of Justice*, art. 38, 1947 I.C.J. Acts and Docs 46. This statute is generally considered to be an authoritative list of the sources of international law.

States, as a member state of the OAS, has international obligations under the OAS Charter and the American Declaration. The American Declaration, which has become incorporated by reference within the OAS Charter by the 1970 Protocol of Buenos Aires, contains a comprehensive list of recognized human rights that includes the right to life, liberty and security of person, the right to equality before the law, and the right to due process of the law.[117] Although the American Declaration is not a treaty, the United States voted its approval of this normative instrument and as a member of the OAS, is bound to recognize its authority over human rights issues.[118]

The International Covenant on Civil and Political Rights, to which the United States is bound, incorporates the protections of the Universal Declaration. Where other nations are criticized and sanctioned for consistent violations of internationally recognized human rights, the United States may not say: "Your government is bound by certain clauses of the covenant though we in the United States are not bound."[119]

C. The Violations Of Mr. Lightsey's Constitutional Rights Discussed Elsewhere In This Brief Also Violated International Law.

The factual and legal issues presented throughout this opening brief demonstrate that Mr. Lightsey was denied his right to a fair and impartial trial in violation of customary international law as evidenced by Articles 6

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[117] American Declaration of the Rights and Duties of Man, Resolution XXX, Ninth International Conference of American States, reprinted in the Inter-American Commission of Human Rights, Handbook of Existing Duties Pertaining to Human Rights, OEA/Ser. L/V/II.50, doc. 6 (1980).
[118] Case 9647 (United States) Res. 3/87 of 27 March 1987 OEA/Ser. L/V/II.52, doc. 17, para. 48 (1987).
[119] Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures* (1993) 42

and 14 of the International Covenant on Civil and Political Rights[120] as well as Articles 1 and 26 of the American Declaration.

The United States deposited its instruments of ratification of the ICCPR on June 8, 1992 with five reservations, five understandings, four declarations, and one proviso.[121] Article 19(c) of the Vienna Convention on the Law of Treaties declares that a party to a treaty may not formulate a reservation that is "incompatible with the object and purpose of the treaty."[122] The Restatement Third of the Foreign Relations Law of the United States echoes this provision.[123]

The ICCPR imposes an immediate obligation to "respect and ensure" the rights it proclaims and to take whatever other measures are necessary to give effect to those rights. United States courts, however, will generally enforce treaties only if they are self-executing or have been implemented by legislation.[124] The Executive Branch of the United States

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DePaul L.Rev. 1241, 1242.

[120] The substantive provisions of the Universal Declaration have been incorporated into the ICCPR, so these are incorporated by reference in the discussion above. Moreover, as was noted above, the Universal Declaration is accepted as customary international law.

[121] Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep. No. 23, 102d Cong., 2d Sess.

[122] Vienna Convention, *supra*, 1155 U.N.T.S. 331, took effect January 27, 1980

[123] Restatement Third of the Foreign Relations Law of the United States, (1987) sec. 313, comment b. With respect to reservations, the Restatement lists "the requirement ... that a reservation must be compatible with the object and purpose of the agreement."

[124] Newman and Weissbrodt, International Human Rights: Law, Policy and Process (1990) p. 579. See also *Sei Fujii* v. *California* (1952) 38 Cal.2d 718, where the California Supreme Court held that Articles 55(c) and 56 of the U.N. Charter are not self-executing.

has declared that the articles of the ICCPR are not self-executing.[125] The first Bush Administration, in explanation of proposed reservations, understandings, and declarations to the ICCPR, stated: "For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated."[126]

But under the Constitution, a treaty "stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts." (*Asakura v. Seattle* (1924) 265 U.S. 332, 341.)[127] Moreover, treaties designed to protect individual rights should be construed as self-executing. (*United States v. Noriega* (1992) 808 F. Supp. 791, 798.) In *Noriega*, the court noted, "[i]t is inconsistent with both the language of the [Geneva III] treaty and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane

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[125] Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep. No. 23, 102d Cong., 2d Sess.

[126] Senate Committee on Foreign Relations, *Report on the International Covenant on Civil and Political Rights* (1992) S.Exec.Rep. No. 23, 102d Cong., 2d Sess. at 19.

[127] Some legal scholars argue that the distinction between self-executing and non self-executing treaties is patently inconsistent with express language in Article 6, section 2 of the United States Constitution that all treaties shall be the supreme law of the land. (See generally Jordan L.

treatment of POWs -- not to create some amorphous, unenforceable code of honor among the signatory nations. 'It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests .... Even if Geneva III is not self-executing, the United States is still obligated to honor its international commitment.'" (*Id.* at 798.)

Moreover, the United States Supreme Court is making increasing use of international law in its reasoning and holdings. In finding in *Atkins v. Virginia* that capital punishment for the mentally retarded exceeds the bounds of decency in violation of the Eighth Amendment, the Supreme Court noted that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, n.21; and see *id.,* citing *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830, 831, n. 31 [considering the views of "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community"]; *Roper v. Simmons,* 125 S.Ct. 1183 [considering the international opposition against the execution of juvenile offenders.) Furthermore, in finding a Texas anti-sodomy law to be unconstitutional, the Supreme Court in *Lawrence v. Texas, infra,* looked heavily to the norms and values practiced by other countries, particularly in Europe, reasoning,

> "The court held that the laws proscribing the conduct were invalid under the Convention on Human Rights. . . Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was

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Paust, *Self-Executing Treaties* (1988) 82 Am.J. Int'l L. 760.)

> insubstantial in our Western civilization." (*Lawrence v. Texas* (2003) 539 U.S. 558, 123 S.Ct. 2472, 2481 (overruling *Bowers v. Hardwick* (1986) 478 U.S. 186, 106 S.Ct. 2841.)

Thus, the customs and practices of the international community are recognized as being relevant to the query of whether capital punishment passes muster under the Eighth Amendment. Though reservations by the United States provide that the treaties may not be self-executing, the ICCPR is still a forceful source of customary international law and as such is binding upon the United States.

Article 14 provides, "[a]ll persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Article 6 declares that "[n]o one shall be arbitrarily deprived of his life ... [The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court."[128] Likewise, these protections are found in the American Declaration: Article 1 protects the right to life, liberty and security of person; Article 2 guarantees equality before the law; and Article 26 protects the right of due process of law.[129]

In cases where the UN Human Rights Committee has found that a State party violated Article 14 of the ICCPR, in that a defendant had been denied a fair trial and appeal, the Committee has held that the imposition of the sentence of death also was a violation of Article 6 of the ICCPR.[130] The Committee further observed, "the provision that a sentence of death may be

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[128] International Covenant on Civil and Political Rights, *supra,* 999 U.N.T.S. 717.
[129] American Declaration of the Rights and Duties of Man, *supra.*
[130] *Report of the Human Rights Committee*, p. 72, 49 U.N. GAOR Supp.

imposed only in accordance with the law and not contrary to the provisions of the Covenant implies that 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review of conviction and sentence by a higher tribunal.'"[131]

Further, Article 4(2) of the ICCPR makes clear that no derogation from Article 6 ("no one shall be arbitrarily deprived of his life") is allowed.[132] An Advisory Opinion issued by the Inter-American Court on Human Rights concerning the Guatemalan death penalty reservation to the American Convention on Human Rights noted "[i]t would follow therefore that a reservation which was designed to enable the State to suspend any of the non-derogable fundamental rights must be deemed to be incompatible with the object and purpose of the Convention and, consequently, not permitted by it."[133] Implicit in the court's opinion linking nonderogability and incompatibility is the view that the compatibility requirement has greater importance in human rights treaties, where reciprocity provides no protection for the individual against a reserving state.[134]

(No. 40) p. 72, U.N. Doc. A/49/40 (1994).
[131] *Id.*
[132] International Covenant on Civil and Political Rights, *supra*, 999 U.N.T.S. 717.
[133] Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 of September 8, 1983, Inter-Amer.Ct.H.R., ser. A: Judgments and Opinions, No. 3 (1983), reprinted in 23 I.L.M. 320, 341 (1984).
[134] Edward F. Sherman, Jr. The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation (1994) 29 Tex. Int'l L.J. 69. In a separate opinion concerning two Barbadian death penalty reservations, the court further noted that the object and purpose of

D. Conclusion

Mr. Lightsey's rights under customary international law, as codified in the above-mentioned provisions of the ICCPR and the American Declaration and customary international law, were violated throughout his trial and sentencing phase. All of these due process violations enumerated also violated Mr. Lightsey's right to a fair hearing as guaranteed by Article 10 of the Universal Declaration, Article 14(1) of the ICCPR, Article 6(1) of the European Convention, Article XXVI of the American Declaration, and Article 8 of the American Convention.

Accordingly, Mr. Lightsey is entitled to relief not only pursuant to individual provisions of the United States and California Constitutions, but also pursuant to international treaties which are co-equal with the United States Constitution and binding upon the judges of this state through the Supremacy Clause. As President Lincoln once noted, the United States is mankind's "last, best hope" of a world governed by freedom and the rule of law and we therefore bear a special duty to vigilantly preserve such freedoms both at home and abroad.[135] Accordingly, Mr. Lightsey's verdicts and sentence of death must be reversed due to these unacceptable violations

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modern human rights treaties is the "protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations not in relation to other States, but towards all individuals within their jurisdiction." (Advisory Opinion No. OC-2/82 of September 24, 1982, Inter-Am. Ct.H.R., ser. A: Judgments and Opinions, No. 2, para. 29 (1982), reprinted in 22 I.L.M. 37, 47 (1983).) These opinions are an indicator of emerging general principles of treaty law, and strengthen the argument that the United States death penalty reservation is impermissible because it is incompatible.

[135] 1865 Inaug. Add., *Inaugural Addresses of the Presidents of the United*

of international law.

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States, supra, U.S. G.P.O.

XV.

THE CAPITAL SENTENCING STRUCTURE IN CALIFORNIA, BOTH GENERALLY AND AS APPLIED TO THE SPECIFICS OF MR. LIGHTSEY'S CASE, VIOLATES APPELLANT'S RIGHTS UNDER THE UNITED STATES CONSTUTION TO TRIAL BY JURY, DUE PROCESS OF LAW, FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT, AND A RELIABLE VERDICT, REQUIRING REVERSAL OF HIS SENTENCE OF DEATH.

A. Introduction

The California capital murder adjudication system that produced Mr. Lightsey's sentence of death is so fundamentally flawed that his sentence of death must be reversed as a matter of law. While this Court has rejected many of the grounds raised in this argument, the federal constitution outweighs the rulings of state courts and Mr. Lightsey respectfully urges reconsideration of such previously rejected arguments.[136]

B. Mr. Lightsey's Sentence of Death Must Be Reversed Because Penal Code § 190.2 Is Impermissibly Broad.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. Instead, the death penalty is imposed in a wanton and freakish manner on only a small fraction of those who are death-eligible. The statute therefore violates the Eighth and Fourteenth Amendments to the U.S. Constitution.

As this Court has recognized, the Eighth Amendment's proscription against cruel and unusual punishment requires that a death penalty law provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord*, *Godfrey v. Georgia* (1980) 446 U.S. 420,

[136] Mr. Lightsey wishes to thank the staff of the California Appellate Project for their substantial assistance with this claim.

427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, California's capital sentencing system must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty: "Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty." (*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

California purports to accomplish this narrowing obligation via the requirement that "special circumstances" exist in order to sentence to death. As this Court has explained, "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against Mr. Lightsey the statute contained twenty-nine special circumstances purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home

tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" (emphasis added).)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every accused murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty*

Scheme: Requiem for Furman? (1997) 72 N.Y.U. L.Rev. 1283, 1324-26.)[137] It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. The statutory list of special circumstances justifying the death penalty is so broad as to cover all but a small subset of murders. Section 190.2 does not genuinely narrow the class of persons eligible for the death penalty, nor was it intended to do so. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [California's then-effective "weak death penalty law does not apply to every murderer. Proposition 7 would."]).

This issue has not been addressed by the United States Supreme Court. Moreoever, this Court has routinely rejected challenges to the statute's lack of any meaningful narrowing, and has done so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in

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[137] The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

Pulley v. Harris (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which Mr. Lightsey was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at p. 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make virtually every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to lead to the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.(See sections B and D of this Argument.)

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor

other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[138] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance on the "circumstance of the crime" aggravating factor because three weeks after the crime defendant sought to conceal evidence,[139] or had a "hatred of religion,"[140] or threatened witnesses after his arrest,[141] or disposed of the victim's body in a manner that precluded its recovery.[142]

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

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[138] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.
[139] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10, *cert. den.*, 494 U.S. 1038 (1990).
[140] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).
[141] *People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.
[142] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35, *cert. den.* 496

a. Because the defendant struck many blows and inflicted multiple wounds[143] or because the defendant killed with a single execution-style wound.[144]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[145] or because the defendant killed the victim without any motive at all.[146]c. Because the defendant killed the victim in cold blood[147] or because the defendant killed the victim during a savage frenzy.[148]

d. Because the defendant engaged in a cover-up to conceal his crime[149] or because the defendant did not

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U.S. 931 (1990).

143 See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

144 See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

145 See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); People v. Allison, No. S004649, 5 RT 968-69 (same); People v. Belmontes, No. S004467, 12 RT 2466 (eliminate a witness); People v. Coddington, No. S008840, 31 RT 6759-60 (sexual gratification); People v. Ghent, No. S004309, 12 RT 2553-55 (same); People v. Brown, No. S004451, 16 RT 3543-44 (avoid arrest); People v. McLain, No. S004370, RT 31 (revenge).

146 See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, 16 RT 3650 (same); *People v. Hawkins*, No. S014199, 31 RT 6801 (same).

147 See, e.g., *People v. Visciotti*, No. S004597, 15 RT 3296-97 (defendant killed in cold blood).

148 See, e.g., *People v. Jennings*, No. S004754, 31 RT 6755 (defendant killed Victim in savage frenzy [trial court finding]).

149 See, e.g., *People v. Stewart*, No. S020803, 8 RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, 6 RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, 19 RT 4192 (defendant did not seek aid for Victim).

engage in a cover-up and so must have been proud of it.[150]

e. Because the defendant made the victim endure the terror of anticipating a violent death[151] or because the defendant killed instantly without any warning.[152]f. Because the victim had children[153] or because the victim had not yet had a chance to have children.[154]

g. Because the victim struggled prior to death[155] or because the victim did not struggle.[156]

h. Because the defendant had a prior relationship with the victim[157] or because the victim was a complete stranger to the defendant.[158]

These examples show that absent any statutory limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of

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[150] See, e.g., *People v. Adcox*, No. S004558, 21 RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, 14 RT 3030-31 (same); *People v. Morales*, No. S004552, 14 RT 3093 (defendant failed to engage in a cover-up).

[151] See, e.g., *People v. Webb*, No. S006938, 25 RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, 21 RT 4623.

[152] See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed Victim instantly); *People v. Livaditis*, No. S004767, 13 RT 2959 (same).

[153] See, e.g., *People v. Zapien*, No. S004762, 1 RT 37 (Jan 23, 1987) (Victim had children).

[154] See, e.g., *People v. Carpenter*, No. S004654, 1 RT 16; 4 RT 752 (Victim had not yet had children).

[155] See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (Victim struggled); *People v. Webb*, No. S006938, 25 RT 5302 (same); *People v. Lucas*, No. S004788, 14 RT 2998 (same).

[156] See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, 1 RT 160 (same).

[157] See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, 14 RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[158] See, e.g., *People v. Anderson*, No. S004385, 14 RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, 19 RT 4264 (same).

the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facts present in all homicides:

> a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[159]
>
> b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[160]
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> c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness,

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[159] See, e.g., *People v. Deere*, No. S004722, 1 RT 155-56 (Victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, 1 RT 10,075 (Victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, 24 RT 5164 (Victim was a young adult, age 18); *People v. Carpenter*, No. S004654, 1 RT 16; 4 RT 752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, 20 RT 4376 (victim was 77); *People v. Bean*, No. S004387, 22 RT 4715-16 (victim was "elderly").

[160] See, e.g., *People v. Clair*, No. S004789, 12 RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, 11 RT 2246 (same); *People v. Fauber*, No. S005868, 26 RT 5546 (use of an ax); *People v. Benson*, No. S004763, 6 RT 1149 (use of a hammer); *People v. Cain*, No. S006544, 31 RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, 1 RT 14,040 (stabbing); *People v. Scott*, No. S010334, 4 RT 847 (fire).

for sexual gratification, to avoid arrest, for revenge, or for no motive at all.

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[161]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[162]

Thus, in actual application of factor (a), there exists an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[163]

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[161] See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, 22 RT 4715 (middle of the night); *People v. Avena*, No. S004422, 12 RT 2603-04 (late at night); *People v. Lucero*, No. S012568, 19 RT 4125-26 (middle of the day).

[162] See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (Victim's home); *People v. Cain*, No. S006544, 31 RT 6787 (same); *People v. Freeman*, No. S004787, 17 RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, 1 RT 16; 4 RT 749-50 (forested area); *People v. Comtois*, No. S017116, 13 RT 2970 (remote, isolated location).

[163] The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See section C of this argument, below.)

As a practical matter, section 190.3's broad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) This is unconstitutional, as it fails to properly narrow the class of defendants eligible for the death penalty.

C. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Trial On Each Factual Determination Prerequisite To A Sentence Of Death; It Therefore Violates The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Moreover, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. In California, juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that the aggravating circumstances outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on

any burden of proof at all.

Inter-case proportionality review should be required, but under this loose scheme, such review is not even possible. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

1. Mr. Lightsey's Sentence of Death Violated His Constitutional Right to Trial By Jury, Because the Findings Used To Sentence Mr. Lightsey To Death Were Not Found Beyond A Reasonable Doubt By A Unanimous Jury.

The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ."

Yet these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [hereinafter *Apprendi*] and *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]. In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable

doubt. (*Id.* at p. 478.)

In *Ring*, the high court held that Arizona's death penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, unanimously and beyond a reasonable doubt, any fact that may increase the maximum punishment. While the primary problem presented by Arizona's capital sentencing scheme was that a judge, sitting without a jury, made the critical findings, the court reiterated its holding in *Apprendi*, that when the State bases an increased statutory punishment upon additional findings, such findings must be made by a unanimous jury beyond a reasonable doubt. California's death penalty scheme as interpreted by this Court violates the federal Constitution.

More recently in *Blakely v. Washington* (2004) 542 U.S. 296, 301, the United States Supreme Court reaffirmed its commitment to the holdings in *Apprendi* and *Ring* and debunked the State's reasoning by holding that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

When a trial court seeks to go beyond the "maximum punishment" called for the jury's guilt verdicts, the additional facts necessary to impose the maximum punishment must be found by a jury under the beyond a reasonable doubt. The jury's findings of guilt for first degree murder and any alleged special circumstances means that the maximum punishment that a judge could impose based on those findings alone is life without possibility of parole. (See also *Sattazahn v. Pennsylvania, supra,* 537 U.S. 101, 111-112.) This Court has recognized that death is a greater punishment as a matter of law and that sentence can only be imposed if the jury makes two additional findings beyond the guilt verdict and truth of the

special circumstance[s]. That is, the jury must find (1) the existence of aggravating circumstances and (2) those circumstances outweigh any in mitigation.

Accordingly, Mr. Lightsey respectfully submits that this Court's persistence in maintaining that the rule from *Apprendi-Ring-Blakely* does not apply to California's death penalty scheme and capital juries are not required to reach unanimous agreement on the factors in aggravation and that they outweigh those in mitigating under the beyond a reasonable doubt standard is simply wrong and contrary to binding authority from the United States Supreme Court.[164]

D. In The Wake Of Apprendi, Ring And Blakely, Any Aggravating Factor Necessary To The Imposition Of Death Must Be Found True Beyond A Reasonable Doubt.

Most of the states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and a few states have related provisions.[165] Only California

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[164] As mentioned above, in *People v. Morrison* (2004) 34 Cal.4th 698, 731, the Court rejected the claim that *Blakely* applies to California's death penalty scheme.

[165] See Ala. Code § 13A-5-45(e) (1975); Ariz. Rev. Stat. Ann. § 13-703.01 (West 2002); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. §§ 16-11-103(d), 18-1.3-1201 (West 2002); Del. Code Ann. tit. 11, 4209 (2002); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (Michie 2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9 (Michie 2002); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); Mo. Rev. Stat. § 565.030.4 (2003); Mont. Code Ann. § 46-1- 401 (2002); 2003 Mont. Laws 154 § 1; Neb. Rev. Stat. § 29-2522 (2002); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. 175.554 & 175.556 (2003); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21,

and three other states (Florida, Montana, and New Hampshire) fail to statutorily address this issue.

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

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors.[166] According to California's "principal sentencing

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§ 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).
Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) Connecticut requires that the prosecution prove the existence of penalty phase aggravating factors, but specifies no burden. (Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

[166] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v.*

instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors outweigh mitigating factors.[167] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[168]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does

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Brown (1988) 46 Cal.3d 432, 448.)

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

[168] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) This holding is based on a truncated view of California law. As section 190, subd. (a),[169] indicates, the maximum penalty for *any* first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring* to no avail:

> In an effort to reconcile its capital sentencing system with the Sixth Amendment as interpreted by *Apprendi*, Arizona first restates the *Apprendi* majority's portrayal of Arizona's system: Ring was convicted of first-degree murder, for which Arizona law specifies "death or life imprisonment" as the only sentencing options, see Ariz.Rev.Stat. Ann. § 13-1105(c) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict. . . . 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 115. (*Ring, supra,* 536 U.S. at pp. 603-604; see also *Sattazahn v. Pennsylvania, supra,* 537 U.S. at pp.

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[169] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

111-112, and *Blakely v. Washington, supra,* 124 S.Ct. at p. 2537, where that reasoning was reaffirmed and the rationale used by this Court to find that *Apprendi* and *Ring* do not apply to California's death penalty scheme was completely debunked.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at p. 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5." (Section 190, subd. (a).)

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance under section 190.2. Death is not an available option unless the jury makes the further finding that one or more aggravating circumstances substantially outweigh(s) the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003).) It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[170] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[171]

There is no meaningful difference between the processes followed under each scheme. "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 536 U.S. at p. 602.) The issue of *Ring*'s applicability hinges on whether as a practical matter, the sentencer must make additional fact-findings during the penalty phase before determining

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[170] Ariz. Rev. Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the enumerated aggravating circumstances and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

[171] California Penal Code Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." In *People v. Brown* (1985) 40 Cal.3d 512, 541, 545, fn. 19, the California Supreme Court construed the "shall impose" language of section 190.3 as not creating a mandatory sentencing standard and approved an instruction advising the sentencing jury that a finding that the aggravating circumstances substantially outweighed the mitigating circumstances was a prerequisite to imposing a death sentence. California juries continue to be so instructed. (See CALJIC 8.88 (7th ed. 2003).)

whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at 589-590, fn. 14.)

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

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "[I]n the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California* (1994) 512 U.S. 967, 972.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (*Prieto*, 30 Cal.4th at 263; emphasis added.) This

summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale. The fact that no single factor determines penalty does not negate the requirement that facts be found as a prerequisite to considering the imposition of a death sentence.

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. The presence of at least one aggravating factor is the functional equivalent of an element of capital murder in California and requires the same Sixth Amendment protection. (See *Ring, supra,* 536 U.S. at p. 602.)

Finally, this Court relied on the undeniable fact that "death is different," but used the moral and normative nature of the decision to choose life or death as a basis for withholding rather than extending procedural protections. (*Prieto*, 30 Cal. 4th at 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances with the argument that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary

to a capital sentence . . . is without precedent in our constitutional jurisprudence." (*Ring*, *supra*, 536 U.S. at p. 606, citing with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at p. 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[172] As the high court stated in *Ring*, "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (*Ring*, *supra*, 536 U.S. at p. 589.) "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death." (*Id.,* at p. 609.)

The final step of California's capital sentencing procedure is indeed a free weighing of aggravating and mitigating circumstances, and the decision to impose death or life is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the facts that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but also as to their

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[172] In *Monge*, the U.S. Supreme Court foreshadowed *Ring*, and expressly found the *Santosky v. Kramer* (1982) 455 U.S. 745, 755, rationale for the beyond-a-reasonable-doubt burden of proof requirement applicable to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added) (quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 [quoting *Addington v. Texas* (1979) 441 U.S. 418]).)

accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

1. The Requirements of Jury Agreement and Unanimity.

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord*, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to Mr. Lightsey's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing further offends the Fifth, Sixth, Eighth, and Fourteenth Amendments.[173] The Fifth, Sixth,

[173] See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled

Eighth, and Fourteenth Amendments are further violated by imposition of a death sentence absent any assurance that the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the ultimate deliberative process in which normative determinations are made. The U.S. Supreme Court has made clear that such factual determinations must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring*, *supra*.)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra,* 524 U.S. at p. 732;[174] *accord,*

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usages].

[174] The *Monge* court developed this point at some length, explaining as follows:

> The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida,* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique "in both its severity and its finality," *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative

Johnson v. Mississippi (1988) 486 U.S. 578, 584), the Fifth, Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring*, *supra,* 536 U.S. at p. 608).[175] See section D, *infra.*

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[176] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact" on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the

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difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding"). (*Monge v. California, supra*, 524 U.S. at pp. 731-732.)

[175] Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[176] The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

due process and cruel and unusual punishment clauses of the federal and state Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and did not do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) However, *Apprendi-Ring-Blakely* make clear that the finding of one or more aggravating circumstance that is a prerequisite to considering whether death is the appropriate sentence in a California capital case is precisely the type of factual determinations for which Mr. Lightsey is entitled to unanimous jury findings beyond a reasonable doubt.

2. The Due Process And The Cruel And Unusual Punishment Clauses Of The State And Federal Constitution Require That The Jury In A Capital Case Be Instructed That They May Impose A Sentence Of Death Only If They Are Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Outweigh The Mitigating Factors And That Death Is The Appropriate Penalty.

a. Factual Determinations.

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

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt.

b. Imposition Of Life Or Death.

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the

decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*Winship*, *supra*, 397 U.S. at 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 743, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than that of human life. If personal liberty is "an interest of transcending value" (*Speiser*, *supra*, 375 U.S. at 525), how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [same]; *People v. Thomas* (1977) 19 Cal.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

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

> "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." (*Id.,* at p. 756.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Stantosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Stantosky*, *supra*, 455 U.S. at 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at 363.)

The final *Stantosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428

U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake. (See *Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly applied the *Stantosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Monge v. California*, *supra*, 524 U.S. at p. 732 (emphasis added) (quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 [quoting *Addington v. Texas* (1979) 441 U.S. 418]).) Thus, for a death sentence to pass constitutional muster under the Eighth Amendment and the due process clause, the sentencing jury must find beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence.

3. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power

to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.*, *supra*, 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

Accordingly, Mr. Lightsey respectfully suggests that *People v. Hayes, supra,* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that

decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, Mr. Lightsey's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, and the appropriateness of the death penalty. Sentencing Mr. Lightsey to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Fifth, Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana*, *supra*.) Accordingly, the death judgment must be reversed.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, *supra*, 428 U.S. at p. 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a

defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*.) The reason is obvious: Without an instruction on the burden of proof, the jurors might not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*.)

E. California Law Violates The Fifth, Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require That The Jury Base Any Death Sentence On Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived Mr. Lightsey of his federal due

process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at p. 543; *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.)[177] The same

[177] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker

analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, California law requires the sentencing judge to state on the record the reasons for the sentence choice. (*Ibid.*; Penal Code section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencing jury in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *id.* at p. 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79) does not obviate the need to articulate its specific factual basis.

The importance of written findings is recognized throughout this country. Of the thirty-eight post-*Furman* state capital sentencing systems,

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must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. See Title 15, California Code of Regulations, section 2280 et seq.

at least twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[178]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* and *Blakely v. Washington* have made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing

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[178] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

whether the jury has made the unanimous findings required under *Ring* and *Blakely* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment and the overall right to a fair trial under the Fifth and Fourteenth Amendments.

F. California's Death Penalty Statute As Interpreted By The California Supreme Court Forbids Intercase Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, Or Disproportionate Impositions Of The Death Penalty, In Violation Of The Eighth Amendment.

The United States Supreme Court has lauded proportionality review as a method of protecting against arbitrariness in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia, supra*, 428 U.S. at p. 198; *Proffitt v. Florida* (1976) 428 U.S. 242, 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase

proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> "[I]n *Pulley v. Harris*, 465 U.S. 37, 51, 104 S.Ct. 871, 879-880, 79 L.Ed.2d 29 (1984), the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.*, at 53, 104 S.Ct., at 881, quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (CA9 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris*." (*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).)

The time has come for *Pulley v. Harris* to be reevaluated since, as this felony-murder case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia, supra*, 408 U.S. at p. 313 (conc. opn. of White, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.

The capital sentencing scheme in effect at the time of Mr. Lightsey's trial was the type of scheme that the *Pulley* Court had in mind when it said

that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris, supra*, 465 U.S. at p. 51.) Even assuming, for purposes of this argument, that the scope of California's special circumstances is not so broad as to render the scheme unconstitutional, the open-ended nature of the aggravating and mitigating factors – especially the circumstances of the offense factor delineated in Penal Code section 190.3, subdivision (a) – and the discretionary nature of the sentencing instruction under CALJIC No. 8.88 grant a jury unrestricted (or nearly unrestricted) freedom in making the death-sentencing decision. (See *Tuilaepa v. California, supra*, 512 U.S. at pp. 986-988 (dis. opn. of Blackmun, J.) .)

California's authorization of the death penalty for felony-murder works synergistically with its far-reaching and flexible sentencing factors and unfettered jury discretion at the selection stage to infuse the state capital sentencing scheme with flagrant arbitrariness. Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed herein. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide Mr. Lightsey with intercase proportionality review. The absence of intercase proportionality

review violates Mr. Lightsey's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

1. The Lack Of Intercase Proportionality Review Violates Mr. Lightsey's Right To Equal Protection Of The Law.

The United States Supreme Court repeatedly has directed that a greater degree of reliability in sentencing is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact finding. (See, e.g., *Monge v. California, supra*, 524 U.S. at pp. 731-732.) Despite this directive, California provides significantly fewer procedural protections for ensuring the reliability of a death sentence than it does for ensuring the reliability of a noncapital sentence. This disparate treatment violates the constitutional guarantee of equal protection of the laws. (U.S. Const., 14th Amend.)

At the time of Mr. Lightsey's sentence of death, California required intercase proportionality review for noncapital cases. (Former Pen. Code § 1170, subd. (d).) The Legislature thus provided a substantial benefit for all prisoners sentenced under the Determinate Sentencing Law (DSL) – a comprehensive and detailed disparate sentence review. (See generally *In re Martin* (1986) 42 Cal.3d 437, 442-444 [detailing how system worked in practice].) However, persons sentenced to the most extreme penalty – death – are unique among convicted felons in that they are not accorded this review. This distinction is irrational.

In *People v. Allen* (1986) 42 Cal.3d 1222, this Court rejected a claim that the failure to provide disparate sentence review for persons sentenced to death violates the constitutional guarantee of equal protection of the laws. The contention raised in *Allen* also contrasted the death penalty scheme with the disparate review procedure provided for noncapital

defendants, but this Court rejected the argument. The reasoning of *Allen*, however, was flawed.

The *Allen* court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case is a jury: "This lay body represents and applies community standards in the capital sentencing process under principles not extended to noncapital sentencing." (*People v. Allen, supra*, 42 Cal.3d at p. 1286.) Although the observation may be true, it ignores a more significant point, i.e., the requirement that any death penalty scheme must ensure that capital punishment is not randomly and capriciously imposed. It is incongruous to provide a mechanism to assure that this type of arbitrariness does not occur in noncapital cases, but not to provide that same mechanism in capital cases where so much more is at stake for the defendant.

Further, jurors are not the only bearers of community standards. Legislatures also reflect community norms in the delineation of special circumstances (Pen. Code, § 190.2) and sentencing factors (Pen. Code, § 190.3), and a court of statewide jurisdiction is well situated to assess the objective indicia of community values that are reflected in a pattern of verdicts. (See *McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality remain alive in the area of capital sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses or offenders. (*See Ford v. Wainwright* (1986) 477 U.S. 399; *Enmund v. Florida* (1982) 458 U.S. 782; *Coker v. Georgia* (1977) 433 U.S. 584.) But juries – like trial courts and counsel – are not immune from error, and they may stray from the larger community consensus as expressed by statewide sentencing practices. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

Jurors are not the only sentencers. A verdict of death always is subject to independent review by a trial court empowered to reduce the sentence, and the reduction of a jury's verdict by a trial judge is required in particular circumstances. (See Pen. Code, § 190.4, subd. (e); *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) Thus, the absence of disparate sentence review in capital cases cannot be justified on the ground that a reduction of a jury's verdict would render the jury's sentencing function less than inviolate, since it is not inviolate under the current scheme.

The second reason offered by the *Allen* Court for rejecting the defendant's equal protection claim was that the sentencing range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen, supra*, 42 Cal. 3d at 1287, emphasis added.) The idea that the disparity between life and death is a "narrow" one, however, defies constitutional doctrine: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability [citation]. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright, supra*, 477 U.S. at p. 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [lead opn. of Stewart, Powell, and Stevens, JJ.].) The qualitative difference between a prison sentence and a death sentence thus militates for – rather than against – requiring the State to apply its disparate review procedures to capital sentencing.

Finally, this Court in *Allen* relied on the additional "nonquantifiable" aspects of capital sentencing when compared to noncapital sentencing as

supporting the different treatment of persons sentenced to death. (See *People v. Allen, supra*, 42 Cal.3d at p. 1287.) The distinction, however, is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered aggravating and mitigating circumstances in a capital case. (Compare Pen. Code, § 190.3, subds. (a) through (j) with Cal. Rules of Court, rules 4.421 & 4.423.) It is reasonable to assume that precisely because "nonquantifiable factors" permeate all sentencing choices, the legislature created the disparate review mechanism discussed above.

The equal protection clause of the Fourteenth Amendment to the United States Constitution guarantees every person that he or she will not be denied fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (See *Bush v. Gore* (2000) 531 U.S. 98, 104-105.) In addition to protecting the exercise of federal constitutional rights, the equal protection clause prevents violations of rights guaranteed to the people by state governments. (See *Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The arbitrary and unequal treatment of convicted felons, like Mr. Lightsey, who are condemned to death cannot be justified, as this Court ruled in *Allen*, by the fact that a death sentence reflects community standards. All criminal sentences authorized by the Legislature, whether imposed by judges or juries, represent community standards. Jury sentencing in capital cases does not warrant withholding the same type of disparate sentence review that is provided to all other convicted felons in this state – the type of review routinely provided in virtually every death penalty state. The lack of intercase proportionality review violated Mr. Lightsey's Fourteenth Amendment right to equal protection and requires reversal of his death sentence.

G. The Use Of Restrictive Adjectives In The List Of Potential Mitigating Factors Impermissibly Acted As Barriers To Consideration Of Mitigation By Mr. Lightsey's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

H. The Failure To Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators Precluded A Fair, Reliable, And Evenhanded Administration Of The Capital Sanction.

Nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn. 15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578,

584-585.)

It is thus likely that Mr. Lightsey's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated Mr. Lightsey "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

The impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious

action'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973 quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma, supra*, 455 U.S. at 112.)

I. The California Sentencing Scheme Violates The Equal Protection Clause Of The Federal Constitution By Denying Procedural Safeguards To Capital Defendants Which Are Afforded To Non-Capital Defendants.

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California, supra*, 524 U.S. at pp. 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to

strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force; the scrutiny of the challenged classification must be more strict; and any purported justification by the State of the discrepant treatment must be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

In *Prieto*,[179] as in *Snow*,[180] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. If that were so, then California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

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[179] "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at 275.)

[180] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (*Snow*, 30 Cal.4th at 126, fn. 32.)

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See sections C.1-C.5, *ante*.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike most states where death is a sentencing option and all persons being sentenced to non-capital crimes in California, no reasons for a death sentence need be provided. (See section C.6, *ante*.) These discrepancies on basic procedural protections are skewed against persons subject to the loss of their life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) There is no hint in *Allen* that the two procedures are in any way analogous. In fact, the decision centered on the fundamental differences between the two sentencing procedures. However, because the Court was seeking to

justify the extension of procedural protections to persons convicted of non-capital crimes that are not granted to persons facing a possible death sentence, the Court's reasoning was necessarily flawed.

In *People v. Allen*, *supra*, this Court rejected a contention that the failure to provide disparate sentence review for persons sentenced to death violated the constitutional guarantee of equal protection of the laws. The Court offered three justifications for its holding.

(1) The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal. 3d at 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values that are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) How can we ensure principles of uniformity and proportionality in death sentencing? We do so, in part, by prohibiting death penalties that flout a societal consensus as to particular offenses (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright*, *supra*; *Atkins v. Virginia*, *supra*). Juries, like trial courts and counsel, are not immune from error. The entire purpose of disparate sentence review is to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices, regardless of who made them.

While the State cannot limit consideration of any factor that could cause the sentencing jury or judge to reject the death penalty, it can and must provide rational criteria that narrow the discretion to impose death.

(*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the channeled statutory criteria that narrow death eligibility or the flat judicial prohibitions against imposition of the death penalty on certain offenders or for certain crimes.

Jurors are also not the only ones responsible for imposition of the death sentence. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See section 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) The absence of a disparate sentence review cannot be justified on the ground that a reduction of a jury's verdict by a trial court would interfere with the jury's sentencing function.

(2) The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at p. 1287 (emphasis added).) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court:

In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability. . . This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different. (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411 (citation omitted)). "Death, in its finality, differs more from life imprisonment than

a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (opn. of Stewart, Powell, and Stephens, J.J.).) (See also *Reid v. Covert* (1957) 354 U.S. 1, 77 (conc. opn. of Harlan, J.); *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 (conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.); *Gregg v. Georgia*, *supra*, 428 U.S. at p. 187 (opn. of Stewart, Powell, and Stevens, J.J.); *Gardner v. Florida* (1977) 430 U.S. 340, 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 605 (plur. opn.); *Beck v. Alabama* (1980) 447 U.S. 625, 637; *Zant v. Stephens*, *supra*, 462 U.S. at pp. 884-885; *Turner v. Murray* (1986) 476 U.S. 28, 90 (plur. opn.) quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994; *Monge v. California*, *supra*, 524 U.S. at p. 732.)[181] The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply its disparate review

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[181] The *Monge* court developed this point at some length:
The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique "in both its severity and its finality," *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding")." (*Monge v. California*, *supra*, 524 U.S. at pp. 731-732.)

procedures to capital sentencing.

(3) Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*, at p. 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices that the legislature created the disparate review mechanism discussed above.

In sum, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer

permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*; see also *Roper v. Simmons, supra,* 125 S.Ct. at pp. 1189-1194, holding that "'the evolving standards of decency that mark the progress of a maturing society'" prohibit the execution of juvenile offenders.)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases (*Allen*, *supra*, 42 Cal.3d at p. 186) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Ring v. Arizona, supra.*)[182] California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra.*)

Procedural protections are especially important in meeting the acute

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[182] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections:

Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . . [Par.] The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. (*Ring*, *supra*, 536 U.S. at p. 589, 609.)

need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California*, *supra*.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

J. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms Of Humanity And Decency And Violates The Eighth And Fourteenth Amendments; Imposition Of The Death Penalty Now Violates The Eighth And Fourteenth Amendments To The United States Constitution.

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (In 1995, South Africa abolished the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, *all* nations of Western Europe have

now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding.[183] "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409.)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia*, *supra*, 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles*, *supra*, 356 U.S. at p. 100; *Atkins v. Virginia*, *supra*, 536 U.S. at pp. 311-312; *Roper v. Simmons,* 125

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[183] In *Roper v. Simmons, supra,* 125 S.Ct. at pp. 1198-1199, the Supreme Court acknowledged that that countries of the world are in 'virtual unanimity" against the execution of juvenile offenders and the Supreme Court has looked to practices in other countries of the world in interpreting

S.Ct. at p. 1190.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons and juvenile offenders, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved," as are the execution of juvenile offenders. (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4; *Roper v. Simmons, supra,* 125 S.Ct. at pp. 1198-1199.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316; *Roper v. Simmons, supra,* 125 S.Ct. at pp. 1198-1199.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311]; see also Argument XVIII, *supra.*)

Categories of crimes that particularly warrant a close comparison

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the Eighth Amendment's prohibition against cruel and unusual punishment.

with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[184] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities and juvenile offenders (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra; Roper v. Simmons, supra.*) Thus, the very broad death scheme in California and the employment of death as regular punishment violate both international law and the Eighth and Fourteenth Amendments.

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[184] Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope:

> "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random. (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence* (1995) 46 Case W. Res. L.Rev. 1, 30.)

XVI.

CUMULATIVE ERROR

Assuming *arguendo* that the individual errors identified above were not independently prejudicial, reversal would still be required because the cumulative effect of these many errors rendered his trial fundamentally unfair, requiring reversal of his verdicts. (See *United States v. Sepulveda* (1st Cir.1993) 5 F.3d 1161, 1195-1196; *People v. Sanders* (1995) 11 Cal.4th 475, 565; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1236.)

Moreover, the cumulative effect of the penalty phase errors also made Mr. Lightsey's sentence of death inherently unreliable, and therefore unconstitutional. (*Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Hill* (1998) 17 Cal.4th 800, 844-845.)

As one appellate court explained:

> "claims under the cumulative error doctrine are sui generis. A reviewing tribunal must consider each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the district court dealt with the errors as they arose (including the efficacy--or lack of efficacy--of any remedial efforts); and the strength of the government's case. See, e.g., *Mejia-Lozano*, 829 F.2d at 274 n. 4." (*United States v. Sepulveda, supra,* 5 F.3d at p. 1196.)

Because the many errors in each phase of Mr. Lightsey's trial taken together operated to deny him of numerous constitutional rights, including but not limited to due process of law, trial before a fair and impartial jury, confrontation, the assistance of counsel, and a reliable penalty

determination in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and its analogous California counterparts, his entire judgment and sentence of death must be reversed.

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CONCLUSION

Given the strength of his alibi defense and the lack of reliable evidence directly linking him to the crime, Mr. Lightsey had a very real chance of being found innocent during the guilt phase of his trial. However, these proceedings were fatally flawed by a series of grave constitutional and state law errors.

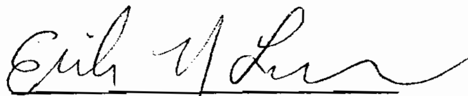
The penalty phase of his trial was equally distorted by a series of constitutional and state law errors that denied him the opportunity of presenting a powerful case in mitigation based on his mental impairments, his mitigating social history, and a very real case of lingering doubt.

Due to these reasons, Mr. Lightsey's convictions and judgment of death cannot stand and must accordingly be reversed.

Dated: December 7, 2006

Respectfully submitted,

LAW OFFICES OF ERIK N. LARSON



Erik N. Larson

DECLARATION OF SERVICE

Case Name: **People v. Christopher Charles Lightsey**
Case Number: **CSC Case No. S048440**

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 345 Franklin Street, San Francisco, CA 94102.

On December 7, 2006, I served the attached

APPELLANT'S OPENING BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and having said envelope(s) deposited in a United States Postal Service mailbox at San Francisco, with postage thereon fully paid

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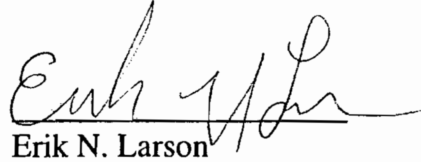
I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 7, 2006, at San Francisco, California

RUSTY GOODROW

WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, I hereby certify that this appellate brief is composed in 13-point times new roman font and consists of 95,895 words. An application to file an over-length brief has been filed simultaneously with this opening brief.



Erik N. Larson