IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

STEPHEN EDWARD HAJEK,

Defendant and Appellant.

Case No. S049626

Santa Clara County
Superior Court No. 148113

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Santa Calra

The Honorable Judge Daniel E. Creed

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STATEMENT OF APPEALABILITY

This is an automatic appeal, pursuant to Penal Code section 1239, subdivision (b), from a conviction and judgment of death entered against appellant, Stephen Edward Hajek (hereinafter "appellant"), in Santa Clara Superior Court on October 24, 1995. The appeal is taken from a judgment that finally disposes of all issues between the parties.

STATEMENT OF THE CASE

On January 22, 1991, the Santa Clara District Attorney's Office filed in the municipal court (Santa Clara County Judicial District) a 12-count felony complaint against appellant and his co-defendant, Loi Tan Vo. (CT 946.) Count 1 alleged that on January 18, 1991, they murdered Su Hung in violation of Penal Code 1 section 187. (CT 946.) Count 1 also contained allegations of Four special circumstances, including (1) murder while lying in wait; (2) while committing burglary; and (3) while committing robbery; (4) torture murder. (CT 946-947.) It was further alleged that petitioner personally used a deadly and dangerous weapon, a pellet gun, and co-defendant Vo personally used a knife, both in violation of section 12022.[1] (CT 946.)

Counts 2-5 alleged that the defendants also committed on January 18, 1991, attempted murder of Cary, Alice, Ellen and Tony Wang in violation of Penal Code sections 664 and 187. (CT 948-950.) Count 6 alleged that the defendants kidnaped Cary Wang in violation of section 207, subsection (a). Counts 7-9 alleged that the defendants falsely imprisoned Cary, Alice and Tony Wang in violation of sections 236 and 237. Count 10

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[1] These arming allegations against appellant and co-defendant Vo are included in each count.

charged both defendants with the robbery of Su Hung in violation of section 211/212.5. Counts 11 and 12 alleged that the defendants committed first degree burglary in violation of sections 459/460.1.

A preliminary examination occurred over a two-week period from June 3, 1991 through June 18, 1991, (CT 956-976.) A 12-count information (numbered 148113), mirroring the complaint except for count 12,[2] was filed on July 1, 1991. (RT 978-989.) Appellant was arraigned on July 15, 1991. He pleaded not guilty to each of the charges, denied all special allegations and denied the special circumstances. (CT 998.) During a status hearing on September 5, 1991, the District Attorney stated his intention to seek the death penalty. (CT 1001.)

On June 8, 1992, the Santa Clara District Attorney filed a motion to amend the information. The proposed amendment included adding appellant's name to all enhancements to counts 1-9 charging the personal use of a knife. (CT 1129.) It also requested that a fifth special circumstance, for murder while committing the felony of kidnapping, be added to count 1. (CT 1130.) The prosecutor also sought to amend Count 10 to add an "ATM card" to the items allegedly stolen and to add the entire Wang family as persons who were robbed. (CT 1131.) On July 29, 1992, the State filed a proposed amended information. (CT 1157-1169.)

Appellant filed a Motion to Dismiss Pursuant to Penal Code Section 995 and Response to District Attorney's Motion to Amend the Information on July 30, 1992. (CT 1187-1224.) The prosecutor's response to this

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[2] The original count 12 was not included in the information. In its place was a new count 12, which charged petitioner with a violation of section 136.1(c)(1), attempting to persuade and prevent a witness, Cary Wang, by force and fear from testifying. (CT 988.)

motion was filed on August 15, 1992, (CT 1304-1328.) The Honorable John F. Herlihy dismissed, on August 29, 1992, all four special circumstances and denied the prosecution's motion to amend to add a fifth special circumstance. (CT 1348-1350.)

On September 10, 1992, the District Attorney filed a notice of appeal of the superior court ruling on the 995 motion to the California Court of Appeal, Sixth Appellate District. (CT 1351-1352.) The First Amended Information was filed on September 23, 1992, and appellant was arraigned that day. (CT 1366-1375.) He pleaded not guilty to each of the charges, denied all special allegations and denied the special circumstance of murder with torture. (CT 1375.)

On October 29, 1993, the California Court of Appeal reinstated the four special circumstances allegations that had been dismissed in the superior court. (CT 1422-1437.) The District Attorney re-filed the original Information No. 148113 on March 2, 1994. (CT 1442-1452.) At a hearing on that same day, counsel for appellant stated that no further arraignment would be necessary, and appellant denied all of the special circumstances allegations. (CT 1454.)

Jury selection began on February 14, 1995, (RT 1646-1647.) It took twenty-three days to chose a jury. On March 29 1995, twelve jurors and four alternates were selected and sworn. (CT 1690.) The guilt phase of the trial began on March 30, 1995, (CT 1692.) The prosecutor started presentation of his guilt phase case-in-chief on April 3, 1995 (CT 1696); it lasted for eight and a half days. (CT 1790.) Appellant's guilt phase case - in-chief began on April 20, 1995, (CT 1790), and lasted for four and a half days. (CT 1807.) Presentation of co-appellant's guilt phase case-in-chief started on May 1, 1995, (CT 1790), and continued for two and a half days.

(CT 1815.)

The guilt phase case went to the jury on May 10, 1995, (CT 1818.) It took the jury approximately six days to reach verdicts at the guilt phase. (CT 1818, 1821, 1826, 1829, 1831, 2114.)

The jurors found both appellant and co-appellant Vo guilty of first degree murder (Count 1); they also found true the special circumstances allegations of lying in wait and torture. (CT 2098-2099.) In addition, they convicted both defendants of four counts of attempted murder (Counts 2, 3, 4, and 5), one count of kidnaping (Count 6), three counts of false imprisonment (Counts 7, 8 and 9), one count of first degree robbery (Count 10) and one count of first degree burglary (Count 11). (CT 2099-2104) Appellant was found guilty of dissuading a witness (Count 12), as well. (CT 2105.) The special allegations for use of a firearm, appended to each count, were found true as to appellant. (CT 2098-2104.)

The penalty phase trial began on June 6, 1995. (CT 2213.) The presentation of evidence took more than six days. (CT 2616.) On June 20, 1995, the matter went to the jury for decision on penalty. (CT 2618.) The penalty deliberations took place over the course of five days. (CT 2618, 2622, 2626, 2627, 2666.) On June 28, 1995, the jury returned verdicts of death as to both appellant and co-appellant Vo. (CT 2666.)

The appellants' automatic motions to modify the death verdicts were heard on October 12, 1995, and denied. Appellant's motion for a new trial was also heard and denied on that date. The trial judge pronounced judgment on appellant and his co-defendant on October 18, 1995. The judge sentenced appellant as follows: (a) to death on Count 1; (b) eight years plus five years (for the arming enhancement) for a total of thirteen years on Count 6; (c) to three years on Count 12, to be served consecutive to

the thirteen years on Count 6; (d) to life plus five years (for the arming enhancement) on Count 2 to be served consecutive to the sentence imposed in Counts 6 and 12; and (e) to life plus five years on Counts 3, 4 and 5 to run concurrently to one another and to Count 2. (CT 2892.) The trial judge stayed imposition of sentence on Counts 7, 8, 9, 10 and 11. (CT 2897.)

Appellant was remanded to the care, custody and control of the Warden of the State Prison at San Quentin for execution of the sentence of death and to be held pending the final determination of appellant's automatic appeal to this Court. (CT 2893-2894.)

STATEMENT OF FACTS

The murder in this case occurred on January 18, 1991, at a house owned by Chi ("Tony") Wang and Hui ("Cary") Wang and located in San Jose, California. (RT 3048, 3079.) Tony and Cary Wang have two daughters, Ellen and Alice Wang. (RT 3050-3051.) Su Hung [3], the 73 year old mother of Cary Wang and the murder victim in this case, was also living with the Wangs in January of 1991. (RT 3051.)

A. The Guilt Phase

The events which precipitated the murder of Su Hung occurred several days earlier when Ellen Wang, then 15 years old, got into a dispute with two other young people, appellant Stephen Hajek and Lori Nguyen, outside an ice cream shop located in the San Jose mall. On January 14, 1991, at approximately 4:30 or 5:00 p.m., Ellen Wang walked by a Baskin Robbins with her friends, Jackie [4] Huynh, Tina Huynh, Ngoc Nguy, and Thuy Dang. (RT 3080.) They saw Lori Nguyen and appellant outside

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[3] Her full Chinese name was Hung Su Chieh. (RT 3159.)

[4] In the transcript, she is also referred to as Jacee. (RT 4035.)

eating ice cream. (RT 3081.) At one time, Ellen and Lori had been best friends (RT 3082), but in January of 1991 they were no longer friends. (RT 3082-3083.) Ellen had never seen appellant before. (RT 3086.) As Ellen and her friends passed by Lori and appellant, Tina Huynh said something to Lori which Ellen did not hear. Based on Tina's tone of voice, Ellen believed that it was not friendly. (RT 3085, 3087.) [5]

Ellen and her group walked to an electronics store located in the same mall, shopped there for about ten minutes and started walking home. While they were still in the parking lot, a white van stopped near them.[6] Appellant was driving, and Lori was sitting in the front passenger seat. (RT 3088-3089.) Lori and Tina began to argue. Lori then attempted to get out of van, but Tina stopped her. Lori began pulling Tina's hair, and Tina pulled Lori's hair. (RT 3090-3091.) The fight actually took place both in and out of the van and involved punching and scratching as well as hair pulling. (RT 3091.)

Others joined in the melee. First, Jackie tried to separate Tina and Lori, but then Lori and Jackie began fighting. (RT 3093.) When Ellen tried to pull Jackie and Lori apart, she saw that there was no ignition part or key to the van. She yelled "This car is picked," meaning that it was stolen. (RT 3093-3094.) After she yelled that, appellant got out of the van and came

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[5] Lori testified that it was Ellen who spoke to Lori, asking her if she had called Ellen a bitch. (RT 4029.)

[6] Lori Nguyen testified differently on this point. She claimed that she and appellant decided to leave Baskin and Robbins in order to avoid any potential confrontation with Ellen Wang and her friends. (RT 4030-4031.) While Lori and appellant were in a van waiting in a line of cars to get out of the parking lot, Tina Huynh ran up to their van and opened the front passenger side door. (RT 4032.) Tina accused Lori of "dogging" her. According to Lori, Tina dragged her out of the van, and they started fighting. (RT 4035.)

over to Ellen and picked her up and threw her down on the ground. (RT 3094.) Ellen landed in some bushes and was scratched on her chest just below her neck but was otherwise unhurt. (RT 3095.) Ellen and appellant swore at each other. (RT 3096.) Soon the fight ended, and appellant and Lori drove away in the van. (RT 3097.)

That evening, Ngoc Nyuh telephoned Ellen and told her that appellant had called Ngoc [7] and asked him to tell Ellen to call appellant if she had a problem with him. (RT 3142-3243.) Between 8:00 and 10:00 p.m., Ellen telephoned appellant and asked him if he had a problem with her or if he wanted to start shit with her. (RT 3144.) Ellen thinks he responded by asking "Why should I?". They swore at each other, and then Ellen hung up. (RT 3100-3101; 3145.)

Tevya Moriarty met appellant when they worked together at Home Express during the summer of 1990. (RT 3638.) They were friendly, although they never socialized outside of work. (RT 3639-3640.) Occasionally, he telephoned her that summer. (RT 3640.) He also called her one or two times before Christmas 1990. (RT 3643.) At about 8:15 p.m. on January 17, 1991, appellant called Teyva. She testified that she remembered the time of this call because she was waiting for a phone call from her boyfriend. (RT 3645.) Initially, appellant and she chatted about her boyfriend and a girl whom appellant was seeing. (RT 3646.) Appellant then began to describe a recent fight between a group of girls on one side

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[7] At trial, Lori Nguyen offered a different version. According to her, after she and appellant left the parking lot, they went to appellant's house. Ngoc called appellant's house and talked to appellant. (RT 4109.) Appellant then telephoned Jackie Huynh. Lori talked to Jackie, and they agreed to end the dispute because it was stupid. Jackie told Lori that Ellen wanted to fight her. (RT 4110.) Soon afterwards the phone calls between Ellen Wang and appellant started. (RT 4111.)

and he and his girlfriend on the other side. (RT 3646-3647.)

Tevya testified that appellant told her that he planned to get back at the girl who picked the fight with his friend by killing her family members while the girl watched and then killing her. (RT 3654-3655.) Tevya testified at trial that shortly after the murder in this case occurred, she told Sgt. Robinson of the San Jose Police Department that appellant had said that he and three others were going to murder and rob this girl's family. (RT 3665.) At trial, however, Tevya stated she couldn't remember whether appellant had said that he ("I") or "they" were going to kill this girl and her family. (RT 3791-3792.) According to Tevya, appellant didn't sound angry during this conversation, and she didn't believe that he actually planned to kill anyone. (RT 3654.) Teyva also told Sgt. Robinson that during the phone conversation, appellant seemed to be in a happy mood, was sort of "blabbering" and didn't sound like he was "all there." (RT 3679.)

On the morning of on January 18, 1991, 10 year-old Alice Wang was watching cartoons while her grandmother, Su Hung, took a nap upstairs. (RT 3270-3271.) At about 10 a.m. the doorbell rang, and Alice opened the door to find appellant and co-defendant/appellant Loi Vo. (RT 3272-3273.) They asked to see her sister Ellen, who was not home. (RT 3274.) They gave her a dark blue turtleneck with white thermal underwear wrapped inside for Ellen and then left. (RT 3275.) Shortly afterwards, they rang the doorbell again, and Vo asked Alice if they could leave a note for Ellen. They came into the house, and she gave Vo paper and a pen. (RT 3277, 3279.) By this time, her grandmother was downstairs in the kitchen cooking. (RT 3280.)

Alice had gone back into the family room to watch television, but Vo called her back to entryway. Then he told her that they had a gun. (RT

3338.) Later she saw appellant with the gun, although he put it away soon after. (RT 3339.) At no point did Alice see appellant point the gun at her or at either of her parents. (RT 3342.)

Shortly after Vo told her that they had a gun, one of the defendants asked her to get her grandmother. (RT 3283.) Vo tied up her grandmother. (RT 3288.) All four of them went upstairs to a bedroom. Alice stayed in the bedroom with her grandmother for awhile. Appellant and Vo were talking outside of the bedroom; the door was closed. (RT 3288.) At the suggestion of appellant, Alice and he went downstairs to watch television. (RT 3345.) Vo stayed upstairs with her grandmother for about twenty minutes. (RT 3347.)

Alice and appellant watched cartoons for about twenty minutes and then they went back upstairs. She went into the upstairs bathroom; she stayed in there alone. (RT 3348.) At some point, appellant came into the bathroom to give her one of her stuffed animals. (RT 3349.) She thought she then went downstairs with Vo. After that appellant and Vo separately went upstairs, although Alice could not remember how many times. (RT 3350-3351.) They never left her alone downstairs. (RT 3366.)

After a while, the telephone rang. Vo and appellant told Alice to answer it and to speak in English. (RT 3296.) After she hung up, she told them that her mother was coming home. (RT 3297.) About a half an hour later, Alice heard the garage door open. Appellant and she were sitting on the gray sofa in the family room. (RT 3297.) Alice saw Vo get a medium-sized knife out of the knife holder in the kitchen and go into the downstairs bathroom. (RT 3298.) When her mother came into the house from the garage, she passed by the bathroom, and Vo stepped out. (RT 3303.)

Cary Wang testified that Vo put a hand over her mouth, held a knife on her and told her not to scream or he would kill her whole family. (RT 3162-3162.) She persuaded him to put the knife down. (RT 3163.) Vo explained that they wanted to talk with Ellen because she had argued with some of his relatives. (RT 3166.) Mrs. Wang offered to give appellant and Vo money or anything else they wanted. (RT 3165-3166.) She also begged them to check on her mother since she had high blood pressure. (RT 3168.) Appellant went upstairs to check on Su Hung. After he came back, he took Alice with him back upstairs. (RT 3169.) Vo wouldn't let Cary go see her mother. (RT 3170.) When Alice came down, she told her mother that her grandmother was sleeping. (RT 3174.)

At about 1 p.m., Vo told Cary Wang that he wanted her to take him to Ellen's school to look for her. (RT 3174-3175.) Vo explained that he wanted to teach Ellen a "little lesson" because of the arguments she had with one of his cousins. (RT 3175.) Appellant was very quiet although he did tell Mrs. Wang that he thought Alice was very cute. (RT 3179.) Vo was the one telling her what to do while appellant sat with Alice on the couch and watched television. (RT 3181.) Most of the time it appeared that Vo was telling appellant what to do. (RT 3181.)

Before leaving for Ellen's school, Cary telephoned her husband to tell him to cancel an appointment. She didn't really have any appointments, but she wanted to try to convey to her husband that something was wrong. Vo and appellant told her that she would have to speak in English, and they listened to the conversation between her husband and her. (RT 3185.) She also telephoned her office and tried to give hints to the woman there that something was wrong. (RT 3186.)

On the way to Ellen's school, Mrs. Wang drove while Loi Vo sat in the seat beside her. He told he had gun, but she never saw it. (RT 3188-3189.) They learned that Ellen was not at school. (RT 3190.) In fact, Ellen had "ditched" school that day and gone over to her friend's house. (RT 3104.) [8] On the way back to the Wangs' house, Cary and Vo stopped at her office; she told him that she needed to drop off some emergency airline tickets.[9] She managed to say, in Taiwanese, to one of the people in her office that he should call the police. (RT 3190.)

On the drive back to the house, Vo again threatened her, saying that if she telephoned the police he would kill her whole family. (RT 3192.) When she went back into the house, she saw her husband at the dining table playing cards with appellant. (RT 3193.) According to Alice, sometime after her mother came home, Alice went upstairs to check on her grandmother. She did this to reassure her mother that Su Hung was alright. (RT 3353, 3355.) Alice saw her grandmother lying on her bed, reading a Chinese language newspaper. (RT 3355.) There was another time that she went upstairs to see how Su Hung was doing and found her sleeping on her bed. Appellant told her to tell her mother that her grandmother was okay; Alice did this. (RT 3369-3370.)

After Vo and Cary Wang came back and discovered that Tony Wang was there, Vo commented that Tony looked like a strong man. Vo directed appellant to tie up Mr. Wang. (RT 3194.) Mr. Wang offered to give the two money and jewelry, but Vo laughed. (RT 3194.) Vo tied up Tony Wang's

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[8] Later that day, when Ellen was over at Jackie Nguyen's house she got a message from her mother. Ellen went home to find police outside her house. (RT 3147-3148.)

[9] At the time, Mrs. Wang owned a travel agency in San Jose. (RT 3160.)

hands behind his back very tightly, and one of the two took him upstairs. (RT 3195; 3865.) When they were upstairs, appellant tied Wang's feet to one of the bedposts in the master bedroom. (RT 3866.) According to Mr. Wang, both Vo and appellant warned him not scream or they would kill him. (RT 3869.)

Appellant told Tony Wang that his daughter Ellen had fought with appellant's girlfriend. (RT 3856.) They also told him that they wanted to talk to Ellen because they wanted to scare her. (RT 3893.) After taking Mr. Wang upstairs and returning downstairs, appellant asked Mrs. Wang if she were feeling alright. In fact, she had a headache, and appellant got her tylenol when she requested it. (RT 3230.) At some point, although he was not sure how long after his wife and Vo had returned to the house, Mr. Wang heard people running down the halls; it was the police. (RT 3873.)

At about 3:00 p.m. on the afternoon of January 18, 1991, Sgt. David Harrison of the San Jose Police Department received a call about a robbery in progress at the wrong residence. (RT 3371-3372.) When he arrived at the address, he saw two other police officers outside. Eventually, other officers arrived, and Sgt. Harrison confronted Loi Vo as he ran out of the laundry room door of the house. (RT 3376.) When Vo saw him, he tried to run back into the house, but he stumbled and fell. While Harrison held a shotgun on Vo, Officer Anderson handcuffed him. (RT 3377.) Officers Anderson and Wendling apprehended appellant in the backyard of the Wang house. (RT 3798.) Appellant had an inoperable pellet gun, a screwdriver, a bank card in the surname of Lee and a pair of dice. (RT 3800.) He did not have a wallet or any form of identification on him. (RT 3800.)

After Vo was taken to the police car, Sgt. Harrison and Officer Schmidt searched the house. They found Tony Wang tied and gagged in the master bedroom; they freed him. (RT 3377.) The officers also found the body of Su Hung in a upstairs bedroom; she was lying on the floor underneath a sheet. (RT 3379.)

Homicide Detective Walter Robinson, along with Sgt. Escobar, was assigned to investigate the murder of Su Hung. (RT 3804.) From January 18, 1991, until the early morning hours of January 19th, Robinson and Escobar interviewed witnesses in this case. Beginning at 3:28 a.m., Robinson interviewed appellant. (RT 3829.) During this interview, appellant did not give any useful information other than an admission that he had been in the Wangs' house. (RT 3839.)

At about 6:30 a.m., on January 19, 1991, Hajek and Loi Vo were put together in an interview room for the purpose of seeing if they would talk about the case. (RT 3812- 3814; 3830.) There was a microphone hidden in the interview room. (RT 3813.) Their conversation was tape-recorded, but the quality of this tape-recording was so poor that parts of it are inaudible. (RT 3815-3816.) Only appellant spoke in an audible voice while Vo whispered. (RT 3845.)

Dr. Angelo Ozoa was the medical examiner who did the autopsy of Su Hung. (RT 3949.) At the time of her death, Su Hung was 5'1" and weighed 87 pounds. (RT 3952.) Dr. Ozoa concluded that she was poorly nourished. (RT 3973.) In addition, the condition of her lungs was poor; scarring of the lung tissue indicated Su Hung had suffered previously from some kind of lung disease. (RT 3973-3974.) In Dr. Ozoa's opinion, her death resulted from both strangulation and a neck wound. (RT 3961-3962; 3976.) The neck wound was a traverse wound, about three and half inches

in length and about three-quarters of an inch deep. It cut through her entire trachea. (RT 3965.)

In Ozoa's opinion, the strangulation occurred before the neck wound because there was no blood in her lungs, which suggested that she had not continued to breathe very long after her throat was cut. (RT 3961-3962; 3985.) Ozoa believed that Su Hung was still alive when that wound was inflicted because there was significant amount of blood. (RT 3963.) By contrast, there was no bleeding associated with the five rather superficial wounds found on the left side of her front chest. (RT 3964.) However, Dr. Ozoa testified that he was not certain, however, whether these wounds were inflicted before she died. (RT 3977.)

Although he could not state with certainty one way or the other, Dr. Ozoa testified that it was entirely possible that at the time Su Hung was stabbed in the neck, she was not conscious. (RT 3984.) Ozoa also stated that it was impossible to determine with any precision the time of her death. (RT 3988.)

Douglas Ridolfi, a criminalist with the Santa Clara County Crime Laboratory, testified about the blood evidence. (RT 3570.) At the time of trial, Ridolfi had worked as a law enforcement criminalist for about 18 years. (RT 3572.) Ridolfi had worked on between 250 and 300 homicide cases and had testified as an expert in serology [10] about 55 times. (RT 3574.) The trial judge granted the prosecution's request that Ridolfi be

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[10] Ridolfi described serology as ". . .the specialty that deals with the identification of various biological fluids often in dry state, identification of blood stains, semen stains, saliva stains. And their further characterization by performing a series of specialized tests to determine genetic blood group factors so we can determine if a blood stain could have come from a certain population, certain individual or inconsistent. Things of that nature." (RT 3572.)

qualified as an expert in serology and the electrophoresis process of blood testing. (RT 3574-3575.)

The police brought a number of items, including clothing, knives, rope, a firearm and scissors, to Ridolfi, who had been assigned to the Su Hung homicide case. (RT 3575.) In addition, blood samples from Su Hung, appellant and Loi Vo were collected. (RT 3576.)

There was a blood stain on the bottom edge of the left glove which supposedly belonged to appellant. (RT 3579.) In order to demonstrate for the jury where the stain was found, Ridolfi drew a "crude" picture (marked as Court Exhibit 97), showing the location and size of the stains. (RT 3579.) These stains were on the knit fabric portion of the glove toward the base of the thumb on the palm side and at the bottom of the glove. (RT 3580.) After testing, the stains were determined to be human blood. (RT 3582.) Electrophoresis was used to try to determine the characteristics of the blood for purposes of identifying its source. (RT 3582-3583.)

Under the ABO grouping, Mr. Vo has type O, appellant type A and Su Hung type B. Testing of the blood stains on the glove did not result in a typing under the ABO grouping. According to Ridolfi, this "no result" finding occurred because there was not enough blood to run a successful ABO grouping test. (RT 3587.)

The testing for PGM subtyping was more successful. The blood on the glove was 1+ as was Su Hung's. Vo's blood is 1+1- while appellant's is 2+1+. While Ridolfi could not say that the PGM subtype of the blood stain showed it definitely belonged to the victim, he did say that it was consistent with her blood and could not have come from either Vo or appellant. (RT 3588.) Ridolfi tested the bloodstains on the glove for 10 other types of blood groups and did not come up with anything conclusive. (RT 3588.)

Ridolfi also tested a blood stain found on the inside left sleeve, near the cuff, of a black leather jacket (Exhibit 26). (RT 3588-3589.) While this stain was not visible to the naked eye, Ridolfi had swabbed the area with a cotton tipped swab. The swab tested positive for blood, but the sample was insufficient for additional testing. (RT 3589.) Ridolfi did not find blood on any of the other clothing belonging to appellant or on any of the clothing of Loi Vo. (RT 3590.) He tested the knives found in the Wangs' house and detected blood on two of the knives; however, he could not determine whether this blood was even from a human being. (RT 3591.) This was also true of the blood found on the kitchen counter in the Wangs' kitchen. (RT 3592.) At the direction of the district attorney's office, Ridolfi sent the blood stain work to an independent laboratory, the Serological Research Institute for DNA testing. (RT 3593.)

Under cross-examination, Ridolfi acknowledged that no blood stain was visible on the cloth lining of appellant's leather jacket (Court Exhibit No. 26) nor was it visible at the time he first looked at the jacket. (RT 3594-3596.) Ridolfi did not take any part of the lining out for testing; rather, he ran a cotton Q-tip swab along the junction of the leather and liner on the sleeve of the jacket. (RT 3595.) Ridolfi further ackowledged, however, that his notes were not sufficiently detailed to locate precisely the area across which he wiped the swab. He also admitted that his testing of the material on the swab was so inconclusive that he could not tell whether the blood was even human. (RT 3596.) Ridolfi also admitted that the only stain on which he received a result from the blood tests was a quarter inch section on the bottom of appellant's left glove. (RT 3599.) There were three other bloodstains on this glove, but testing did not reap any information about their properties. (RT 3600) This suggested that the bloodstains were

sufficiently old as to have resulted in a complete drying of the glove. Testing of a thread which crossed the three bloodstains on the glove showed that they were human blood stains. (RT 3600.) Under Ridolfi's testing, there was only one system of blood typing, the PGM subtype, which tied the victim's blood to the blood found on the glove. Both the blood on the glove and the victim's blood was PGM subtype 1+. This is the most common PGM subtype, shared by 40% of all humans. (RT 3618.)

Brian Wraxall, who identified himself as a forensic serologist, also testified for the prosecution. Wraxall is the Executive Director of and Chief Forensic Serologist for the Serological Research Institute ("SRI"). (RT 3730.) The Santa Clara County Crime Lab sent Wraxall blood samples from appellant, Loi Vo and Su Hung as well as a pair of gloves. (RT 3732.) Wraxall examined the gloves (Court Exhibit 34) and found three different areas of blood staining on the left glove, two on the palm portion and one on the wrist area. (RT 3732.) He tested these stains for two genetic marker systems, the Gamma or GM system and the Kappa or KM system. Wraxall analogized the GM and KM systems to the ABO system of typing blood. (RT 3734.) Both the GM and KM are immunoglobulins found in the serum portion of the blood. If a blood stain is dried, in order to look for the GM and KM, the scientist must put liquid back into the stain in order to test for the presence of gamma and kappa markers. To test the blood samples in this case, Wraxall used a procedure called absorption inhibition, which involves antiserum solutions. (RT 3756.)

Based on his testing for GM markers, Wraxall concluded that the blood stains on the left glove could not have come from either appellant or Vo but could have come from Su Hung. (RT 3738.) For purposes of the KM markers, the results for two of the stains were inconclusive; however,

one of the blood stains could have come from Su Hung but not from either appellant or Vo. (RT 3739.)

For purposes of determining the frequency at which a certain PGM marker occurs in the general population, Wraxall relied upon a database put together in 1982 by the War Memorial Hospital in Minnesota. (RT 3741.) The PGM marker found in Su Hung's blood is found in approximately 40 percent of the population. [11] (RT 3739.)

Wraxall conceded that for purposes of databases dealing with PGM, GM and KM markers, there is information about the white, black and Hispanic populations but not for the Asian population. (RT 3745.)[12] According to the study on which Wraxall based his analysis of the PGM, GM and KM markers in Su Hung's blood sample, 1 in 570 people would have the same combination of markers as she did. (RT 3746.)

Wraxall acknowledged that the interpretation of the serological data in this case definitely involved a level of subjectivity. (RT 3762.) While Wraxall could exclude both appellant and Vo as the donor of the blood sample found on the glove, he could not say that the stain belonged to Su Hung. (RT 3764.) He also could not determine the race of the donor of this blood stain. (RT 3765.)

He was only able to see these stains with the use of a high-powered oblique light. (RT 3767.) Although he couldn't remember, Wraxall agreed that it was possible that he needed to use a microscope to see the stain with

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[11] Later, Dr. Wraxall amended this estimate to 35%. This change was based in part on the fact that he did not have any specific percentage for Asians as he did for whites, blacks and Hispanics. (RT 3752.)

[12] Wraxall's statistics were based on a study involving 3000 people. This study included whites, blacks and Hispanics but no Asians. (RT 3769.)

the greatest concentration. (RT 3767-3768.) Wraxall did not take any measurements of the stains nor did he have anything in his notes indicating their size. (RT 3768.)

Appellant's Defense at the Guilt Phase

Appellant presented a mental state defense. Appellant was born in Bartow, Florida, on September 8 or 9, 1972, and was abandoned at birth by his biological mother. (RT 4637.) He became a ward of the Florida Health and Rehabilitative Services Agency ("HRS") under the name of Baby Boy Miller. Later, he was renamed Stephen Noble Miles and placed in a series of foster homes. (RT 4637-4378.)

Appellant's adoptive mother, Linda Hajek, testified about the course and events of his life. She and her husband first met appellant in January 1974, when he was about two and half years old and was in foster care. Appellant had recently been taken out of the home of a family who had agreed to adopt him but then backed out of the adoption. (RT 4638.) He went to live with the Hajeks very soon after they met him. (RT 4204-4205.) They adopted him; the adoption became final on December 23, 1975. (RT 4205.)

Although Mrs. Hajek described appellant as a very sweet and beautiful child, when they first took him into their home, he had a lot of problems. He was very withdrawn and had several physical problems, including weak ankles, severe diaper rash and a rash on top of his head. (RT 4212-4213.) He also appeared to be afraid of being dirty and was meticulous about eating and drinking. Mrs. Hajek remembered that once when he accidentally dropped some food, he turned white and covered himself as though he thought she was going to beat him. (RT 4215.)

Appellant also went into screaming panics when he heard loud noises, such as sirens. (RT 4214.) Sometimes he banged his head on the wall. (RT 4215.)

In the period after they adopted appellant, the Hajeks made every effort to make him feel safe and secure. Appellant was particularly attached to Mr. Hajek. (RT 4220.) When they were in Florida, Mr. Hajek was in military. He left the service, however, when he received orders to go to Germany because the Hajeks thought it would be too hard on appellant to be away from his father for any extended period of time. (RT 4216.) By the time they left Florida, appellant's problems seemed to have diminished. (RT 4216.)

The Hajeks moved to California when appellant was about six years old. He did reasonably well in elementary school; he tried very hard. (RT 4221.) By the time he was six years old appellant was wearing glasses, and his eyes progressively deteriorated. He was not good in sports. (RT 4222.) Appellant continued to have some problems; for example, he was a bed-wetter until he was 12. (RT 4219.) He also went through periods when he got very angry at his mother and accused her of beating him, although she never did. (RT 4220.) It was as though he were reliving the days prior to the time the Hajeks adopted him. (RT 4220.)

Mrs. Hajek testified that appellant did well until he was about 15 or 16 years old. Early in high school, he participated and did well in ROTC. (RT 4224-4225.) Later, he started to imitate the Asian boys with whom he was friends. He got into trouble because he "streaked" the neighborhood. (RT 4227.) Appellant also started to lose his temper with his mother and blame her for everything that was wrong with his life. (RT 4229.)

Sally Lowell[13] became appellant's juvenile probation officer in 1989 after appellant was found to have committed misdemeanor indecent exposure. He had run naked through the apartment complex in which the Hajeks lived. (RT 4348.) This was treated as appellant's first offense because an earlier incident involving possession of nunchucks had been settled at intake. Appellant was about 15 years old when Ms. Lowell first met him. (RT 4349.) Because a notation in the police report of the officer involved in the indecent exposure case stated that petitioner may have psychiatric problems and because the court ordered counseling, Lowell placed him in a program that offered both school and counseling. Petitioner did not last in that program, and on May 29, 1989, he was arrested for driving a stolen car and possessing a stolen bank card. (RT 4363.) About a month later, petitioner got into a fight and broke the nose of another teenage boy. (RT 4364.)

Ms. Lowell required that appellant attend school, go to counseling, and get a job so that he could pay restitution for damage to the car which he was driving illegally and for the person whose nose he broke. By the end of his juvenile probation period, appellant had met all of these requirements. (RT 4365.)

Ms. Lowell could have recommended that appellant be sent to Juvenile Hall for his commission of these misdemeanors, but she believed that he had mental health problems that should be addressed by counseling. (RT 4392.) In December, 1989, he was placed in Monte Villa Hospital for inpatient mental health treatment. (RT 4396.) Only after he started taking medication at Monte Villa did she see a real change in appellant's

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[13] In 1989, at the time she was supervising appellant, she was known as Sally Shaver. (RT 4347.)

emotional state. For the first time, he actually seemed to smile rather than grimace. (RT 4396; 4408.) Ms. Lowell never believed that appellant was a "hard-core violent type of offender" (RT 4437); she believed that he had serious emotional and mental problems. (RT 4436-4437.)

After his release from Monte Villa, appellant was required to do a 20 day work program administered by Juvenile Hall. The person supervising appellant in this program gave him an excellent evaluation, commenting that he was a good worker and a good kid. (RT 4448.) Lowell believed that appellant changed after he was put on medication at Monte Villa and completed the intensive program there. He seemed more cooperative and his behavior had improved. (RT 4454-4455.)

Dr. James Griffin, a licensed clinical psychologist, treated appellant while Griffin was doing his supervised internship leading to his licensure. (RT 4460.) As part of his work with appellant, Dr. Griffin administered the standard battery of psychological tests, including the Rorschach Ink Blot, the revised Wechsler Intelligence Scale for Children, the Thematic Apperception and the Draw A Person tests. (RT 4464-4465.) Because he was still in training, all of Dr. Griffin's testing of appellant was reviewed by two supervising psychologists. (RT 4465-4466.) Dr. Griffin developed a very good working relationship with appellant. (RT 4465.)

Dr. Griffin explained that adolescence is usually a very difficult time for children who have been adopted. Often they begin to think that there must be something wrong with them since their birth parents put them up for adoption. (RT 4466.) Dr. Griffin believed that appellant was having significant identity problems. He also had trouble with his peer relationships. Prior to 7th grade, appellant showed a positive attitude toward school, but on the first day of junior high he was beat up on school

grounds by a group of 8th grade boys. This was a traumatic and humiliating event which apparently changed forever appellant's attitude towards school. (RT 4467.)

Appellant was very artistic, had moved a lot and had lived in violent areas. (RT 4468.) His friendship with a boy named Sean was the best he had ever had. Dr. Griffin believed that appellant's identification with Asians and Asian culture was explained, at least in part, by the fact that Sean was part Vietnamese. (RT 4469.)

Dr. Griffin did not diagnose appellant because in his view diagnosing most adolescents is not very helpful since they are going through so many changes during this period of life. (RT 4469-4470.) As the result of psychological testing of appellant, however, Griffin did conclude that appellant had a severely impaired concept of reality. The testing also revealed that appellant had problems with "cognitive slippage," meaning that he had difficulty seeing the causal relationship between what he was doing and the consequences of his actions. (RT 4477.)

The testing suggested that appellant sometimes dealt with difficult situations by avoiding them. (RT 4478.) Other times, he reacted very emotionally. (RT 4477-4478.) After this testing and having seen appellant over a period of time, Dr. Griffin decided that he needed in-patient treatment. When appellant revealed that he had taped tinfoil over his bedroom windows so that he would not know whether it was day or night, Dr. Griffin became very concerned. This was a sign of both depression and isolation. Griffin also believed that appellant had become suicidal. (RT 4485.)

During cross-examination, Dr. Griffin rejected the prosecutor's suggestion that appellant was a psychopath. Griffin testified that he

recommended that appellant be hospitalized in December, 1989, because appellant was decompensating mentally, was moving toward schizophrenia and was very depressed. (RT 4507.)

John Hennessey worked at Monte Villa Hospital as a social worker when appellant was a patient there at the end of 1989 and the beginning of 1990. (RT 4522.) In that job, Hennessey learned about the patient's family, and he was convinced that appellant's parents were very concerned about him. (RT 4526.) Initially Hennessey thought appellant was Asian because he spoke in what appeared to be an Asian language, although Hennessey soon learned that it was a made-up language. (RT 4524-4425.)

Hennessey learned that appellant was adopted. Appellant's parents described certain behavior that appellant had engaged in as a young child which suggested that he might have had early childhood schizophrenia. This behavior included head banging, rocking, repetitive picking up of and throwing down of objects and tantrums. (RT 4530.) In Hennessey's initial meeting with appellant and his parents, appellant was hostile, angry and resentful of the rules imposed upon him by his parents. (RT 4531.) According to Hennessey's notes and his memory, appellant was never violent while in Monte Villa. (RT 4532.)

Hennessey saw definite improvements in appellant during his stay in the hospital. The most dramatic improvement occurred after appellant began taking lithium. He became more rational and less angry, had a better sense of reality and was more cooperative with his parents. (RT 4533-4534.) After his discharge from Monte Villa, appellant and his parents continued to come in for counseling. (RT 4535.)

Hennessey testified that a child under 18 years of age cannot be diagnosed as having an anti-social personality disorder, although he or she

can be deemed to have a conduct disorder. (RT 4547.) In his view, appellant did **not** exhibit behavior consistent with a conduct disorder. (RT 4552.) When asked about a diagnosis of conduct disorder for appellant by Dr. Daegle at Monte Villa, Hennessey explained that Daegle was neither a psychologist nor a psychiatrist and thus was not competent to make mental illness diagnoses. (RT 4554.)

Dr. Dean Freedlander, a psychiatrist, testified about his treatment of appellant when he was hospitalized at Monte Villa Hospital. Appellant was at Monte Villa from December 6, 1989, through January 4, 1990, and Freedlander was his attending psychiatrist for most of that time. (RT 4562.) Dr. Freedlander did the initial assessment of appellant; he based his first diagnosis of typical psychosis on appellant's beliefs that he was Asian and that he had an excellent chance of becoming a famous Japanese cartoonist. Appellant also exhibited tangential thinking, meaning he would jump from one idea to another. Tangential thinking results when emotions play too important a part in the thought process. (RT 4564-4565.) Initially, Freedlander also suspected that appellant had some traits of a personality disorder. (RT 4568.) The indicators of a personality disorder were appellant's impaired view of relationships and his impaired capacity to sustain relationships. (RT 4570.)

Dr. Freedlander also believed that appellant might be developing manic-depressive (bipolar) illness. He knew that appellant had been arrested for running naked through his apartment complex, behavior that is often seen in manic-depressives. (RT 4571.) Freedlander also knew that appellant had been charged with assault and battery as a result of a fight with another young man over a cassette. Freedlander said this didn't seem like purposeful misbehavior. (RT 4572.) This impression was reinforced by

what he saw in his interviews with appellant, who seemed to be engaged in impulsive acting out. (RT 4573.)

At Dr. Freedlander's direction, appellant was retested by a psychologist. These tests showed that mood or affect were the cause of appellant's disordered thinking. (RT 4576.) As a result, Dr. Freedlander decided to medicate appellant with lithium, a drug used for manic-depression, bipolar disorder. Once on lithium, appellant gradually improved; his behavior and thinking became more organized and logical. (RT 4552.) While he did not diagnose appellant as being bipolar because he was so young (RT 4583), Dr. Freedlander nonetheless believed that appellant was an early bipolar. (RT 4588-4589.)

In Freedlander's view, appellant was not a delinquent with anti-social tendencies because appellant continued to insist that there was nothing wrong with him. In Freedlander's experience, delinquents who are put in an institution like Monte Villa try to make themselves look sick so they can escape blame for their bad acts. (RT 4586-4587.)

Rahn Minagawa, a clinical psychologist, was hired by the defense as a mental health expert. His specialty was treating children, adolescents, and families. (RT 4642.) At the time of the trial in this case, Dr. Minagawa had just finished a 12 year stint in the U.S. Navy, working as a psychologist. (RT 4641-4642.) Dr. Minagawa saw appellant seven times during the period from February 1992 through April 1995. In addition to interviewing him and administering psychological testing, Minagawa also reviewed numerous documents concerning appellant's medical, psychological and

social histories.[14] He also reviewed materials from the murder case.

In Minagawa's view, at the time appellant entered the Wangs' house in January 199, 1 he was mentally ill, suffering from a cyclothymic disorder and a borderline personality disorder with antisocial traits. (RT 4655.) He explained that cyclothymic disorder is a mood disorder, which is similar to but not as serious as bipolar disorder. (RT 4656.) Research indicates that many individuals who have cyclothymic disorder will later develop full bipolar disorder. (RT 4656.) Dr. Minagawa also concluded that appellant was in the midst of a hypomanic or manic episode at the time of the murder in this case. (RT 4655-4656.) According to him, cyclothymic disorder can be a disabling type of mental illness and can be treated only with medication because the disorder has a biochemical basis. (RT 4659.) Cyclothymic disorder can lead to both delusional and paranoid thinking. (RT 4660-4661.)

Dr. Minagawa noted that appellant did not get into real trouble until he was 15 years, 8 months, when he was arrested for "streaking." (RT 4678.) His next arrest occurred 10 months later and involved a more serious offense. Two months later he was arrested again, and yet again within a month's time. (RT 4679.) Dr. Minagawa observed that this cycle ended only when appellant entered an in-patient mental health program at Monte Villa Hospital and was medicated with lithium. (RT 4679-4680.) For about six months, appellant did well on medications and stayed out of trouble. However, once he stopped taking lithium, appellant began to get in trouble again, culminating in the incident at the Wangs' house.

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[14] Dr. Minagawa reviewed appellant's birth records, foster care and adoption records, school records, juvenile probation records, medical records from Monte Villa Hospital, work records, and materials relating to the instant case, including the tape recording of a conversation between appellant and Vo while they were in a police interview room the day after their arrests. (RT 4664-4665.)

A similar cycle occurred after appellant's arrest. When he was first incarcerated in the Santa Clara County Jail, he was not on lithium and engaged in some acting out. The medical records from the jail show that he was acting, "expansive, elated, silly childlike." (RT 4682.) In addition, appellant himself told the jail medical staff that he was having problems sleeping and was experiencing serious mood swings. (RT 4682.) In addition, he was acting agitated and having emotional outbursts. (RT 4688.) However, once he was put on lithium again in mid-August 1991, the jail staff noted that he appeared less agitated.

The jail records show that for about five days sometime in May 1992, appellant stopped receiving lithium because the jail was not able to locate the written consent for the medication. (RT 4690.) The records also show that in May 1992, appellant tore the sink off the wall in his jail cell as well as damaged other jail property. (RT 4691.) Dr. Minagawa explained:

> If the record is accurate and if they didn't give him his medication, then the medication started going out of his bloodstream and dropped below therapeutic level for him and he started reacting to the pressures and stresses and had basically another manic episode in which he couldn't contain himself. Once he started back on the medication he comes back down and is controlled again.

(RT 4691.)

Dr. Minagawa also diagnosed appellant as suffering from borderline personality disorder with anti-social traits. (RT 4696.) Although there may be a genetic component to personality disorders, they are believed to be primarily the result of environmental factors. (RT 4697.) Dr. Minagawa traced appellant's borderline personality disorder back to the time of his birth when his biological mother abandoned him. (RT 4699.) This break in maternal-infant bonding significantly affected appellant's development and

his concept of himself. (RT 4700.)

Shortly thereafter, appellant was placed with a foster family with whom he developed a strong bond. Indeed, the attachment between him and these foster parents appeared so strong that the Florida HRS social worker decided to take appellant out of this home because the agency did not allow foster parents to adopt their foster children. (RT 4700.) This change was another disruption in appellant's development since attachment between a baby and his caretakers is critical during infancy.

From 11 months to about 20 months, appellant was in another foster family. When he was about 20 months old, appellant was placed with the Rectors, who were suppose to adopt him. (RT 4701.) Eight months later and after the birth of a biological son, the Rectors decided to not adopt appellant. Finally when he was about 2 ½ years old, appellant was placed with the Hajeks who adopted him. (RT 4701.) One of the key symptoms of borderline personality disorder is an overwhelming fear of abandonment or rejection as an adult. (RT 4701.) Certainly, appellant's history of disrupted placements during the first 2 ½ years of life would have produced and/or exacerbated such feelings. (RT 4703.)

The Guilt Phase Defense of Loi Tan Vo

As part of his defense in this case, appellant's co-defendant, Loi Tan Vo, introduced "other crimes" evidence concerning appellant. Vo called James O'Brien to testify about an incident which occurred with appellant when both worked at Round Table Pizza in June 1989. Appellant was 17 years old, and O'Brien was 15; they both worked in the kitchen. (RT 4930.) When O'Brien got off work one evening, appellant punched him in the face and broke his nose. (RT 4930-4931.) According to O'Brien, prior to appellant's attack, there had never been any kind of dispute between them.

(RT 4930.) When the incident occurred, O'Brien was unlocking his bicycle, and appellant said something indicating that he was unhappy that O'Brien was getting off work early. (RT 4928.) O'Brien testified that this attack appeared to be totally irrational. (RT 4934.)

Douglas Vander Esch, a correctional officer at the Santa Clara County main jail north, testified concerning an incident on May 16, 1992, involving appellant in the day room. When appellant said he wanted to speak to a sergeant about being reclassified, Vander Esch told him he should make a written request on the appropriate form. (RT 4942.) Reclassification would mean a change in where appellant was being housed. (RT 4973.) Appellant told Vander Esch that he didn't want to fill out a request form because he never got an answer. (RT 4974.) Shortly after this conversation, the officer heard a noise coming from the shower area of the day room. He saw appellant in that area, and he had a mop wringer in his hand. There was broken glass on the floor near appellant and glass in the showers. (RT 4943.) According to Vander Esch, appellant then said that he bet he could see a sergeant now. (RT 4944-4945.)

At the time of this incident, appellant was housed in 4-C, a high security area in the jail. Appellant's cell there was smaller than the jury box in the courtroom, and he spent 23 hours a day in his cell. (RT 4975-4976.) For one hour a day, the inmate could go into the day room; he would be alone during that time. (RT 4977.)

Loi Tan Vo testified in his own defense. He claimed that when appellant and he went to Ellen Wang's house to look for her, their only purpose was to talk to her. Appellant was the one who had a problem with Ellen, according to Vo. He accompanied appellant just in case Ellen and her friends should become hostile. (RT 4987-4988.) Vo testified that

appellant told him that all he wanted to do was to tell Ellen to leave him alone and to scare her off. (RT 4987.) According to Vo, appellant never said anything about intending to kill anyone. Vo also stated that he did not kill Su Hung nor did he play any part in killing her. (RT 4992.)

During the prosecutor's cross-examination, Vo blamed appellant for the decision to go to the Wangs' house and for the fact that they stayed there so long waiting for Ellen Wang to return. (RT 5140-5142.) Vo also claimed that after Tony Wang came home and after they had taken him upstairs and tied him up, appellant told Vo that Su Hung was dead. At first, Vo thought Hajek might be joking. Vo ran upstairs to Su Hung's bedroom and found her body under a comforter. (RT 5175.)

On cross-examination by appellant's trial counsel, Vo said he did not know when appellant killed Su Hung but that he had his theories. (RT 5237.) The last time he saw her was before Cary Wang came home. (RT 5238.) Vo doesn't know if it occurred when appellant was alone in the house with Alice, although he acknowledged that Alice had testified that appellant never left her side when Vo and Cary Wang left to look for Ellen at school. (RT 5238.) Vo also disputed the testimony of the Wangs that he was going up and down the stairs multiple times. (RT 5239.)

Vo said he was not sure why he was whispering when he was in the holding cell with Hajek after they were arrested. It could have been because he thought the police might be taping their conversation. (RT 5245.) At that point, he was angry at appellant because it was appellant's fault that he was in this trouble. There had not been a plan to kill anyone. (RT 5245-5246.)

B. The Penalty Phase

The Prosecution's Case for Death

The District Attorney told the jurors that the State was relying almost exclusively on the underlying facts and circumstances of the murder to persuade them to sentence the defendants to death. (RT5708.) He presented only one penalty phase witness: Ellen Wang. She was asked to describe the impact of her grandmother's murder on her family and on her.

Ellen testified that she considered her grandmother, Su Hung, to be her "second mom" because she took care of Ellen during the early years of her life, which were spent in Taiwan. (RT 5718.) Even after Ellen and her immediate family moved to the United States, Su Hung would come visit and stay for long periods of time. (RT 5718.) Su Hung had six children and fourteen grandchildren. (RT 5720-5721.)

The Wang family never lived in that San Jose house after her grandmother's murder, and they sold it. (RT 5722.) Ellen did not go back to school for about 2 or 3 months. Her mother took her and Alice to Taiwan for a while. (RT 5723.) Ellen testified that all of them had been changed emotionally by the murder. Her mother became afraid of everything; Alice became far less open to other people; and Ellen felt sad, angry and guilty, feeling that the murder was her fault. (RT 5724-5725.)

Her parents separated. Her mother sold her travel agency in San Jose and moved back to Taiwan. (RT 5726.) Ellen thinks of her grandmother every night, and Ellen's mother still cries a lot about her mother's death. (RT 5728.)

C. Appellant's Mitigation Case

As noted *ante*, appellant Stephen Hajek was abandoned by his mother almost immediately after his birth. His mother checked into a

hospital in Florida, apparently under a false name, and then vanished without a trace after his birth. (RT 5741.) Appellant went into foster care at age one week. (RT 5741.) For the first eleven and half months appellant lived in a loving foster care home with a couple who wanted to adopt him. (RT 5741-5742.) At that period of time, the Florida Health and Rehabilitative Services Agency ("HRS") prohibited the adoption of children by their foster parents. (RT 5736.) Because these foster parents expressed a desire to adopt appellant, the foster care worker suddenly and precipitously took him out of their home. (RT 5742.)

After appellant was placed in another foster care home, it took him some time to adjust to this placement, but he did. (RT 5743.) Less than nine months later, however, he was wrenched from that foster home and placed with the Rectors, a couple who were suppose to adopt him. (RT 5743.)

The Rectors already had their own biological child, a six year old daughter, Angie, and they wanted to adopt a son who was between the ages of two and three. (RT 5744.) Initially, appellant's placement in the Rector household appeared to go well. (RT 5750.) Appellant went to live at the Rectors on May 13, 1974. Although the Rectors never mentioned it to June Fountain, the social worker overseeing the adoption process, Mrs. Rector was already two months pregnant at the time appellant was placed in their home. Indeed, they did not tell Ms. Fountain about the pregnancy until September when Mrs. Rector was obviously pregnant and then only after Fountain asked about it. (RT 5752.)

During this September home visit to the Rector household, Ms. Fountain became concerned about Mr. Rector's teasing of Angie and his adverse comparison of her to appellant. When Fountain asked the Rectors

if they wanted the new baby to be a boy or girl, Mr. Rector said he didn't care because he had his son, meaning appellant. (RT 5753.) As a result of this response, June Fountain became concerned that if the baby were a boy that might cause Mr. Rector to reject appellant. (RT 5753.) Despite her concerns, Fountain didn't want to remove appellant from the Rectors' home because he had already experienced traumatic disruptions during his first two years of life. (RT 5754.)

Some friction developed between June Fountain and the Rectors, particularly after she started talking to them about their parenting style. They rejected Fountain's suggestion that they do some reading and also attend a workshop on parenting. (RT 5755.) The Rectors did not contact Fountain again. Finally, on December 18th, she called them. Mr. Rector told her that things were not going well. He had lost his job; the baby (a boy) had been born; Angie and appellant were fighting; and appellant was causing problems. Rector told her that he wanted her to come out to their house, but not until after the holidays were over. (RT 5756.) As a result of this conversation, Fountain believed that the Rectors were going to ask her to remove appellant from their home. She and her supervisor began to look for another placement for appellant. (RT 5758.)

When June Fountain visited the Rector home on January 6, 1975, Mrs. Rector seemed very angry. She complained that appellant would not "potty," would not talk, would not play and did not want to be touched. She also said she couldn't take it anymore (RT 5758) and was worried she might do something to hurt appellant. (RT 5761.) Fountain testified that appellant's regressive behavior was a not surprising response to all the stress within the household; however, the Rectors apparently saw it as willful misbehavior on appellant's part rather than as the age-appropriate

response of a two year old who had already experienced a number of difficult disruptions in his short life. (RT 5760.)

While Fountain believed that it was difficult for the Rectors to give up appellant, they were just at "the ends of their rope." (RT 5762.) In Fountain's view, they were under enormous stress and believed that if they got rid of appellant, their problems would be solved. (RT 5762.) After the Rectors asked that appellant be removed, the agency made arrangements to move him directly into another adoptive home, that of the Hajeks, who in fact became his parents.

Ms. Fountain testified that now an adoption agency would never move a child directly from one failed adoption setting to a new adoptive family. She explained why this kind of transfer is so bad for children:

> The rationale behind that [policy not to move a child from one adoption home immediately to another] was that the child would blame the second set of parents for removing him from the first set of parents.[15] So you put him into a foster home to kind of cool him off for a while so that they would be ready to move on into another placement. Now we know how extremely damaging that is for kids.

(RT 5763.)

Because the Rectors so clearly had rejected appellant, at least during the last weeks of his stay with them, Fountain believed that he had experienced emotional abuse. (RT 5782-5783.) By rejection, Ms. Fountain meant that the Rectors could only find fault with appellant; they could not see anything positive in him. Although Fountain believed that moving appellant yet again was not a good option, she felt it had to be done.

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[15] This, in fact, did happen with appellant. His mother, Linda Hajek, testified about how appellant would sometimes get very angry with her and accuse her of beating him. She never beat him; he was remembering his experiences in other homes before he was adopted by the Hajeks.

Because of the Rectors' disapproval of him, appellant would not be able to develop any self-worth or trust in others. (RT 5784.) Fountain testified:

> . . .what I did observe was the anger of the Rectors toward him [appellant]. The fact that they were blaming him for what was wrong in the house, the rejection they were showing him. (RT 5807.)

While Mr. Rector, at the last minute, tried to prevent the removal of appellant from his house, June Fountain thought she had to take appellant out of the house because Mrs. Rector had said that she was afraid that she would hurt appellant. (RT 5796.) Moreover, she observed that after he had begun meeting with the Hajeks, when she took him back to the Rectors's house he seemed sad. It was not "normal" for a child to be sad when he went home. (RT 5806.) Ms. Fountain, her supervisor and even the Rectors" lawyer believed that Mr. Rector decided to fight the removal so that he would not feel responsible for the failure of the adoption. The responsibility for the removal would instead fall upon the agency, the Florida HRS. (RT 5808.)

Ms. Fountain agreed that HRS was responsible for some of the damage done to appellant prior to his adoption by the Hajeks in that the agency had moved him several times when it shouldn't have. (RT 5822.) Nonetheless, she was certain that by the time appellant left the Rectors he was indeed psychologically damaged. (RT 5823.)

Dr. Rahn Minagawa testified again at the penalty phase. He stated that, for purposes of his psychological development, the first critical event experienced by appellant was his abandonment by his mother in the hospital shortly after his birth. As Minagawa observed, the week after birth is actually a period of "intense bonding" for both the child and mother. (RT 5829.) Minagawa characterized the rupture in this relationship for appellant

as ". . .the first block or development block that we see that weaken sic the development of the individual." (RT 5830.)

Appellant's first foster placement was with a couple with whom he apparently developed deep attachment. In fact, it was because these foster parents had supposedly become too attached to appellant that a case worker removed appellant from their care, thus rupturing appellant's first strong bond with a set of care givers when he was eleven months old. (RT 5830.) Indeed, according to Minagawa, this was probably the most traumatic disruption that appellant experienced during the first two years of his life because the rupture occurred at a critical time, eleven months, just when a child should be getting over "stranger anxiety." (RT 5837.)

Appellant's next placement lasted for about nine months. At twenty months, he was placed for adoption with the Rectors. In turn, appellant had to leave the Rectors when he was about 30 months old because they had rejected him after Mrs. Rector gave birth to a son. (RT 5837-5838.) All of these disruptions impaired his development because the primary task of an infant and toddler is to develop a sense of trust in other human beings. (RT 5833-5834.) Without stable and continual bonds with care givers, a child cannot proceed successfully with his development. (RT 5834-5835.)

Dr. Minagawa testified that all of these disruptions, which constituted emotional trauma, during the first five years of appellant's life affected his behavior during adolescence. The primary development task of the adolescent is to decide who he/she is and what kind of relationships he/she will have. (RT 5843.) Dr. Minagawa explained:

> Those tasks [of adolescence] are very much related to what happens between the ages of zero and five in terms of whether or not they develop or have in place the feelings of trust, whether or not they have in place a sense of stability and identity in themselves. (RT

5843.)

Minagawa also stated that the normal tasks of adolescence were not only complicated by the instability of his first years but also by the fact that appellant was adopted. (RT 5852-5853.) Adopted children generally don't know the identity of their birth parents, so often when they reach adolescence they find the search for identity, normal for all adolescents, especially difficult. (RT 5852.) Minagawa stated that appellant's belief that he might have an Asian background reflected these problems. (RT 5853.)

In Dr. Minagawa's view, appellant was still an adolescent, at age 18, when he was involved in the crimes at issue in this case. (RT 5855.) In addition, appellant suffered from a mood disorder, which is a medical condition which can be treated with both medication and talk therapy. (RT 5855, 5857.)

Co-defendant Loi Tan Vo called numerous witnesses, including members of his family, friends and former teachers, to describe his "good character." In addition, several witnesses, including an expert on Vietnamese immigrants to the United States, testified about the difficulties experienced by Vo and his family when they left Vietnam and came to the United States to make a new life.

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I.

THE DECISION OF THE SANTA CLARA COUNTY DISTRICT ATTORNEY TO CHARGE APPELLANT WITH CAPITAL MURDER WAS ARBITRARY AND CAPRICIOUS

A. Procedural Background

Prior to trial in this case, co-defendant Vo filed an in limine motion which requested, inter alia, the preclusion of the death penalty in this case. (CT 1540-1541.) That motion not only challenged the imposition of the death penalty against Loi Vo under *Furman v. Georgia* (1972) 408 U.S. 238, but it also requested a court order requiring the District Attorney of Santa Clara County to provide discovery regarding the office's charging practices and policies. (CT 1540.)

During oral argument, Vo's counsel expounded upon the motion, noting that the *Furman* decision held that arbitrary and capricious imposition of the death sentence violated federal constitutional rights. In this case, given his client's youth, 18 years at the time of the crime, and lack of any prior criminal history, the decision to seek the death penalty was arbitrary and capricious. (RT 122-123.) Vo's counsel also urged the trial judge to order discovery [16] as to the charging policies of the Santa Clara County prosecutor in order to determine whether "there's some justifiable basis" for the decision to seek the death penalty against his client. (RT 126.) Appellant's trial counsel joined in this motion. (RT 126.) The trial judge took the motion under submission. (RT 130; CT 1560.)

On May 2, 1995, as the guilt phase of the trial was winding down,

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[16]Although the record is not entirely clear, this motion for discovery regarding the charging policies of the Santa Clara District Attorney's Office apparently was never granted.

Vo filed a "Supplement to Defendant Loi Vo's Motion *In Limine*: Motion to Preclude the Death Penalty." (CT 2069-2087.) This supplement reiterated the principles, first articulated in *Furman v. Georgia, supra*, that the death sentence may not be imposed arbitrarily and capriciously. It also provided information about the facts of seven murder cases charged in Santa Clara County during the same time period as the instant case where the District Attorney did not seek the death penalty. (CT 2081-2087.)

At a hearing on May 22, 1995, after the jury had found both defendants guilty of first degree murder with special circumstances, Vo's counsel reminded the trial judge about the still pending motion to preclude the death penalty. He also pointed out that he had filed a supplement to the original motion. (RT 5695.) Counsel for appellant moved "to join in the supplemental papers." (RT 5697.)

The trial judge did not actually decide the defense motion to preclude the death penalty in this case until after the end of the trial when he was hearing arguments on the motions for new trial. At that hearing on October 12, 1995, the trial judge finally denied the motion to preclude the death penalty as well as the discovery request. (10/12/95 RT 6.)

B. The California Death Penalty Statute is Unconstitutional Because It Allows Prosecutors Standardless Discretion in Deciding Which Defendants Will Face a Capital Charge

California's death penalty statute, the product of the successful 1978 Briggs Initiative, fails to provide any standards to guide the exercise of discretion by prosecutors in deciding when to seek a sentence of death. It thus permits the ultimate penalty to be imposed in an arbitrary and capricious manner in violation of the Eighth Amendment to the United States Constitution.

Prior to *Furman v. Georgia* (1972) 408 U.S. 238, the Supreme Court had not found that discretion in capital sentencing offended the Constitution. In *Furman* itself, although two justices (Brennan and Marshall) concluded that the Eighth Amendment prohibited the imposition of the death penalty, three justices were unwilling to hold the death penalty *per se* unconstitutional. However, in voting to hold the Georgia statute invalid, these three justices concluded that discretionary sentencing, unguided by legislatively defined standards, violated the Eighth Amendment. In doing so they found that such unguided discretion permitted the death penalty to be imposed wantonly and freakishly. (*Id.* at pp. 240-257, 306-314.)

The variety of opinions supporting the judgment in *Furman* created some confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment (see *Lockett v. Ohio* (1978) 438 U.S. 586, 599), causing many states to reenact death penalty statutes containing what they perceived to be the necessary procedural safeguards against the freakish and discriminatory imposition of the penalty.

In *Lockett v. Ohio, supra*, 438 U.S. at p. 601, Chief Justice Burger, after summarizing the holdings of the various opinions in *Furman*, noted that the Supreme Court had considered the Eighth Amendment issues posed there in five of the post-*Furman* death penalty statutes, and commented on these in the following post-*Furman* decisions: *Gregg v. Georgia* (1976) 428 U.S. 153; *Proffitt v. Florida* (1976) 428 U.S. 242; *Jurek v. Texas* (1976) 428 U.S. 262; *Woodson v. North Carolina* (1976) 428 U.S. 280; *Roberts v. Louisiana* (1976) 428 U.S. 325.

The *Lockett* opinion distilled from this group of cases the concept that there is a qualitative difference between the death penalty and punishment in noncapital cases. It found that, although legislatures remain free to decide how much discretion should be reposed in a judge or jury in noncapital cases, "[w]e are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio, supra*, 438 U.S. at p. 604.)

As Justice Stevens declared in *Gardner v. Florida* (1977) 430 U.S. 349:

> Death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

(430 U.S. at pp. 357-358; citations omitted.)

This drastic difference has caused the Supreme Court to conclude that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (*Woodson v. North Carolina, supra*, 428 U.S. at p. 304, citations omitted.)

To comply with *Furman*, sentencing procedures should not create a substantial risk that the death penalty will be inflicted in an arbitrary or capricious manner. *Furman* does not require that all sentencing discretion

be eliminated but only that it be directed and limited so that the death penalty will be imposed in a more consistent and rational manner, and that there will be a meaningful basis for distinguishing the cases in which it is imposed from those in which it is not. (See *Lockett v. Ohio, supra*, 438 U.S. at pp. 600-601.)

Under these principles, the complete discretion given to the prosecutor by California's death penalty statute to seek or not to seek a sentence of death violates the federal constitutional ban against cruel and unusual punishment.

Appellant acknowledges that in *Gregg v. Georgia, supra,* the opinions joined in by Justices Stewart, Powell, Stevens, White, Rehnquist, and Chief Justice Burger, suggested that the requirements imposed upon a sentencing body are not applicable to decisions by the prosecutors. (*Gregg v. Georgia, supra*, 428 U.S. at pp. 199, 224-226.) [17] The *Gregg* decision does not, however, apply to the California death penalty law, because it differs from the statutes of Georgia, Florida and Texas, approved by the Supreme Court in *Gregg* and its companion cases cited in footnote 2, *post.* In those three states, discretion is not vested in the prosecutor as the statutes themselves require that the State seek the death penalty in the event of conviction of specified felonies. (*Gregg v. Georgia, supra*, 428 U.S. at pp. 162-163; *Proffitt v. Florida, supra*, 428 U.S. at pp. 247-248; *Jurek v. Texas,*

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[17]A similar conclusion was reached in *Keenan v. Superior Court* (1981) 126 Cal.App.3d 576, 581-585.

supra, 428 U.S. at pp. 268-269.) [18]

Under California's statute, a sentencing hearing is neither required after conviction for murder with special circumstances, nor is the prosecutor told when he may seek the death penalty. The prosecutor is given total discretion to determine whether a penalty phase hearing will be conducted,[19] a discretion which is unaffected by any judicial determination to the contrary. This discretion can be, and is, exercised at any point in the proceedings following the filing of capital charges up to when a verdict has been reached at the sentencing hearing. Whether or not this discretion is exercised formally at the defendant's arraignment on capital charges in the trial court, at a pretrial conference, or during trial, the result is the same: it is the *prosecutor* who narrows the class of similarly charged defendants through his decision to waive death or to demand a sentencing hearing following conviction. Furthermore, the prosecutor has unlimited discretion, unaided by legislatively created directives, in the performance of this

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[18]Additionally, the opinion of Justices White, Rehnquist, and Chief Justice Burger in *Gregg* rejected the prosecutorial discretion argument made there on the grounds that it was "unsupported by any facts." (428 U.S. at p. 225.) The *Gregg* decision interpreted the constitutionality of a recently enacted death penalty statute, where presumably an insufficient number of capital proceedings and convictions had occurred to enable a finding of abuse of prosecutorial discretion in the charging of the death penalty.

It should be observed that *Jurek v. Texas, supra,* a case decided the same day as *Gregg*, also found the state statute under consideration to be constitutional. However, some thirteen years later, in *Penry v. Lynaugh* (1989) 492 U.S. 302, 315-328, the United States Supreme Court overturned a Texas death sentence on the ground that the facially valid statute in reality did not provide for the full consideration of mitigating evidence in the specific case of a mentally retarded defendant.

[19] See *People v. Williams* (1981) 30 Cal.3d 470, 477; *Ramos v. Superior Court* (1982) 32 Cal.3d 26, 29; *Sands v. Superior Court* (1983) 34 Cal.3d 567, 569.

indispensable part of the sentencing function. This unlimited and unguided discretion contradicts the clear spirit of *Furman* and its progeny.[20]

If a death sentence in California can be imposed only if a penalty hearing is requested by the prosecutor, the exercise of discretion by him or her in determining whether or not to request such a hearing leads to just the sort of arbitrary and freakish application of the penalty which has been condemned since *Furman.* The United States Supreme Court has focused its concern in death penalty cases on the determination of which defendants, among the many convicted of offenses punishable by death, will actually receive the death penalty, because it is at this stage where arbitrariness, discrimination, and irrationality are most likely to infect the decision whether a defendant will live or die. The exercise of such prosecutorial discretion must, therefore, be governed by standards similar to those required of the sentencing body by the U.S. Supreme Court.

California's death penalty statute contains both aggravating and mitigating factors to be applied in deciding the appropriate penalty. (Pen. Code, § 190.3.) However, the statute specifically provides that these factors are for the consideration of the trier of fact deciding whether the death penalty should be imposed. (*Id.*) Nowhere does the statute state that these factors apply to the prosecutor. This failure to provide standards to guide the charging decisions of the prosecutor means that the California

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[20]The discretion of the prosecutor to seek the death penalty has been greatly increased by the opinion in *People v. Morales* (1989) 48 Cal.3d 527, which expanded significantly the scope of the lying-in-wait special circumstance. (*Id.* at pp. 554-558.) It now appears that a prosecutor is free to seek the death penalty in almost every first degree murder case. The instant case, which involves a lying-in-wait special, demonstrates how broad the class of capital eligible defendants has become in California. (*Zant v. Stephens* (1982) 462 U.S. 862, 879.)

death penalty law eliminates any "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *(Furman v. Georgia, supra*, 408 U.S. at p. 313, concurring opinion of White, J.)

As was noted by Justice Broussard in his dissenting opinion in *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, in appraising the effect of the prosecutor's discretion, it must be remembered that the statute confers this discretion upon the respective district attorneys in each of the 58 counties of California. Without any statutory directives to the prosecutor, each district attorney is free to establish his or her own policy as to when a penalty hearing will be sought.

Despite the discretion vested in each district attorney in each county to make charging decisions, the California Attorney General is the chief law officer of the state, with supervisory power over every district attorney. "[I]t is the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced." (Cal. Const. art. V, § 13; *Pitts v. County of Kern* (1998) 17 Cal. 4th 340, 357, 823, 843; *see also* Cal. Gov't. Code, § 12550 (West 2004).)

Inevitably, under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications who are tried in different counties or even in the same county will be spared by other prosecutors. This disparate result is not the product of mercy but is due to an uneven application of a law which lacks sufficient statutory direction to the prosecutor. Differences in sentencing for similarly situated defendants are the result of differences in the personal beliefs or office policies of district attorneys. As a result, there will inevitably be cases where there will not be any reasonable basis

for the distinction between one who receives the death penalty, and another who is sentenced to life without the possibility of parole. (*Lockett v. Ohio, supra,* 438 U.S. at pp. 600-601.)

Thus, California's statutory scheme, as it is written, interpreted, and applied, does not assure that like cases are treated alike and does not provide any mechanism to protect against the arbitrary, capricious, or discriminatory winnowing of defendants convicted of crimes punishable by death. As such, California's present death penalty system has merely replaced "arbitrary and wanton jury discretion," (*Woodson v. North Carolina, supra,* 428 U.S. at p. 303), with arbitrary and wanton prosecutorial selection, in violation of the Eighth and Fourteenth Amendments.[21]

C. The Santa Clara County District Attorney's Charging Practices in Murder Cases Are Inconsistent and Therefore Result in Arbitrary and Capricious Sentences of Death

The decision of the Santa Clara County District Attorney to charge appellant and co-defendant Vo with special circumstances and to pursue death judgements against them demonstrates such arbitrary and wanton exercise of prosecutorial discretion.

The decision to charge appellant with the death penalty, as opposed to life without the possibility of parole (LWOP), was unusual and arbitrary in many respects. This case, like all murder cases, involved a tragic death; however, it did not present particularly egregious facts. Certainly,

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[21]In light of these U.S. Supreme Court safeguards, petitioner respectfully requests that this Court revisit its decisions in *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1024; *People v. Morales, supra*, 48 Cal.3d at pp.554-558;and *People v. Keenan, supra,* 46 Cal.3d at p. 506

appellant, who was only 18-years-old with a very limited criminal history, did not represent the "worst of the worst."

One must compare the facts of this case with those of the six murder cases, described in co-defendant Vo's supplement to his motion to preclude the death penalty (CT 2076-2096), in which the Santa Clara District Attorney's Office did not pursue the death penalty. That document reveals that in 1992, the prosecutor did not pursue the death penalty against Angel Zetina Garcia in a case where he was charged and convicted of a lying-in-wait special circumstance murder. In addition, Mr. Garcia, unlike appellant, had a serious criminal history which included: a robbery conviction, a prior prison term for assault with a deadly weapon, and a conviction for selling cocaine. (CT 2081.)

Similarly, the case of Edward Jamoll Miller involved a very brutal murder. The victim was kidnapped, robbed and then beaten to death in 1990. Mr. Miller was charged with kidnapping and robbery special circumstances, but the Santa Clara District Attorney did not seek the death penalty. Miller was convicted of first degree murder with two special circumstances and sentenced to life without the possibility of parole. (CT 2082.)

The 1989 case of Jeffrey Curtis Ault involved a rape murder where the prosecutor alleged that the defendant had raped the victim, knocked her unconscious, taken her to a secluded place, stripped her naked and murdered her by a shotgun blast to her back. (CT 2082.) After Ault's trial resulted in a hung jury, he pled guilty to first degree murder. He was sentenced to a term of 27 years to life, after the special circumstance was stricken. (CT 2083.)

In the case of Larry Giraldes, Jr., the Santa Clara District Attorney did not even charge any special circumstances, despite the fact that the case involved the execution-style murder of two people. Mr. Giraldes, like his two victims, was a drug dealer who had a prior serious felony conviction for assault with a deadly weapon. The prosecution alleged that Mr. Giraldes and another person murdered the two victims because of disputes about payment for drugs. A jury convicted defendant of two first degree murders; he received a sentence of 50 years to life. (CT 2083.)

In yet another murder case involving egregious facts the Santa Clara District Attorney did not charge special circumstances even though the murder involved both a kidnapping and a robbery. This case (Santa Clara County Superior Court NO. 152075) was a murder-for-hire scheme involving four defendants named Wiley, Brown, Alvarez, and Santos. The victim was struck with the butt end of a knife, handcuffed and placed in the trunk of defendant Wiley's car. A day or two later, Wiley finally killed the man by strangling him with a ligature. Mr. Wiley pled guilty to, inter alia, murder, kidnapping and robbery and was sentenced to 26 years to life. His co-defendants fared even better. Alvarez received two concurrent terms of 2 years for convictions of being an accessory to murder and a felon in possession of a gun; Santos received 5 years for kidnapping; and Brown received 19 years and 8 months for manslaughter, kidnapping, burglary and robbery. (CT 2084.)

Two other cases [22] described in Vo's supplement involved the murder of the husband of one of the defendants. In both cases, the

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[22]Apparently, the two defendants, Judith Ann Barnett and Andrew Granger, were charged separately for the same crime.

defendants were charged with and found guilty of the murder-for-financial-gain special circumstance. The Santa Clara District Attorney did not seek the death penalty, and the defendants were sentenced to LWOP.

The comparison of the facts of these cases and the criminal backgrounds of the defendants involved with the facts of the instant case and the criminal history of appellant support the conclusion that the decision to charge appellant with capital murder violated his Eighth Amendment rights as described in *Furman v. Georgia* (1972) 408 U.S. 238 and its progeny.[23] As the U.S. Supreme Court has cautioned, where discretion is afforded "'on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" (*Godfrey v. Georgia, supra*, 446 U.S. at p. 427 (quoting *Gregg v. Georgia, supra,* 428 U.S. at p.189.) The six cases described above and in the Supplement to Defendant Loi Vo's Motion *In*

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[23]The decision in *McCleskey v. Kemp* (1987) 481 U.S. 279 does not apply to this case. In *McCleskey*, the defendant alleged that in Georgia the death penalty was imposed more often on black defendants and killers of white victims than on white defendants and killers of black victims. The U.S. Supreme Court concluded that the defendant had failed to show that any of the decision makers in his case acted with discriminatory purpose in violation of the equal protection clause of the Fourteenth Amendment. (*Id.* at p. 298.) Unlike *McCleskey*, the instant case does not present an issue of racial discrimination or equal protection analysis. Although the *McCleskey* decision also involved an Eighth Amendment argument, it focused on alleged deficiencies in the entire state capital sentencing process in Georgia. Appellant's claim focuses instead on the failure of the Santa Clara County District Attorney to pursue death sentences against other defendants facing similar or more aggravated murder charges in Santa Clara County at the same time as appellant was facing such charges.

Limine: Motion to Preclude the Death Penalty" (CT 2069-2087) demonstrate that the discretion was not adequately guided and limited in Santa Clara County when the prosecutor sought the death sentence against appellant. Accordingly, his death sentence must therefore be reversed.

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II.

THE TRIAL JUDGE ERRED WHEN HE DENIED APPELLANT'S MOTION TO SEVER HIS TRIAL FROM THAT OF HIS CO-APPELLANT

Both appellant and co-appellant Vo moved pre-trial for the severance of their trials because of antagonistic defenses.[24] (RT 95-106.) The trial judge erroneously denied their motion. (CT 1547-1548.)

A. The Law Governing Severance

Penal Code section 1098 provides that "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be jointly tried, unless the court orders separate trials." Generally, the decision whether to grant severance is left to the discretion of the trial judge. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286.) While joint trials save time and expense, "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452.)

As this Court has noted, severance is appropriate "in the face of an incriminating confession, prejudicial association with co-defendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a co-defendant would give exonerating testimony." (*People v. Massie* (1967) 66 Cal.2d 899, 917; See also *People v. Champion* (1995) 9 Cal.4th 879, 904.) In *People* v. *Keenan* (1988) 46 Cal.3d 478, this Court observed: "Severance motions in capital cases should receive heightened scrutiny for potential prejudice." (*Id.* at

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[24] Vo also argued that severance should have been granted based on the principles of *Aranda/Bruton* because Tevya Moriarty was going to testify about alleged admissions by appellant which implicated, by inference, co-defendant Vo.

p. 500.) This principle conforms to the Eighth Amendment requirement of heightened reliability in capital cases. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 376.)

In *Zafiro v. United States* (1993) 506 U.S. 534, the United States Supreme Court held that severance is proper "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Id.* at p. 539.)

As this Court noted in *People v. Massie, supra,* in assessing a claim of improper denial of severance, an appellate court ". . . must weigh the prejudicial impact of all of the significant effects that may reasonably be assumed to have stemmed from the erroneous denial of a separate trial." (66 Cal.2d. at p. 923.) The appellate court must also view the record as it stood before the trial court at the time of the motion. (*People v. Price* (1991) 1 Cal.4th 324, 388.)

Under Penal Code sections 954 and 1098,[25] when joinder of defendants' cases for trial results in substantial prejudice, such misjoinder constitutes both an abuse of discretion by the trial judge and a denial of defendants' federal constitutional rights under the Fifth, Sixth and Fourteenth Amendments to due process and to a fair trial. (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285.) Improper joinder also violates the Eighth Amendment right to reliable guilt and penalty

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[25] Failure to sever also implicates article I, section 15 of the California Constitution, which guarantees a criminal defendant due process and a fair trial.

determinations in capital cases. (*Mills v. Maryland, supra,* 486 U.S. at p. 376.)

The general rule is that propriety of a ruling on a motion to sever counts is judged by the information available at the time the motion was heard. (*People v. Cummings, supra,* 4 Cal.4th at p. 1285.) However, a court reviewing the issue on appeal may reverse a denial of a motion to sever even if the trial judge's decision on the motion was correct at the time it was made if "a gross unfairness had occurred. . .such as to deprive the defendant of a fair trial or due process of law." (*People v. Mendoza* (2000) 24 Cal.4th 130, 162; *People v. Arias* (1996) 13 Cal.4th 92, 127; *People v. Johnson* (1988) 47 Cal.3d 576, 590.)

In his motion for severance filed pre-trial, Vo stated that he would "adamantly" deny any intent to harm or kill anyone when he went to the Wang house with appellant. (CT 1538.) He also asserted that his defense would "establish that [appellant] apparently lost control for psychiatric reasons and killed the victim." (RT 1538.) During the hearing on the motion, Vo's counsel stated that he intended to introduce evidence about an incident in the jail where appellant lost control of his temper. (RT 104.) Therefore, at the pre-trial phase, the trial judge was on notice that Vo's defense would be to blame appellant for the murder of Su Hung. However, since this Court is reviewing this issue on appeal, it can assess the question of whether the trial judge erred in denying the motion to sever based on the fact that it actually resulted in a unfair trial for appellant. (*People v. Johnson, supra,* 47 Cal.3d at p. 590.)

B. The Guilt Phase

1. Antagonistic Defenses

Vo's Testimony [26]

Appellant did not testify at trial, but his co-defendant did. Loi Vo testified that it was appellant's idea that they go to Ellen Wang's house. (RT 4984.) He claimed that when appellant and he went to look for her, their only purpose was to talk. Appellant was the one who had a problem with Ellen, according to Vo. He accompanied appellant just in case Ellen and her friends should become hostile. (RT 4987.) Vo testified that appellant told him that all he wanted to do was to tell Ellen to leave him alone and to scare her off. (RT 4987.) According to Vo, appellant never said anything about intending to kill anyone. (RT 4987-4988.) Vo also testified that he did not kill Su Hung nor did he play any part in killing her. (RT 4992.) Vo also claimed that after Tony Wang came home and after they had taken him upstairs and tied him up, appellant told Vo that Su Hung was dead. At first,

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[26] The fact that Vo testified and appellant did not gave Vo's attorney a rhetorical advantage during closing argument to the jury at the guilt phase. His lawyer stated:

> Now, he [Vo] testified. It's very common in criminal cases for defendants not to testify. There's no way that a defendant can be forced to testify; can't even comment on it. But Loi Vo wanted to testify and tell you what he did, why he did it, and in particular importance, he wanted to testify about what he did not do. (RT 5542.)

While the prosecutor was forbidden to comment on appellant's silence, his co-defendant was not. (*Griffin v. California* (1965) 380 U.S. 609, 614.) This is another reason why the severance motion should have been granted.

Vo thought Hajek might be joking. Vo ran upstairs to Su Hung's bedroom and found her body under a comforter. (RT 5175.)

Other Crimes Evidence

As part of his defense in this case and over appellant's objections, co-defendant Vo introduced "other crimes" evidence concerning appellant.

In his argument in support of the motion for severance, trial counsel for Vo explained how he intended to portray appellant:

> And he [appellant] kills the victim, in our view, because if you look at the psychiatric reports and the psychiatric materials, it shows a significant history of psychiatric problems, psychiatric hospitalizations, psychiatrist [sic] and an indication that *when Mr. Hajek does not take his psychiatric—his anti-psychotic medication, that he suffers from a significant problem in controlling his behavior.* So our view is that Vo is there for his limited purpose and that *Mr. Hajek is there, loses control for the psychiatric reasons and ultimately ends up killing this elderly lady, killing an elderly lady that Mr. Vo doesn't even know about before he goes into the house.* And there's nothing to show that he has any interest in harming this 75 year old lady.

(RT 102; emphasis added.)

Further, Vo's attorney described some of the evidence--including an incident in which appellant lost his temper and destroyed jail property-- he planned to introduce in support of his claim that it was appellant who killed Su Hung. (RT 104.) Counsel explained that Vo's defense was designed to show that "Mr. Hajek is unable to control his behavior and lashes out." (RT 104.)

Appellant's counsel objected to this evidence, stating that if the trial judge was going to allow Vo to introduce this highly prejudicial evidence,

he should grant appellant's request for severance. (RT 106-107.) Ultimately, the trial judge denied the motions for severance. (RT 170.)

The issue of appellant's destruction of jail property came up in another context later in the trial. Appellant filed a motion in limine, *Defendant Hajek's Motion No. 7: Objections to Specific Evidence*, which included an objection to the prosecution's introduction of evidence regarding an incident when appellant had destroyed property within the jail. (CT 1613.) During the discussion about this motion, Vo's trial counsel stated his intention to use this evidence during his defense. (RT 327.) He also explained that he did not want to be in a position where it was argued later that somehow he waived Vo's rights to urge the admissibility of this evidence. Counsel further told the trial judge that he would be prepared at some later time to make a more in-depth offer of proof and to explain to the court why he thought this evidence was admissible. (RT 328.) He argued that the evidence was clearly relevant and constituted an appropriate defense for Vo. (RT 328.)

Before co-defendant Vo began presenting his defense, counsel for appellant objected to allowing Vo to call a correctional officer, Douglas Vander Esch, to testify about appellant's destruction of jail property:

> I do take a position as to proving up the jail acting out incident and the Round Table Pizza disturbance. And the reason is because the jury has heard extensive testimony about that and it's clear that Mr. Hajek and I are not disputing those facts. So why there has to be additional testimony in order to simply confirm it when we are not denying it, in any event, and what we, in fact, put in front of the jury, I think is not necessary. And under 352, would be my belief that all certainly wants to make whatever arguments he can from

> those incidents and he is free to do so. But the addition of the live witnesses is something that, at this point, is superfluous and comes into the realm, I think, of bad character evidence at that point. I would make the same objection if Mr. Waite [the prosecutor] were attempting to present that evidence in rebuttal and I think it's the same type of thing.

(RT 4854.)

Despite this objection,[27] the trial court permitted Vo to present the testimony of Mr. Vander Esch. (RT 4936.)

Testimony of Douglas Vander Esch

Over the objection of appellant's trial attorney, Douglas Vander Esch, a correctional officer at the Santa Clara County main jail north, testified concerning an incident on May 16, 1992, involving appellant in the day room. Appellant asked to speak to a sergeant about being reclassified, and Vander Esch told him to make a written request on the appropriate form. (RT 4942.) Appellant replied that he didn't want to fill out a request form because he never got an answer. (RT 4974.) Shortly after this conversation, the officer heard a noise coming from the shower area of the day room. He saw appellant in that area, and he had a mop wringer in his hand. There was broken glass on the floor near appellant and glass in the showers. (RT 4943.) According to Vander Esch, appellant then said that he bet he could see a sergeant now. (RT 4945.)

Testimony of James O'Brien

Over appellant's objection (RT 4854), Loi Vo also presented the testimony of James O'Brien about an incident involving appellant when

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[27] See Argument___, *post*, which discusses the trial error in allowing Vo to present this evidence.

both worked at Round Table Pizza in June, 1989. Appellant was seventeen years old, and O'Brien was fifteen; they both worked in the kitchen. (RT 4930.) According to O'Brien, when he got off work one evening, appellant punched him in the face and broke his nose. (RT 4930-4931.) O'Brien testified that, prior to appellant's attack, there had never been any kind of dispute between them. (RT 4930.) When the incident occurred, O'Brien was unlocking his bicycle, and appellant said something indicating that he was unhappy that O'Brien was getting off work early. (RT 4928.) O'Brien testified that this attack appeared to be totally irrational. (RT 4934.)

C. The Failure to Grant the Defendants' Motions for Severance Resulted in an Unfair Guilt Phase for Appellant

As noted *ante*, the appellate court must view a claim that the trial court improperly denied severance in two different contexts. The first context involves the state of the record when a pre-trial request for severance is denied. In that case, the question is whether the denial was an abuse of discretion given the record before the trial court. (*People v. Davis* (1995) 10 Cal.4th 463, 508.) Even if a pre-trial denial were correct when made, an appellate court may still reverse if the record of the trial shows that the failure to sever resulted in a grossly unfair trial. (*People v. Johnson* (1988) 47 Cal.3d 576, 590.)

In this case, the trial judge abused his discretion when he denied the pre-trial severance motions of both defendants. Alternatively, the record of the trial shows that the failure to sever resulted in a grossly unfair trial.

Co-defendant Vo sought to exonerate himself by testifying that not only did he not kill Su Hung, he did not know that appellant had any plan to

kill any member of the Wang family. He also was allowed to introduce highly prejudicial "other crimes" evidence – the incidents involving Jimmy O'Brien and the destruction of property at the Santa Clara County Jail-- to attempt to prove his case that it was appellant, not him, who was volatile and violent and therefore the likely killer in this case.

Appellant acknowledges that the incident involving Jimmy O'Brien and the incident at the Santa Clara County Jail both came up, in very general terms, during the testimony of some of appellant's witnesses. That does not, however, diminish the fact that having his co-defendant introduce witnesses, including in the case of Mr. O'Brien the victim himself, to testify about these "other crimes" was highly prejudicial to appellant. The failure to sever appellant's trial from that of Vo meant that appellant faced two prosecutors at the guilt phase: the State and his co-defendant. Such "double-teaming" is inherently unfair.

D. The Failure to Sever Also Violated Appellant's Federal Constitutional Rights

If the failure to grant a motion for severance results in prejudice so great as to deny a defendant a fair trial, it constitutes constitutional error. (*United States v. Lane* (1985) 474 U.S. 438, 349.) Such prejudice may arise when, inter alia, evidence is introduced from which the jury may infer a criminal disposition on the part of the defendant. (*Webber v. Scott* (10th Cir. 2004) 390 F.3d 1169, 1177.)

In this case, the failure to sever the trials of appellant and Loi Vo greatly prejudiced appellant because it forced him to defend himself against the case made against him not only by the prosecutor but also by his co-

defendant. Mr. Vo testified in his own defense, blaming appellant for the murder of Su Hung. Vo also introduced improper and prejudicial "other crimes" evidence against appellant.

Accordingly, the failure to sever violated appellant's federal constitutional rights to due process and a fundamentally fair guilt phase trial. It also violated his right to a reliable guilt determination at his capital trial. (U.S. Constitution, 6th, 8th and 14th Amendments.)

E. The Failure To Sever Also Produced an Unfair Penalty Trial

The prejudice created in the guilt phase also unfairly prejudiced appellant in the penalty phase of his trial. In addition, evidence presented at the penalty phase further contributed to that prejudice. The prosecutor called only one witness, Ellen Wang, to testify about the impact her grandmother's murder had on her family. The prosecutor relied primarily on the "circumstances of the crime" to make the case that the jury should sentence both appellant and Loi Vo to death. (RT 5708-5709.) While there were improprieties committed by the prosecution which will be discussed later in this brief, the severance issue as it relates to the penalty phase turns on the evidence presented by appellant's co-defendant.

Vo called thirty witnesses to make his case that he should not be sentenced to death. (RT 5969.) Because appellant had presented the testimony of a number of mental health experts during the guilt phase, he did not repeat that evidence, with the exception of Dr. Minagawa, at the penalty phase. He did call June Rector, who had supervised appellant's foster placement and adoption in Florida, his parents and a former teacher

who had visited him in jail as penalty phase witnesses. By comparison to the numerous witnesses testifying on behalf of his co-defendant, appellant's mitigation case necessarily appeared meager.

Appellant's trial counsel made a number of mistrial motions at the penalty phase. These motions were, in effect, related to the failure to grant appellant's motion for severance because they concerned the prejudice he suffered by being tried with co-defendant Vo.

In her first motion at this phase, counsel argued that appellant was being denied a fair penalty trial as a result of Vo's "good character" case in mitigation:

> Your honor, as the court knows, there has been a concern on my part from the beginning of this penalty phase regarding how trying the two of these men together during the penalty phase is going to impact on my client in particular because I represent him, although it's equally well taken as to both of them. . . And at this time, I am going to object and move for a mistrial based on the presentation that [Vo's trial counsel] is giving in a joint trial during the penalty phase. Essentially, I think what the problem here is that he certainly must have the right to present everything he can on behalf of Mr. Vo. But because he has opted to present what is, in essence, a good character presentation about his client, these people who are sitting on the jury are only human. And even though we instruct them not to, even if the district attorney is instructed that he may not do a comparison between the two defendants, which I believe is in violation of the requirement under the Eighth Amendment that a defendant in a penalty phase must be given an individualized determination as to what the appropriate penalty should be.

(RT 6019-6020.)

The trial judge denied appellant's motion for mistrial. (RT 6021.)

Appellant's trial counsel moved a second time for a mistrial after the prosecutor's cross-examination of one of Vo's witnesses, Jeff Nguyen, elicited a statement implying that appellant had been a "gangster" in high school. (RT 6115.) Counsel argued that this cross-examination violated appellant's Eighth Amendment rights; the trial judge denied this second mistrial motion. (RT 6120.) Thereafter, appellant's counsel asked that the prosecutor be prohibited from questioning subsequent witnesses about gang affiliations. (RT 6121.) When the prosecutor tried to justify such questioning, appellant's lawyer responded:

> Are we in the same courtroom, [the prosecutor] and I? None of those witnesses said that Loi Vo has been hanging out with gangsters. Each of them deliberately said he did not do that and, in fact, like many other kids in San Jose or in high school know people who are in gangs and can identify them. This is extraordinarily prejudicial. It is unreliable material and under the Eighth Amendment he [the prosecutor] is not entitled to get into it, and additionally, I have no way of defending against it when he starts to ask questions in which he's eliciting information Mr. Vo supposedly started to hang around with the wrong crowd. Guess what the jury is going to think? My client is the wrong crowd. That's illegal. I'm going to ask the Court prohibit him from doing this.

(RT 6122-6123.)

Vo's trial counsel joined in this objection and also asked the judge to consider this evidence in terms of Evidence Code section 352. Their objection was overruled by the trial judge. (RT 6123.)

The failure to sever appellant's trial from that of Vo thus allowed the prosecutor the opportunity to introduce evidence suggesting that appellant was a gang member. There was absolutely no evidence, other than the

prosecutor elicited during his cross-examination of this "good character" witness for Vo, that appellant was a member of a gang. Gang evidence is highly prejudicial in any case. Like other bad character evidence, it is not admissible if it is introduced only to "show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) It was particularly unfairly prejudicial in this case since there was no evidence that appellant was a gang member.[28] Therefore, this is further proof that the failure to sever resulted in a constitutionally unfair penalty phase trial for appellant.

Appellant's counsel also objected to the testimony of James Park, Vo's expert on prisons and prisoner classifications, on the grounds that it was prejudicial to appellant:

> . . . I am going to object to Mr. Park's testimony in that it also prejudices my client in that clearly it creates a vacuum. From what [Vo's counsel] has said, Mr. Park is now going to be going into the issue of Mr. Vo's classification status and why he would qualify as a presumably model prisoner in the state prison. And the absence of such testimony in relation to Mr. Hajek creates an implication that there is a problem there. So I will add those two bases to object and those two to my objections previously stated to this which I would now assert

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[28] This evidence of alleged gang membership also violated California law which prohibits the State from introducing aggravating evidence which does not fit within one of the statutory factors listed in Penal Code section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 773.) This, in turn, constituted a violation of federal due process rights as it violated a state-created liberty interest, to wit, the right to a penalty trial where the prosecutor is limited to aggravating evidence set forth in section 190.3. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

also violates the 5th and 14th Amendment right to due process. (RT 6158.) [29]

As this Court noted in another death penalty case, *People v. Ochoa* (1998) 19 Cal.4th 353, the Eighth Amendment of the United States Constitution "requires an individualized assessment of the defendant's background, record and character, and the nature of the crimes committed, both as a matter of state law and as a federal constitutional requirement." (*Id.* at p. 455, citing Penal Code section 190.3, *People v. Beeler* (1995) 9 Cal.4th 953, 991-992 and *Woodson v. North Carolina* (1976) 428 U.S. 280, 303-305.) In *Woodson, supra*, the U.S. Supreme noted: "[t]he penalty of death is qualitatively different from a sentence of imprisonment, however long . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." (*Id.*, 428 U.S. at p. 305.) When carrying out this task, the jury must focus on the defendant as a "uniquely individual human being." (*Ibid.*) Also, matters not relevant to defendant's personal responsibility and moral guilt should not play any part in the jury's determination of whether defendant should receive the death penalty. (*Ibid.*)

In addition, the case put on by Vo at the penalty phase implicated appellant's Sixth Amendment right to be tried "by an impartial jury." (U.S. Const., 6th Amend.) As noted in *Irvin v. Dowd* (1961) 366 U.S. 717, 722, "[i]n essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial 'indifferent' jurors." The evidence

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[29]Subsequently, defense counsel acknowledged on the record that the judge had denied this motion for mistrial. (RT 6161.)

presented by appellant's co-defendant, taken together with the prosecutor's cross-examination of these witnesses, undoubtedly affected in an adverse way the jurors' ability to be impartial in their assessment of the much shorter and thus less compelling mitigation case offered by appellant.

These important constitutional principles were violated in the penalty phase of appellant's trial because the jurors deciding appellant's fate were exposed at both the guilt and penalty phases of appellant's trial to prejudicial evidence which would not have been presented had he not been jointly tried with Loi Vo. At guilt, Vo testified that appellant had killed Su Hung. In addition, Vo presented "other crimes" evidence which unduly prejudiced defendant.

In the penalty phase, appellant was prejudiced by the fact that Loi Vo was able to introduce a parade of witnesses extolling his virtues. By comparison, appellant's mitigation evidence seemed meager and unpersuasive. Obviously, if Vo had not been tried in the same penalty phase trial, appellant would have avoided this unfavorable comparison and would have been properly judged based on his individual characteristics and background as is required under the United States Constitution.

In analyzing the error described above, the fact that Loi Vo was also sentenced to death is immaterial. The question is not whether Vo was successful in making his case for life but whether in attempting to make that case his presentation adversely affected, in violation of the Sixth, Eighth and Fourteenth Amendments, appellant's efforts to persuade the jury that his life should be spared. In the context of another type of federal constitutional error, this Court noted that a reviewing court must determine

whether the ". . .verdict actually rendered in [the] trial was surely unattributable to the error." (*People v. Kobrin* (1995) 11 Cal.4th 416, 430.)

This Court cannot say that appellant's sentence of death was surely not attributable to the failure to grant his motion for severance. At the penalty phase of the joint trial of appellant and Loi Vo, Vo's presentation was as prejudicial to appellant's case for life imprisonment as anything presented by the prosecution. Appellant faced two prosecutors at that phase of the trial; thus, his Eighth Amendment rights to an individualized determination of his sentence and to a reliable determination of penalty were violated as were his rights to due process, to an impartial jury and to a fundamentally fair trial pursuant to the Sixth and Fourteenth Amendments. Appellant's convictions and death sentence must be reversed.

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III.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE FINDING AND THE LYING-IN-WAIT FIRST DEGREE MURDER

A. The Trial Judge Erred in Denying Appellant's Motion Pursuant to Section 1118.1 for a Judgement of Acquittal as to the Lying-in-Wait Special Circumstance Allegation

In this case, both defendants filed motions to dismiss under Penal Code section 1118.1, objecting to the submission of the lying-in-wait special circumstance to the jury because the evidence was insufficient to support such a charge. Initially, the trial judge expressed agreement with the defendants' arguments urging dismissal of both the torture and lying-in-wait special circumstances. (RT 4190-4191.) At a later hearing on the motion, he denied the defendants' 1118.1 motions as to these two special circumstances. (CT 1815.)

1. The Substantial Evidence Standard

A motion under section 1118.1 is determined under the "substantial evidence" standard, which also governs the determination of whether the evidence is sufficient to uphold a conviction.[30] This Court has noted: "The substantial evidence test applies both when an appellate court is reviewing on appeal the sufficiency of the evidence to support a conviction and when

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[30] The Court reviews a challenge to the sufficiency of the evidence to support a special circumstance finding under the same standard of review as the sufficiency of the evidence to support a conviction. (*People v. Hillhouse, supra*, 27 Cal.4th 469, 497-498.)

a trial court is deciding the same issue in the context of a motion for acquittal under Penal Code section 1118.1 at the close of evidence." (*People v. Cuevas* (1995) 12 Cal.4th 252, 261.) Under this standard, the court "'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'"(*People v. Johnson* (1980) 26 Cal.3d 557, 578 [citation omitted].)

Under California law, the focus of the substantial evidence test is on the entire record of evidence presented to the trier of fact, rather than on "isolated bits of evidence." (*Id.* at p. 577.) Earlier cases provide additional description of the meaning of "substantial evidence." "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises the possibility, and this is not a sufficient basis for an inference of fact." (*People v. Reyes* (1974) 12 Cal.3d 486, 500, citing *People v. Redmond* (1969) 71 Cal.2d 745, 755; see also *In re Eugene M.* (1976) 55 Cal.App.3d 650, 658 ["Well-grounded suspicion is not proof, and especially it is not proof beyond a reasonable doubt."].) Nor can "substantial evidence" be based on speculation:

> We may speculate about any number of scenarios that may have occurred on the morning in question. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence."

(*People v. Morris* (1988) 46 Cal.3d 1, 21 [citations omitted].)

Under the Fifth and Fourteenth Amendments of the United States Constitution, the prosecution bears the burden of proving every element of a crime beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 368.) In *Jackson v. Virginia* (1979) 443 U.S. 307, 315-319, the U.S. Supreme Court found that the Due Process Clause of the Fourteenth Amendment also requires that there be sufficient evidence, found to be true beyond a reasonable doubt, of each element of a charged crime. The *Jackson* decision defined sufficient evidence as that which allows the trier of fact to reach a "subjective state of near certitude of the guilt of the accused. . ." (*Id.* at p. 315.)

Application of these principles to the jury's finding that appellant committed first degree murder with a lying-in-wait special circumstance mandates reversal of the guilt and death verdicts.

2. The Elements of the Lying-in-Wait Special Circumstance

This Court has found that the lying-in-wait special circumstance includes the following elements: an intentional murder (1) committed by concealment of purpose; (2) a substantial period of watching and waiting for an opportune time to act; and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 500; *People v. Carpenter* (1997) 15 Cal.4th 312, 388.)

3. The Elements of Lying-in-Wait First Degree Murder

The requirements of lying-in-wait first degree murder under Penal Code section 189 are "slightly different" from the lying-in-wait special circumstance under Penal Code section 190.2, subdivision (a)(15). (*People v. Ceja* (1993) 4 Cal.4th 1134, 1140, fn. 2.) Section 189 provides that a murder "perpetrated by means of" lying in wait is first degree murder. Section 190.2, subdivision (a)(15), however, describes the lying-in-wait special circumstance as the commission of an intentional murder "while lying in wait." (*People v. Morales* (1989) 48 Cal.3d 527, 558.) For purposes of the insufficiency argument raised in this brief, however, the slight differences between lying-in-wait murder and lying-in-wait special circumstance do not matter because the concealment requirement for both involves the element of a surprise attack. (*Ibid.*; *People v. Webster* (1991) 54 Cal.3d 411, 448.)

B. The Trial Judge Stated that There was no Evidence of a Surprise Attack on the Victim

During the hearing on the defendants' motion, the trial judge conceded that the evidence did not establish the existence of a surprise attack, one element of the lying-in-wait circumstance:

> I did not consider the surprise attack. All I considered was they were lying in wait for Ellen, and they killed Su Hung while they were lying in wait for Ellen. . .I will give the fact there is *absolutely no evidence* on the record there was a surprise attack other than the fact that she may have been tied or bound at the time it did occur.

(RT 5272, emphasis added.)

This finding by the trial judge requires a reversal of the special circumstance allegation because it cannot be disputed that the presence of a

"surprise attack" is an element of the lying-in-wait special circumstance. Having stated that there was "absolutely no evidence of a surprise attack," the trial judge necessarily found the record devoid of substantial evidence of one element of the lying-in-wait special circumstance. This Court should accept this assessment of the trial judge. (*People v. Trevino* (1989) 39 Cal.3d 667, 695.)

C. There Was Insufficient Evidence to Support Other Elements of the Lying-in-Wait Special Circumstance Finding

As noted above, this special circumstance also involves the element of "concealment of purpose." (See, e.g., *People v. Morales* (1989) 48 Cal.3d 527, 557.[31]) The concealment required to prove a special circumstance allegation of lying-in-wait "is that which puts the defendant in a position of advantage, from which the fact finder can infer that lying-in-wait was part of the defendant's plan to take the victim by surprise." (*Id.* at p. 555.) In *Morales*, this Court found that the defendant need not actually conceal himself physically in order to meet the concealment element of this special circumstance. (*Ibid.*) It is sufficient that the defendant's true intent and purpose were concealed by his actions or conduct. (*Ibid.;* see also

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[31] In *Morales*, this Court described the standard as follows: "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, presents *a factual matrix* sufficiently distinct from 'ordinary' premeditated murder to justify treating it as a special circumstance." (*Id.* at p. 557, italics added.)

People v. Gutierrez (2002) 28 Cal.4th 1083, 1149.)

Defense counsel in this case argued that the evidence showed that the defendants had not made any effort to conceal their purpose. They brandished weapons and then tied up the victim, Su Hung, and took her upstairs to her room, thus isolating her from the only other person in the house, her granddaughter, Alice Wang. (CT 1743-1744.) Because the defendants used intimidation, rather than stealth or concealment of purpose, no reasonable fact finder could infer that Su Hung had been lulled into a sense of false security. (CT 1744.)

Defense counsel also argued at trial that the prosecution had failed to prove the necessary "factual matrix," as described in the *Morales* opinion. (See footnote 2, *ante*.) In particular, trial counsel argued that the matrix standard required that the concealment and the watchful waiting must apply to the victim, not some third party. (RT 5267.) The trial judge rejected this point, finding that although Ellen Wang was the "target" of the defendants' concealment of purpose and watchful waiting while Su Hung was the actual murder victim, the lying-in-wait special circumstance still applied. (RT 5268-5270.) The trial judge acknowledged that this may be a "unique and novel approach to thinking about lying in wait." (RT 4795-4796.) The trial judge did not cite any case law supporting this proposition, and none exists.

The prosecution also failed to demonstrate the "appropriate temporal relationship exists between the killing and the lying in wait." (*Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1011.) This special circumstance requires that the defendant must have killed the victim *while* lying in wait. (*People v. Carpenter, supra,* 15 Cal.4th at p. 388; Pen. Code,

§ 190.2, subd. (a) (15)) [32] The killing must either be contemporaneous with or "follow directly on the heels of the watchful waiting." (*People v. Morales, supra,* 48 Cal. 3d at p. 558.) In *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1149, this Court noted "the killing [must] take place *during the period of concealment and watchful waiting.*"[33] (Emphasis in original.)

In the *Domino* decision, *supra*, the Court of Appeal found that the lying-in-wait special circumstance was not demonstrated where the decedent was kidnapped during a period of watchful waiting, transported somewhere else and then killed some one to five hours later. Because of the "cognizable interruption" between the period of watchful waiting and the actual killing in the *Domino* case, the prosecution did not establish the lying-in-wait special circumstance. (*Domino, supra,* 129 Cal.App.3d at p. 1011.)

In the instant case, assuming arguendo that the concealment element was shown by the appellants' entry into the Wangs' house by use of a ruse, the prosecution failed to establish that there was a continuous flow of events leading to the killing of the decedent after a period of watchful waiting. Rather, as the prosecutor pointed out that it appeared that a good amount of time passed after the defendants' entry into the house before Su

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[32] In 1998 the California Legislature amended section 190.2 (a) (15) to state that this special circumstance requires that the murder occur "by means of lying in wait." This change does not apply here because the murder at issue occurred in January, 1991.

[33] By contrast, first degree murder by means of lying in wait does not contain a temporal requirement. (*Houston v. Roe* (9th Cir. 1999) 172 F.3d 901, 908.)

Hung was killed. (RT 5379.) The prosecutor was never able to establish when, in the course of the day, the killing occurred.

Moreover, the evidence showed that co-defendant Vo threatened members of the family that if one or more of them screamed, he would kill the whole family. (RT 3162.) [34] Thus, the evidence is simply insufficient to prove concealment of purpose by the appellants.

The element of "watchful waiting"[35] by the defendants is also missing from the evidence of record. The victim was a seventy-three-year-old woman, who weighed less than 90 pounds. She never posed any danger and was tied up and taken up to her bedroom shortly after appellants entered the Wang house. Certainly, there was no need for "watchful waiting" for an opportune time to kill her.

Further, the prosecution failed to offer any evidence establishing *when* Su Hung was killed. During the hearing regarding the defendants' 1118l.1 motions, the prosecutor stated:

> But they were lying in wait with the Grandma to wait until Ellen showed up. At that point, that was the time they wanted to kill the grandmother in front of her. Whatever reason, they got tired of waiting for a long time, anywhere from one to three hours, I suppose.

(RT 4372.)

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[34] Although later on, Vo apparently told Tony Wang that he did not intend to harm the Wang family. (RT 3894.)

[35] See, e.g., *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1149 ["the killing [must] take place *during the period of concealment and watchful waiting*." (Emphasis in original.)]

The evidence of record allows only for speculation on this issue of timing, which is crucial to the proof of the lying-in-wait special circumstance. Speculation falls far short of the requirement that the prosecution present "substantial evidence" of each of the elements of a criminal charge. Absent substantial evidence regarding the temporal aspect of the murder, the prosecution failed to establish that the murder occurred while one or both of the defendants were lying in wait.

On this record, it cannot be said that the State sustained its burden of proving beyond a reasonable doubt that the killing of Su Hung constituted a lying-in-wait special circumstance murder. The evidence was insufficient as a matter of law to support this special circumstance finding. Should this Court reverse this special circumstance, this would mean that the invalidated special would have to be taken out of the mix of evidence lawfully supporting appellant's death sentence. This would, in turn, require the vacating of appellant's death sentence.

D. The Invalidation of the Lying-in-Wait Special Circumstance Requires a Reversal of the Death Sentence

The 1978 death penalty statute, under which appellant was convicted and sentenced, constitutes a "weighing" scheme. (*Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1477.) California law requires that, in reaching a sentencing verdict, each special circumstance finding becomes a statutory aggravating circumstance which the jury should weigh against the mitigating circumstances presented. (Pen. Code, § 190.3, subd.(a).) As noted in *Stringer v. Black* (1992) 503 U.S. 222, in a weighing state such as California, the invalidated aggravating factor necessarily added to the

aggravating side of the balance and thus prejudiced appellant when the jury was deciding whether to sentence him to death.[36]

Since the two special circumstances allegations found true by appellant's jury are what made appellant eligible for the death penalty, it seems highly likely that this was an aggravating factor to which the jurors gave significant weight. During his closing argument at the penalty phase, the prosecutor relied primarily on what he deemed to be the "circumstances" of the crime, claiming that this murder represented the worst of the worst. He made specific reference to the special circumstances in support of that claim:

> First degree murder. A much more evil or culpable crime because the person plans it out. And that type of cold-bloodedness and that type of evil is more serious under the law. Simple enough. Even worse than that, of course, are special circumstances, which you are familiar with at least [sic] too. First degree murder – and it could be even a felony murder where the premeditation of evil frame of mind is imputed by law. But a special murder is even more severe and will incur life without parole as you know. The defendants are liable under two types of special circumstances in this case. The minimum for killing Su Hung alone under those specials – that's where you would be, if you found for the death penalty in this case. What does it take to exceed

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[36] The *Stringer* decision noted:

But 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. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence. (*Id.* at p. 232.)

that, to exceed that rare crime for which we call special circumstance murder, like a torture, something that evil, that heinous?

(RT 6418.)

The prosecutor introduced only one witness at the penalty phase. Ellen Wang testified about the how the death of her grandmother had adversely affected her as well as her mother, father, and sister. (RT 5717-5728.) During her testimony, Ellen described several photographs (Exhibits 10-12) of her grandmother with Ellen's mother, her sister and herself.

The above discussion shows that the prosecutor emphasized the special circumstances in his penalty phase closing argument after having introduced a paucity of aggravating evidence. The record also establishes that the jury was having some trouble reaching its penalty phase decision. The jurors deliberated for many hours over five days before coming back with the death verdict. (CT 2616, 2622, 2626, 2627, 2666.)

Given all these factors, it is clear that appellant was prejudiced by the improper inclusion of the lying-in-wait special circumstance among the aggravating factors considered by the jury. Accordingly, appellant's death sentence must be reversed.

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IV.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT EITHER FIRST DEGREE TORTURE MURDER OR THE TORTURE SPECIAL CIRCUMSTANCE

The prosecutor argued that the murder of Su Hung involved torture. He offered it as one of several theories of first degree murder and also as one of the two special circumstance allegations that went to the jury. The prosecutor conflated the requirements to prove a torture first degree murder and those necessary to prove a torture special circumstance during his argument. While some of the elements of the two overlap, there are distinct differences.

A. The Elements of Torture First Degree Murder

Torture murder is " 'murder committed with a wilful, deliberate and premeditated intent to inflict extreme and prolonged pain.' "(*People v. Raley* (1992) 2 Cal.4th 870, 888-889, quoting *People v. Steger* (1976) 16 Cal.3d 539, 543-544.) Torture murder requires proof of intent to cause pain and suffering beyond the pain of death. (*Ibid.*) The culpable intent is one to cause pain for "the purpose of revenge, extortion, persuasion or for any other sadistic purpose." (*People v. Wiley* (1976) 18 Cal.3d 162, 168; see also *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101; *People v. Davenport* (1985) 41 Cal.3d 247, 267.) In addition, there must be a causal relationship between the torture and the death of the victim; however, the acts of torture may not be segregated into their constituent elements to order to determine whether any single act by itself caused the death. (*People v. Proctor* (1993) 4 Cal.4th 499, 530-531.)

The intent to inflict extreme and prolonged pain may be inferred from the circumstances of the crime. (*People v. Morales* (1989) 48 Cal.3d 527, 559.) On the other hand, this Court has cautioned against "giving undue weight to the severity of the victim's wounds, as horrible wounds may be as consistent with a killing in the heat of passion, in an 'explosion of violence,' as with the intent to inflict cruel suffering." (*People v. Pensinger*, supra, 52 Cal.3d at p. 1239.)

B. Elements of Torture Special Circumstance

In January 1991, when Su Hung was killed, the torture-murder special circumstance required the following: the intent to kill, intent to torture, and commission of an act calculated to cause extreme pain. (*People v. Cole* (2004) 33 Cal. 4th 1158, 1225, citing *People v. Proctor, supra,* 4 Cal.4th at pp. 534-535.) The key distinction between the torture special circumstance and murder by torture is that the former requires that the defendant must have acted with the intent to kill. (*People v. Cole, supra,* 33 Cal.4th at p. 1226.)

For purposes of this case, the principal area of overlap between the elements of first degree torture murder and those of the torture special circumstance is the requirement that the prosecution prove beyond a reasonable doubt that the defendant had an intent to cause the victim extreme pain.

C. Legal Principles Governing Sufficiency of Evidence

A conviction which is not supported by sufficient evidence is a denial of due process under both the state and federal Constitutions. (U.S. Const., Amend. 14; Cal. Const., art. I, § 15; *People v. Rowland* (1992) 4

Cal.4th 238, 269.) Similar standards are used to determine sufficiency under both state and federal law.

Under the federal Constitution, the test is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, italics omitted.) Similarly, under the state Constitution, the test is whether a "reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 576.)

In both cases, the latter portion of the formulation is crucial. The test is not whether the evidence was sufficient to show that the defendant "might" be guilty or even whether it was sufficient to show that the defendant is "probably" guilty. A conviction cannot stand if the evidence does no more than make the existence of an element of the crime "slightly more probable" than not. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320.) The test is whether the evidence is sufficient to convince a rational trier of fact that the defendant is guilty *beyond a reasonable doubt*. (*Id.* at p. 319; *People v. Johnson*, *supra*, 26 Cal.3d at p. 576.)

Speculation, even speculation that can be said to be entirely "consistent" with the proven facts, is not sufficient to uphold a conviction. (*People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Reyes* (1974) 12 Cal.3d 486, 500; *Evans-Smith v. Taylor* (4th Cir. 1994) 19 F.3d 899, 910.) "'[S]peculation is not evidence, less still substantial evidence.'[Citation.]" (*People v. Waidlaw* (2000) 22 Cal.4th 690, 735.)

D. The Medical Examiner's Testimony Did Not Provide Substantial Evidence of the Intent to Cause Extreme Pain

The prosecutor's description in closing argument of the findings of the medical examiner, Dr. Angelo Ozoa, was not accurate. A review of Dr. Ozoa's testimony shows equivocation rather than certainty about the wounds and injuries suffered by Su Hung. Dr. Ozoa, the Chief Medical Examiner/Coroner of Santa Clara County, conducted the autopsy of Su Hung. (RT 3948.) When he examined the body, rigor mortis was complete, and he could not determine a time of death. (RT 3953-3954.) There was a cord around the neck of the body as well as a ligature furrow. (RT 3954.) In addition, there was a stab wound on the front of her left shoulder as well as five superficial perforations on the left side of her chest. (RT 3957.) The stab wound to the shoulder was one inch deep but not life-threatening. (RT 3959.) Dr. Ozoa also noted a small contusion on her chin, but he could not say what caused it other than some blunt force. (RT 3960.)

In Dr. Ozoa's opinion, Su Hung died from two causes: strangulation and an incise wound to the neck. (RT 3961.) This cut went through the trachea and partially cut the external jugular vein on the right side. (RT 3955.) There were also two superficial cuts, "confined to the outer layer of skin," alongside of the neck wound. (RT 3959.) He believed that the strangulation occurred before the cut to the neck because the petechiae on her face indicated there was still blood pressure at the time she was strangled. In addition, the large amount of blood from the neck wound also indicated that she was still alive at the time she was stabbed. (RT 3961-3962.)

Dr. Ozoa also testified that he could not determine how long it took for her to die after she was strangled. (RT 3970.) In fact, he agreed that she could have died within a few seconds or within a few minutes after being strangled. (RT 3981.) Because Su Hung had not aspirated any blood into her lungs, Dr. Ozoa believed that she did not breath for long after her throat was cut. (RT 3982.)

Dr. Ozoa described the victim as a poorly nourished woman in her 70s whose lungs showed significant scarring (or adhesions) due to a previous infection. (RT 3973-3974.) Further, both lungs showed marked fibrosis which would have diminished their function and efficiency. (RT 3975.) He agreed that her poor medical condition and her age at the time of death could have lessened the time it took for her to die after she was strangled. (RT 3975.) Similarly, her age would have adversely affected her veins, and this, in turn, could have increased the number of petechiae created by the strangulation. (RT 3978.)

Dr. Ozoa also agreed that because of Su Hung's age, it would take less pressure to fracture her thyroid cartilage (Adam's Apple). (RT 3983.) Once the pressure was relieved (in this case, the cord was released), it would not stop the process – that is, her suffocation -- which had been started by the ligature. (RT 3983.) Dr. Ozoa agreed that he could not state how much pain Su Hung suffered because she may have almost immediately lost consciousness after she was strangled. (RT 3984.) The large amount of bleeding from the neck wound may have accelerated her death. (RT 3986.)

E. The Prosecutor's Statements During Closing Argument Are Not Supported by the Actual Testimony of Dr. Ozoa

The Strangulation

In asserting that the defendants "tortured her to death," the prosecutor incorrectly claimed that

> they strangled her for a long time, hard enough so that they broke the cartilage in her Adam's Apple, long enough so that the blood vessels, the capillaries all burst on her face, all over her face.

(RT 5361.)

In fact, Dr. Ozoa did not testify that the crushing of her Adam's Apple showed that whoever strangled Su Hung did so for a long time. On direct examination by the prosecutor Ozoa testified that

> a break to the Adam's Apple is not really a life threatening injury. What it does also, just serves as a marker to us that there is some kind of force being applied to the neck. How much pain that involves, I don't know.

(RT 3971.)

Concerning the burst capillaries (petechiae), Ozoa said:

> The significance of this petechiae is that it indicates that some kind of pressure had been applied around the neck so that the flow of blood from the head back to the heart had been cut off."

(RT 3954-3955.)

Dr. Ozoa acknowledged on cross-examination that there would be *no* petechiae had very strong pressure on a person's neck been applied because it would have cut off all blood flow both to and from the heart. (RT 3979.)

The Stab Wounds

In claiming that the stab wounds found on Su Hung's body showed that she had been tortured, the prosecutor first argued:

> Then they began to stab her. They slit her throat and they stabbed her, well, actually, two or three times in the throat before they deigned to cut it. And they punctured her chest six times.

(RT 5361.)

In fact, as the description *ante* of his testimony shows, Dr. Ozoa never said that Su Hung was stabbed two or three times in the neck before it was cut. He said there were two superficial wounds, "confined to the outer layer of the skin," next to the neck wound which went through her trachea. (RT 3959.) Dr. Ozoa also testified that there were *five superficial* wounds to the chest and that he was not sure whether she was still alive when they were made. (RT 3964.)

F. Both the Conviction for First Degree Torture Murder and the Torture Specia Circumstance Finding Must be Reversed

The record is devoid of substantial evidence supporting either first degree torture murder[37] or the torture murder special circumstance. The wounds suffered by the victim in this case do not support a crucial element of both first degree torture murder and the torture special circumstance: an intent on the part of the perpetrator(s) to inflict pain and suffering beyond that normally associated with any murder. (*People v. Raley, supra*, 2 Cal.4th at pp. 888-889.)

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[37] The record actually does not establish upon which theory –premeditated and deliberated, torture, lying in wait, or felony murder– the jury convicted appellant of first degree murder.

The intent to inflict extreme and prolonged pain may be inferred from the circumstances of the crime. (*People v. Morales, supra*, 48 Cal.3d at p. 559.) The medical examiner's testimony was equivocal about crucial aspects of the murder. Dr. Ozoa believed that there were two causes of death–strangulation and an incise wound to the neck which cut through the victim's trachea; he also believed that the strangulation occurred first. There were six other knife wounds to the body, but only one of those appeared to occur before her death. The other five were superficial stab wounds to the chest which apparently were made after the victim was dead. One cannot "torture" a dead body. (See, e.g., *People v. Turville* (1959) 51 Cal.2d 620, 632.)

This Court's decision in *People v. Hillhouse* (2002) 27 Cal.4th 469 is instructive about what kind of evidence is substantial and thus sufficient to uphold a criminal conviction. The issue in *Hillhouse* was whether the victim of an alleged kidnapping for robbery was dead or alive at the time the defendant dragged him away from his truck. The evidence on that point was inconclusive, though most of it suggested the victim was probably dead. (*Id.* at p. 498.) The State, however, claimed that there was substantial evidence the victim was alive because the testimony of Dr. Hall, the pathologist who performed the autopsy, *left open the possibility* that the victim had survived during all or part of the dragging. (*Ibid*; emphasis added.)

In rejecting this contention, the Court explained why the bare possibility the victim had survived was not the equivalent of substantial evidence that he had:

> Citing Dr. Hall's testimony that she could not be certain exactly how long [the victim] lived, the Attorney General

> argues that "the absence of bleeding under the abrasions on [the victim's] back is not conclusive evidence that he was dead at the time of the dragging." But, as defendant notes, the question is not whether the evidence conclusively proved Schultz was dead, but whether substantial evidence supported a finding he was alive. We see no such substantial evidence.

(*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 499.)

As noted previously, the injuries to Su Hung's body do not support a finding that the person(s) who inflicted them intended to inflict "extreme and prolonged" pain. Su Hung was strangled; she was stabbed less than seven times. This record contrasts sharply with those of other cases in which this Court has sustained findings of torture murder and/or torture special circumstance.

The following cases show the kind of extreme injuries which support an inference of an intent to inflict extreme and prolonged pain:

(1) Victim was stabbed 41 times and her skull crushed with a rock and then locked in a car trunk for hours before being thrown down an isolated ravine during the winter months (*People v. Raley. supra,* 2 Cal.4th at pp. 888-889);

(2) 90-year old victim was repeatedly beaten by a pipe, resulting in broken ribs and brain injuries, was strangled and set afire (*People v. Ross* (1979) 92 Cal.App.3d 391);

(3) Two separate murders of women, each involving inter alia multiple stab wounds–170 knife wounds in one case and 120 in the other (*People v. Robertson* (1982) 33 Cal.3d 21);

(4) The victim suffered numerous and extensive stabbing and slashing wounds about the neck, chin, jaw, hands and forearms; in

addition, her carotid artery had been severed and a long wooden stake had been inserted in her rectum (*People v. Davenport* (1985) 41 Cal.3d 247);

(5) Victim was stabbed 48 times (and the coroner determined he was alive at time he was being stabbed), his throat was slit and his teeth were kicked out *(People v. Leach* (1985) 41 Cal.3d 72);

(6) Defendant shot 3 rounds from his shotgun at the victim's feet and lower legs; kicked him; hit him in the head, face and ribs with the butt of a gun; beat him in the head with a frying pan; snagged him in the back with a fish hook; and stabbed him multiple times in the chest and abdomen (*People v. Barnett* (1998) 17 Cal.4th 1044); and

(7) The victim suffered one blunt force laceration and several abrasions mostly to the head as well as 37 stab wounds over his entire body, several of which involved a great deal of force and penetrated through the rib cage into the heart and lungs (*People v. Bemore* (2000) 22 Cal.4th 809).

Obviously, the injuries suffered by the victim in this case are not in the "same league" as those found in other cases in which this Court has sustained either a first degree torture murder and/or a finding of a torture special circumstance. Indeed, if the facts of this case are found to be sufficient to sustain a finding of torture murder, virtually any murder will qualify as a torture murder. The record shows that the State did not sustain its burden to prove beyond a reasonable doubt that perpetrator(s) had the intent to inflict extreme and prolonged suffering on Su Hung; thus, there is insufficient evidence to sustain either a first degree torture murder charge or

a torture special circumstances.

During his closing argument at the guilt phase, when talking about this element of the crimes of torture murder and torture special circumstance the prosecutor pointed only to the evidence regarding the injuries suffered by Su Hung (RT 5361) and the testimony of the Dr. Ozoa. (RT 5376.) No other evidence in the record showed appellant had the desire to inflict extreme and prolonged pain on Su Hung. Teyva Moriarty testified that appellant told her he wanted to get back at some girl who fought with his friend by killing her family members while the girl watched and then kill her. (RT 3654-3655.) Although the girl in question was Su Hung's granddaughter, Ellen Wang, this alleged statement by appellant to Teyva did not provide substantial evidence of an intent to inflict extreme pain on Su Hung. Instead, it simply established a motive to exact revenge against Ellen Wang.

The failure of the prosecutor to prove this crucial element of both the torture murder and the special circumstance murder means that there was insufficient evidence to uphold the charged murder and special circumstance murder.

G. Effect of the Reversal of the Special Circumstance on the Death Verdict

Should this Court reverse the torture special circumstance, the invalidated special circumstance finding would have to be taken out of the mix of evidence lawfully supporting appellant's death sentence.

A previous argument in this brief, Argument III, subsection D, *ante*, discusses in detail why the invalidation of one or both special circumstances would require vacating appellant's death sentence. If both the special

circumstances were to be reversed, appellant would not be eligible for either the death sentence or life without the possibility of parole. If only one were reversed, appellant would be entitled to a new penalty trial.

The 1978 death penalty statute, under which appellant was convicted and sentenced, constitutes a "weighing" scheme. (*Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1477.) California law requires that each special circumstance finding becomes a statutory aggravating circumstance which the jury should weigh against the mitigating circumstances presented in reaching a sentencing verdict. (Pen. Code, § 190.3, subd.(a).) As noted in *Stringer v. Black* (1992) 503 U.S. 222, in a weighing state such as California, the invalidated aggravating factor necessarily added to the aggravating side of the balance and thus prejudiced appellant when the jury was deciding whether to sentence him to death.[38]

Since the two special circumstances allegations found true by appellant's jury are what made appellant eligible for the death penalty, it seems highly likely that this was an aggravating factor to which the jurors gave significant weight. During his closing argument at the penalty phase, the prosecutor relied primarily on the "circumstances" of the crime, claiming

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[38] The *Stringer* decision noted:

> But 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. When the weighing process itself has been skewed, only constitutional harmless-error analysis or re-weighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

(*Id.* at p. 232.)

that this murder represented the worst of the worst. He made specific reference to the special circumstances in support of that claim:

> First degree murder. A much more evil or culpable crime because the person plans it out. And that type of cold-bloodedness and that type of evil is more serious under the law. Simple enough. Even worse than that, of course, are special circumstances, which you are familiar with at least [sic] too. First degree murder–and it could be even a felony murder where the premeditation of evil frame of mind is imputed by law. But a special murder is even more severe and will incur life without parole as you know. The defendants are liable under two types of special circumstances in this case. The minimum for killing Su Hung alone under those specials–that's where you would be, if you found for the death penalty in this case. What does it take to exceed that, to exceed that rare crime for which we call special circumstance murder, like a torture, something that evil, that heinous?

(RT 6418.)

The prosecutor introduced only one witness at the penalty phase. Ellen Wang testified about the how the death of her grandmother had adversely affected her as well as her mother, father, and sister. (RT 5717-5728.) The discussion *ante* shows that the prosecutor emphasized the special circumstances in his penalty phase closing argument after having introduced only a paucity of aggravating evidence. The record also establishes that the jury was having some trouble reaching its penalty phase decision. The jurors deliberated for many hours over five days before coming back with the death verdict. (CT 2616, 2622, 2626, 2627, 2666.)

Given all these factors, it is clear that appellant was prejudiced by the improper inclusion of the torture special circumstance among the aggravating factors considered by the jury at the penalty phase. Accordingly, appellant's death sentence must be reversed.

V.
APPELLANT'S CONVICTIONS AND DEATH SENTENCE MUST BE REVERSED BECAUSE LIABILITY CANNOT BE BASED ON AN UNCHARGED CONSPIRACY

A. Failure to Charge Conspiracy in the Information Violates Federal Constitutional Principles

It is a fundamental principle of constitutional law that a person may not be convicted of an uncharged offense (other than lesser included offenses), whether or not the evidence establishes the uncharged offense. (*Cole v. Arkansas* (1948) 333 U.S. 196, 201; *People v. Thomas* (1989) 43 Cal.3d 818, 823; *People v. Toro* (1989) 47 Cal.3d 966, 973; *People v. West* (1970) 3 Cal.3d 595, 612.) "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." (*Cole v. Arkansas, supra,* 333 U.S. at p. 201.) It is the accusatory pleading that provides notice that the State will seek to prove the elements of an offense. (*People v. West, supra,* 3 Cal.3d at p. 612.) [39]

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[39] In a series of recent cases, the United States Supreme Court has reiterated the due process and jury trial guarantees of notice and jury determination of all elements based on proof beyond a reasonable doubt. (*Jones v. United States* (1999) 526 U.S. 227; *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 124 S.Ct. 2531.) As stated in *Jones*, ". . . under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than a prior conviction) that increases the maximum penalty for a crime *must be charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt.*" (*Jones v.*

(continued...)

The accusatory pleading in this case did not charge appellant with conspiracy. But the prosecution relied at least in part on the offense of conspiracy to prove the murder charge. That is, the prosecution argued that the jury could find murder by finding that appellant had engaged in a conspiracy resulting in a murder. (RT 5369-5370.) So while appellant was not technically "convicted" of conspiracy, he was forced to defend against the uncharged conspiracy claim in an attempt to avoid conviction for murder.

Appellant's counsel objected to the use of the uncharged conspiracy to prove murder. (RT 3900.) Counsel for Vo also specified the prejudice resulting from defending against the uncharged conspiracy:

> One, you don't know who the parties to the conspiracy are. You don't know whether the conspiracy is a robbery conspiracy or a homicide conspiracy. And the vice in it is once it gets before the jury they're allowed to speculate as to what does it all mean without adequate foundation, without adequate guidance . . .

(RT 3903.)

Allowing the uncharged conspiracy to be used as a theory of criminal liability for murder denied the federal constitutional due process and jury trial guarantees. The resulting murder conviction must be reversed.

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[39](...continued)
United States, supra, 526 U.S. at p. 243, fn. 6, emphasis added.) The Fourteenth Amendment commands the same requirement in a state prosecution. (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 490.) While these recent cases concerned sentencing provisions, the due process and jury trial guarantees relied on in those cases stem from the basic principles long recognized by the Supreme Court as applying to guilt determinations. (See, e.g., *Cole v. Arkansas, supra,* 333 U.S. at p. 201.)

B. An Uncharged Conspiracy Violates the Principle of California Law Requiring That Crimes Be Defined Only By Statute

There are no common law crimes in California. Criminal liability extends only to those who commit offenses defined as crimes by the Legislature. No court-created doctrine may create a new form of criminal liability. (Pen. Code, § 6; *In re Brown* (1973) 9 Cal.3d 612, 624; *People v. Apodaca* (1978) 76 Cal.App.3d 479, 491.)

Penal Code section 31 defines the principals that may be held liable for a crime.[40] Because the statutory definition of principals does not include conspirators, participation in a conspiracy alone is not an authorized basis for finding a person guilty of any offense other than conspiracy, a crime also defined by statute. (See Pen. Code, § 182.)

The federal rule permits finding a co-conspirator liable for a substantive offense committed by another co-conspirator in furtherance of

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[40] At the time pertinent to this case, Penal Code section 31 provided:

WHO ARE PRINCIPALS. All persons convicted in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, lunatics or idiots, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, areprincipals in any crime so committed.

the conspiracy. (See *Pinkerton v. United States* (1946) 328 U.S. 640.) [41] However, the *Pinkerton* rule has been the subject of much criticism and has been rejected by most states. As pointed out by LaFave and Scott, "the Pinkerton rule never gained broad acceptance," and has been widely rejected. Most states, with a very few exceptions, have declined to include conspiracy as a basis or theory for criminal liability for substantive, non-conspiracy offenses. (LaFave and Scott, Criminal Law, Second Edition, section 6.8, pp. 587-589 and fn. 16.)

As noted above, Penal Code section 31 does not provide a definition of principals liable for a crime subject to such a broad interpretation. Although liability extends to an aider and abettor, liability is not extended under the statute to a conspirator. California law does not permit liability for another crime to be based on an uncharged conspiracy.

The use of an uncharged conspiracy to support the murder conviction violated California law. This deviation from the authorized state statutory scheme also violated federal due process because appellant had a protected state-created liberty interest in enforcement of that statutory scheme. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.)

C. This Court Should Re-examine its Earlier Decisions Regarding the Concept of the Uncharged Conspiracy

Appellant recognizes that, in *People v. Pulido* (1997) 15 Cal.4th 713,

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[41] In *Pinkerton*, unlike the present case, the defendant *was charged* with conspiracy as well as the substantive offense.

720- 725, this Court reaffirmed the notion that participation in an uncharged conspiracy may be a basis for finding vicarious liability for a substantive offense. The Court noted that the conspirator and the aider and abettor stand in the same position. (*Id.* at pp. 724-725.) While the decision did not address the distinction between co - conspirator liability and aider and abettor liability, the Court declined to extend vicarious liability to an aider and abettor for acts committed prior to his becoming an accomplice. If one person, acting alone, kills in preparation of a robbery and another thereafter aids and abets the robbery by carrying away and securing the property, the second person is an accomplice to the robbery but not liable for murder under Penal Code section 189 because the killer and accomplice were not jointly engaged in the robbery at the time of the killing. (*Id.* at p. 716.)

Similarly, this Court's dicta approving the use of conspiracy as a theory of aiding and abetting liability in *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1134, and *People v. Belmontes* (1988) 45 Cal.3d 744, 788, should not control this issue. In *Rodrigues,* although the defendant was not charged with conspiracy, defense counsel and the prosecutor agreed that the court should instruct with the law relating to conspiracy and admission of co - conspirator's statements and set forth in CALJIC Nos. 6.10.5, 6.11, and 6.24. (*Id.*,8 Cal.4th at p. 1133.) This Court held that consent of defense counsel to the instructions barred appellate review. (*Id* .at p. 1134.) Thus, any language in *Rodrigues* that conspiracy instructions are proper where there is evidence of an uncharged conspiracy is dicta.

Also, in *Belmontes*, liability properly was found for aiding and abetting because, even under the defendant's theory, he had not notified the

other parties of his intention to withdraw from the crime nor had he done everything in his power to prevent the crime from being committed. Liability was also proper under the felony - murder doctrine, and, as this Court held, the jury's verdict reflected that it found liability under both theories. (*Id.* at p. 790.) Thus, the discussion of the conspiracy theory in the *Belmontes* decision was unrelated to any issue raised by appellant and unnecessary to affirming the conviction. (*Id.* at pp. 788-789.)

In *People v. Washington* (1969) 71 Cal.2d 1170, this Court suggested that it is permissible to instruct on conspiracy where only a substantive offense is charged if there is evidence of a conspiracy to commit the substantive crime. (*Id.* at pp. 1174-1175.) However, this portion of the discussion was not necessary to the decision. The jury's verdict in the *Washington* case necessarily meant that they rejected the defense that the defendant was not at the scene of the crime and did not participate in any way. The prosecution's evidence established defendant's liability as an aider and abettor. (*Id.* at pp. 1172-1174.) None of the above - cited cases identifies the statute showing that an uncharged conspirator can be held liable for a substantive offense based solely on the conspiracy nor do they explain how this basis of liability would be constitutional under California law.

This Court should clarify that criminal liability under California law is controlled by statute and that no statutory authority allows an uncharged conspiracy to serve as a basis for liability for another crime

D. An Uncharged Conspiracy as a Theory of Criminal Liability Creates an Impermissible Mandatory Presumption

Moreover, an uncharged conspiracy as a basis for criminal liability creates a mandatory conclusive presumption that a person who engages in an uncharged conspiracy to commit a substantive offense is guilty of the substantive offense later committed by others. Once the jury finds a defendant to be a co - conspirator, the instructions make it unnecessary for them to find that he acted as a principal by either directly committing the crime or aiding and abetting in its commission. This approach to vicarious liability creates a mandatory conclusive presumption because it informs the jury "'that it must assume the existence of the ultimate, elemental fact from proof of specific, designated basic facts.'" (*People v. Roder* (1983) 33 Cal.3d 491, 498, quoting *Ulster County Court v. Allen* (1979) 442 U.S. 140, 167.) It "removes the presumed element from the case once the State has proved the predictable facts giving rise to the presumption." (*Francis v. Franklin* (1985) 471 U.S. 307, 314, fn. 2.)

Mandatory conclusive presumptions of guilt are prohibited by *Sandstrom v. Montana* (1979) 442 U.S. 510, 512-515 and *Carella v. California* (1989) 491 U.S. 263, 265-266, where, as here, the defendant could rationally be acquitted of the substantive crime without the improper mandatory conclusive presumption. An error of this kind, which lightens the prosecution's burden of proof, violates the federal constitutional guarantees of due process and the right to a trial by jury (U.S. Const., 6th

and 14th Amends.;[42] *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740; see *In re Winship, supra,* 397 U.S. 358, 364), and requires reversal unless the error "surely" did not contribute to the verdict. (*Sullivan v. Louisiana, supra,* 508 U.S. 275, 279). Such error requires reversal unless this Court is able to declare it harmless beyond a reasonable doubt. (*Rose v. Clark* (1986) 478 U.S. 570, 577; *People v. Reyes-Martinez* (1993) 14 Cal.App.4th 1412, 1416-1419.)

E. The Use of an Uncharged Conspiracy as a Basis for Liability for First Degree Murder Prejudiced Appellant

The State cannot establish harmless error in appellant's case. Both burglary and murder were identified as the target offense of the uncharged conspiracy.[43] (CT 1897.) By following CALJIC Nos. 6.10.5 and 8.26, the jury could find appellant guilty of either or both burglary and murder if he participated in an agreement to commit those offenses and a co-conspirator committed one or both of those offenses. Similarly, if the killing committed by a co-conspirator was a foreseeable consequence of the burglary,

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[42] It also violates article I, sections 7 and 15 of the California Constitution.

[43] As noted in Argument ___ *post*, the instruction given under CALJIC No. 6.10.5 in this case identifies both burglary and murder as the "public offenses" allegedly intended by the perpetrators. (CT 1858.) However, the wording regarding the target offenses is very inartful. The instruction reads in pertinent part: "A conspiracy is an agreement between two or more persons with the specific intent to agree to commit *a public offense such as Burglary or Murder . . .*" (CT 1858, italics added.) It appears that the language noted in italics refers to the target offenses of the uncharged conspiracy, although the use of the "such as" language seemingly only demonstrates examples of potential target offenses.

appellant would be guilty of felony-murder. To prevail on this theory, the prosecution would not have to prove that appellant engaged in any act beyond participation in the agreement because the necessary overt act may be committed by any of the co-conspirators. In effect, the conspiracy instructions created an alternative type of aiding and abetting, not requiring a finding of any act on appellant's part that would even amount to preparation.

As shown above, giving instructions on the uncharged conspiracy theory violated state law and federal constitutional law. The jury found appellant guilty of first degree murder on a general verdict form. (CT 2098.) The prosecution presented a plethora of theories which supposedly established first degree murder, including premeditated murder, lying-in-wait murder, torture murder, felony murder and the uncharged conspiracy theory. Because of the general verdict, it cannot be ascertained which theory or theories the jury relied on in reaching the murder conviction. Elsewhere in this brief appellant has challenged each of these theories. The State cannot show that the jury did not rely on the invalid conspiracy theory in arriving at the murder finding. Under this circumstance, the error relating to reliance on the uncharged conspiracy theory cannot be considered harmless. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Reversal is required.

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VI.

THE TRIAL COURT ERRED IN ALLOWING THE ISSUE OF FIRST DEGREE FELONY MURDER BASED ON BURGLARY TO BE DECIDED BY THE JURY

A. Procedural Background

In his motion to dismiss under Penal Code section 1118.1, appellant [44] moved to dismiss, inter alia, the special circumstance allegations of burglary and robbery murder because of insufficient evidence. (CT 1748-1752.) During the first hearing on this motion, the prosecutor acknowledged the weakness of the State's evidence regarding these charges:

> . . .I've had a chance to also review, and I'm trying to figure out what I should devote myself to, and I would off the bat concede that the special circumstances for the burglary and the robbery would be the weakest legally. I can understand why the court would grant a dismissal as to those.

(RT 4368.)

At the second hearing regarding the 1118.1 motion, appellant's trial counsel said that she wasn't going to address the robbery and burglary specials "because I understood they were conceded." (RT 5265.) In response to this remark, the trial judge stated: "Even looking at the evidence in light of the testimony, I don't see the burglary and robbery as specials." (RT 5265.) Ultimately, at the second hearing, the trial judge ordered that the robbery and burglary special circumstances be stricken, but he did not specify the basis for this dismissal. (CT 1815; RT 5280.)

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[44] His co-defendant also moved, under Penal Code section 1118.1, to dismiss these special circumstances. (CT 1763-1767.)

After the dismissal of these two special circumstances, appellant's counsel said:

> I'm interpreting your ruling regarding felony murder specials and your comments about the burglary and robbery to mean that the district attorney will also not be able to request instructions on felony murder as a first degree murder theory.

(RT 5281.)

The judge responded: "I think that is to be determined." (RT 5281.)

The charge that the murder of Su Hung constituted a first degree felony murder occurring during the commission or attempted commission of burglary did go to the jury. (CT 2022-2023; RT 5312-5315.) The substantive charge of burglary (Count 11) alleged that the two defendants, appellant and Loi Vo, entered the Wang house with the intent "to commit theft and felonies, to wit: Murder, Robbery and False Imprisonment." (CT 1874.)

At a post-trial hearing on the motions for a new trial in this case, the trial judge explained the basis for his dismissal of the burglary and robbery specials:

> Court did not instruct the jury on the robbery and burglary specials because it was the court's belief the defendants entered the residence with intent to commit murder.

(10/12/95 RT 47.)

B. The Trial Judge's Finding Establishes that as a Matter of Law the Charge of First Degree Felony Murder Based on Burglary Should Not Have Been Submitted to the Jury

As the description *ante* shows, both the prosecutor and the trial judge acknowledged at the section 1118.1 hearings that there were problems with

the robbery and burglary special circumstance allegations. After the completion of the trial judge explained that he dismissed these specials because the evidence showed that at the time that appellant and co-defendant Vo entered the Wang residence their felonious purpose was to murder. The intent to murder negated the burglary special circumstance under the "merger doctrine" first articulated in *People v. Ireland* (1969) 70 Cal.2d 522, 539, which prohibits a felony-murder conviction predicated on the crime of assault or assault with a deadly weapon. (See also *People v. Wilson* (1969) 1 Cal. 3d 431, 436-442 [extending the merger doctrine to first-degree felony-murder, where the underlying felony was based on burglary with the intent to assault with a deadly weapon].) This Court has also found that the merger doctrine prohibits a felony-murder conviction based on burglary in a case where at the time of entry the perpetrator had the specific intent to commit murder. (*People v. Garrison* (1989) 47 Cal.3d 746, 778, citing *People v. Ireland, supra*, and *People v. Wilson, supra.*)

In the instant case, the trial judge clarified at a post-trial hearing, that the reason he dismissed the burglary special circumstance allegation before it went to the jury was because he found that the defendants entered the house with the intent to murder. The only reasonable inference to be drawn from this statement was that the trial judge relied on the merger doctrine. This finding of the applicability of the merger doctrine to the burglary special circumstance perforce must apply to any first degree felony murder based on burglary. This is true because there appears to be little or no distinction between the special circumstance and the first degree felony murder as the proof of a felony-murder special circumstance no longer

requires an intent to kill. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1138-1139.) [45] Certainly, at trial neither the prosecutor nor the judge explained how the elements of the burglary special circumstance differed from those of first degree felony murder based on burglary.

Under these circumstances, the statement by the judge about why he granted the 1118.1 motion as to the burglary and robbery special circumstances showed he found the prosecutor's case to be legally insufficient for purposes of any felony murder conviction based on burglary. That is, under the merger doctrine, if the defendants entered the Wang residence with the intent to murder, as the trial judge found they did, a crucial element of a first degree murder based on burglary would be missing. The purpose of the felony murder rule is to impute malice when the killer is engaged in one of the felonies enumerated in Penal Code section 189. (See, e.g., *People v. Patterson* (1989) 49 Cal.3d 615, 626.) Therefore, a finding that the merger doctrine defeats a burglary felony murder is a finding of legal insufficiency.

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[45] The decision in *Andersen, supra,* did preserve the intent to kill requirement under limited circumstances. This Court recently noted:

> Thus, in *Carlos* we mistook the first and crucial step in our analysis by determining that section 190.2(a)(17) is ambiguous: given a fair reading in conjunction with section 190.2(b), the provision can realistically be read only to require intent to kill for the aider and abettor but not for the actual killer.

(People v. Dickey (May 23, 2005) ___ Cal.4th ___, 2005 WL 1202726, 7, citing *Anderson, supra*, 43 Cal.3d at p. 1145.)

In *People v. Trevino,* (1985) 39 Cal.3d 667, 698-699,[46] the trial judge denied motions for acquittal during the trial but granted a post-trial motion for a new trial on the ground that the evidence identifying Trevino's co-defendant, Rivas, as a participant in the murder charged was insufficient as a matter of law. This Court noted the inherent inconsistency between these two rulings, reviewed the evidence and found it to be insufficient as a matter of law. It also barred any retrial of Rivas, noting "This court cannot condone the evasion of a defendant's former jeopardy rights where, as here, the defendant is entitled to, but denied a judgment of acquittal." (*Id.* at p. 699.)

Like Rivas, appellant was subjected to inherently inconsistent decisions by the trial judge who dismissed the special circumstance of burglary felony murder but permitted the charge of first degree felony murder predicated on burglary to go to the jury. As in *Trevino, supra,* the manifest inconsistency between those rulings is established by the trial judge's own findings. Accordingly, the trial judge should have sustained the defendants' objection to allowing the jury to decide whether appellant and his co-defendant were guilty of first degree felony murder based on burglary.

C. Because the Jury may Have Exclusively Relied on an Invalid Felony Murder Theory to Convict Appellant of First Degree Murder, Appellant's Murder Conviction Must be Reversed

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[46] The *Trevino* decision was overruled on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194, 1219.

Given the trial judge's stated ground for dismissing the burglary and robbery special circumstances, there was no valid basis for the first degree murder conviction on a felony murder theory, and this Court must reverse appellant's conviction of murder.

In the present case, this Court cannot ascertain whether the jury exclusively relied on the invalid felony murder theory to find appellant guilty of first degree murder. The jury completed a general verdict form, which stated:

> We, the jury in the above-titled case, find the defendant, STEPHEN EDWARD HAJEK guilty of a felony, to wit: a violation of California Penal Code section 187, First Degree Murder.

(CT 2098.)

Even assuming, arguendo, that the evidence was sufficient to convict appellant of murder on the theory of premeditated and deliberated murder posited by the State, the murder conviction must be reversed.[47] This Court has held that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*People v. Guiton, supra,* 4 Cal.4th at p. 1122, quoting *People v. Green, supra,* 27 Cal.3d 1 at p. 69; see also *Zant v. Stephens* (1983) 462 U.S. 862 ["a general verdict must be set aside if the jury was instructed that it could

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[47] Appellant acknowledges that the jurors found true the special circumstance allegations of lying-in-wait and torture murder. However, as set forth in Arguments III and IV *ante*, these true findings should be overturned for insufficiency of the evidence.

rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground"].) Where the trial record leaves the reviewing court uncertain as to the actual ground on which the jury's decision rested (a valid ground or an invalid ground), the reviewing court must reverse. (*Zant v. Stephens, supra,* 462 U.S. at p. 879.)

In *Griffin v. United States* (1991) 502 U.S. 46, the Supreme Court held that if evidence is insufficient to support an alternative theory of liability, due process is not violated as long as the general verdict is legally supportable as to one of its grounds.[48] Here, however, the general presumption that when given the option of relying on a factually inadequate theory "jurors are well equipped to analyze the evidence" (*id.* at. p. 59), was undermined by the fact that there were multiple and confusing jury instructions [49] regarding the various theories of first degree murder as well as confusing and misleading prosecutorial argument which unduly stressed the importance of the unsupported alternative theories of felony murder.

In this case, the prosecutor argued to the jury at the guilt phase that there was a conspiracy between the defendants to commit burglary:

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[48] Compare *United States v. Alexius* (5th Cir. 1996) 76 F.3d 642, 647, fn. 11, where the Fifth Circuit Court of Appeals reversed a perjury conviction because a general verdict finding defendant guilty failed to specify which of multiple statements was perjured. Also, the cross-examination of the critical prosecution witness was improperly limited as to one statement, and, thus, the jury was not "well-equipped to analyze" this testimony. Accordingly, there was no reason to suppose that the jury did not rest its guilty verdict on that statement.

[49] See Argument XIII *post.*

> He [Loi Vo] told you at least they had a conspiracy to get in that house and to deal with Ellen. He was gonna [sic] back up Mr. Hajek who was gonna [sic] forcefully talk to her, falsely imprison her. At least he admits that much. That's a conspiracy to commit a burglary. If they had the intent to enter a building to do some felony, that's all burglary's about. But the instructions of law tells [sic] you for the liability that if a number of persons conspired together to commit a burglary and if the life of another person is taken by one or more of them in furtherance of a common design and if such killing is – is intentional, unintentional or accidental. If you find that Mr. Vo went into that house with a felonious intent, it doesn't matter whether he intended or whether the killing was even accidental.

(RT 5369-5370.)

The prosecutor also argued felony murder on a theory of aiding and abetting:

> Another way of looking at it is part of a felony murder, an aider and abettor. It's a similar liability as a conspirator.

(RT 5370.)

Later in his closing argument at the guilt phase, the prosecutor gave another long, meandering argument about the alleged felony murder in this case:

> . . .I want to talk about the other alternative theory of felony murder. That's the other way you get to a first degree murder, because a murder that's committed in the course of a felony, even though it wasn't intended, is first degree. You will get instructions on that and that involves, in this case, a burglary. The intention upon entry to commit a felony such as false imprisonment, robbery or murder. If they entered with any of those intentions–that's when they entered that house by that trick – that qualifies as a burglary itself. Burglary does not require that actually anything like that happen or any theft occur. It's a felonious entry that makes it a felony, makes it

burglary. . .
(RT 5380.)

Because of this prosecutorial focus on the felony murder theory, it is reasonably likely that the jury relied on this invalid ground to convict appellant of first degree.

D. Conclusion

Given the trial judge's finding the robbery and burglary special circumstances had to be dismissed because the defendants entered the Wang house with the intent to murder, it was error to allow the theory of first degree felony murder based on burglary to go to the jury. In addition, the record in this case, including the confusing jury instructions and the incoherent prosecutorial argument, makes it impossible to determine whether the basis for the first degree murder conviction in this case was in fact based on the invalid felony murder theory.

When the jury is given the option of convicting the defendant on a legally erroneous theory and the reviewing court cannot determine if the verdict of guilty rested on that theory or on other theories which are legally sound, the resulting conviction violates due process and must be reversed. (U.S. Const., Amend. 14th; Cal. Const., art. I, §§ 7 & 15; *Griffin v. United States, supra*, 502 U.S. at pp. 59-60; *Yates v. United States* (1957) 354 U.S. 298, 312, overruled on other grounds by *Burks v. United States* (1978) 437 U.S. 1, 18; *People v. Guiton, supra,* 4 Cal.4th at pp. 1128-1129.)

Moreover, appellant was further prejudiced when the jury was allowed to consider the felony murder theory because his defense at trial was that because of a serious mental illness he was not capable of forming

the requisite intent of premeditation and deliberation for first degree murder. Reliance on the felony murder doctrine relieved the prosecution of its burden to prove, beyond a reasonable doubt, such intent on the part of appellant. (*In re Winship* (1970) 397 U.S. 358, 364.) This error by the trial judge therefore deprived appellant of his Fourteenth Amendment due process rights under the United States Constitution. Appellant's conviction for first degree murder and his death sentence must be reversed.

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VII.
THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S MOTION, PURSUANT TO PENAL CODE SECTION 1118.1, TO DISMISS THE ATTEMPTED MURDER CHARGES

Counts 2 through 5 of the amended information charged appellant and his co-defendant with attempted murder in violation of Penal Code sections 664 and 187. Each of these counts, which named four separate victims, alleged that the defendants "did attempt to willfully, deliberately, and with premeditation, murder a human being." The alleged victims were: Cary Wang, Alice Wang, Tony Wang and Ellen Wang. (CT 1869-1870.)

Appellant [50] argued in his motion to dismiss, pursuant to Penal Code section 1118.1, that the evidence was insufficient to sustain these counts. Section 1118.1 motions and appellate claims of insufficiency of evidence are assessed on the same basis. The standard applied to determine sufficiency of the evidence under state law is the "substantial evidence" test. Substantial evidence has been defined by this Court as ". . .evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [citation omitted].) The federal constitutional rule, under the Due Process Clause of the Fourteenth Amendment, is similar. (*Jackson v. Virginia* (1979) 443 U.S. 307, 315-319 [sufficient evidence is that which allows the trier of fact to reach a "subjective state of near certitude of the guilt of the accused. . ."].) The trial

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[50] Co - defendant Vo also filed a motion to dismiss under Penal Code section 1118.1, arguing that the attempted murder charges should be dismissed for insufficient evidence. (CT 1772-1773.)

judge erred when he denied the motion and failed to dismiss the attempted murder charges. This Court should grant judgment in favor of appellant on these four counts.

A. Attempted Murder Defined

"'[T]o constitute an attempt, there must be (a) the specific intent to commit a particular crime, and (b) a direct but ineffectual act done towards its commission . . . To amount to an attempt the act or acts must go further than mere *preparation*; they must be such as would ordinarily result in the crime except for the interruption.'" (*In re Smith* (1970) 3 Cal.3d 192, 20, quoting 1 Witkin, Cal.Crimes (1963) § 93, at p. 90, emphasis in original.) Moreover, "the act must not be equivocal in nature." (*People v. Buffum* (1953) 40 Cal.2d 709, 718, overruled on other grounds in *People v. Morante* (1999) 20 Cal.4th 403.)

In addressing an insufficiency claim in *People v. Kipp* (1998) 18 Cal.4th 349, this Court noted that an attempted robbery has been committed "*at that point*" at which, "[i]f the transaction is interrupted. . ., no one would doubt that the defendant is guilty of an attempted robbery." (*Id.* at p. 377, emphasis added.) That point, the Court said, is reached only when the defendant's conduct "is sufficient to move the transaction beyond the sphere of mere preparation and into the zone of actual commission of the crime of robbery." (*Ibid.*)

In this case, "that point" was not reached for purposes of the alleged attempted murders.

B. The Record

The record does not contain substantial evidence of a direct,

unequivocal act by appellant and his co-defendant in furtherance of the murders of Cary, Alice, Tony and Ellen Wang. Quite simply, the defendants' actions did not reach "that point" because they were in the Wangs' house for a number of hours without taking any action to kill anyone other than Su Hung. Defendants undeniably had ample time to kill Alice, Cary and Tony Wang[51], but they did not.

The fact that the defendants tied up Tony Wang and took him upstairs did not constitute an action beyond mere preparation. According to the prosecutor's evidence, this action only occurred after Vo and Cary Wang came back to the house, and Vo, observing that Tony looked "strong," asked appellant to tie up Tony. (RT 3194.) The only rational inference to be drawn from Vo's statement is that the defendants tied up Tony and isolated him upstairs because they were concerned that he might cause trouble while they waited for Ellen to return home.

The principal evidence offered by the prosecution to prove the specific intent to kill element of attempted murder were statements allegedly made by appellant in a telephone conversation with Teyva Moriarty. Moriaty testified that appellant told her that he planned to get back at the girl who picked a fight with his friend by killing her family members while the girl watched and then killing her. (RT 3654-3655.)

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[51] Ellen Wang did not return home until after appellant and Loi Vo were arrested.

C. Because of the Strictures of the Corpus Delecti Rule,[52] the Evidence was Insufficient to Sustain the Convictions for Attempted Murder

"The corpus delicti of a crime must be proved independent of the accused's extrajudicial admissions." (*People v. Alcala* (1984) 36 Cal.3d 604, 624.) The purpose of the corpus delicti rule is to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1169.)[53] The Court also observed:

> In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself--i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying exclusively upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.]

(*Id.* at pp. 1168-1169.)

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[52] The corpus delicti of a crime consists of two elements: the fact of the injury or loss or harm, and the existence of a criminal agency as its cause. (See, e.g., *People v. Jones* (1998) 17 Cal.4th 279, 301.)

[53] In the *Alvarez* decision, this Court also addressed the effect of article I, section 28, subdivision (d) of the California Constitution, the "Truth in Evidence" provision adopted by Proposition 8 in 1982, on the corpus delicti rule. The Court found that it abrogated any corpus delicti basis for excluding a defendant's extrajudicial statements from evidence. (*Id.* at p. 1165.). This provision, however, "did not abrogate the corpus delicti rule insofar as it provides that every conviction must be supported by some proof of the corpus delicti aside from or in addition to such statements, and that the jury must be so instructed." (*Ibid.*)

Other than appellant's alleged statements to Teyva Moriarty, there was not any evidence tending to prove that appellant had the specific intent to kill Cary, Alice, Tony and Ellen Wang. While it is true that Cary and Tony Wang testified that Vo threatened to kill the entire family, they also stated that he said he would do this only if someone either screamed or called the police. (RT 3161-3162, 3869.) These threats did not establish a specific intent to kill because they were conditional in nature.

The corpus delicti rule requires the prosecution to produce "some evidence of each element of the [offense]. . .independent of defendant's statements." (*People v. Zapien* (1993) 4 Cal.4th 929, 986.) Appellant recognizes that the corpus delicti "may be [proved] by circumstantial evidence, and it need not be beyond a reasonable doubt. A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient." (*People v. Diaz* (1992) 3 Cal.4th 495, 529 [citations omitted].) The evidence may be "slight" or "minimal" as long as it supports a "reasonable inference that a crime was committed." (*People v. Jones* (1998) 17 Cal.4th 279, 301.) Absent the alleged statements of appellant to Teyva Moriarty, there is not even "slight" evidence of an intent to kill any of the four Wang family members.

D. The Evidence Did Not Establish an Unequivocal but Ineffectual Act Toward Commission of the Murder

As noted previously, not only was the evidence insufficient to prove that appellant intended to kill Cary, Alice, Tony and Ellen Wang, it was insufficient to prove the other element of attempted murder-- an act that went beyond mere preparation toward the commission of the murder of any

of the alleged victims.

"Mere intention to commit a specified crime does not amount to an attempt." (*People v. Miller* (1935) 2 Cal.2d 527, 535.) This Court further observed in the *Miller* decision: "A party may purchase and load a gun, with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim, there is only preparation and not an attempt."[54] (*Id.* at p. 532.).

An attempt requires "the actual commencement of the doing of the criminal act." (*People v. Dillon* (1983) 34 Cal.3d 441, 452.) A defendant's acts are sufficient to meet this definition only "when they . . .are an *immediate* step in the present *execution* of the criminal design." (*Id.* at p. 453.) The record in this case does not contain substantial evidence that appellant took any immediate step to murder any of the Wangs. To the contrary, he spent literally hours watching television with Alice Wang. After Tony Wang came home, appellant played cards with him until Vo and Cary Wang returned from looking for Ellen. Appellant tied up Tony and took him upstairs only at the direction of Vo. He then left Tony alone and returned downstairs. Shortly thereafter the police arrived.

The decision in *People v. Adami* (1973) 36 Cal. App.3d 452 illustrates just how far a defendant must go to be guilty of attempted

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[54] This Court found the evidence insufficient in *Miller* to support a conviction for attempted murder. Having threatened to kill a man for allegedly harassing his wife, defendant Miller walked towards the victim, who was working in the fields owned by the town constable, stopped to load his weapon and continued approaching. After the victim fled and upon request by the constable, the defendant surrendered his firearm.

murder. In that case, the defendant told an undercover narcotic agent who was secretly investigating him that he wanted to get rid of his wife. In a subsequent conversation with the agent, the defendant said he would like the agent to do something about her. The agent then set up a meeting between the defendant and a police inspector posing as a would-be assassin. The defendant gave the inspector a down payment, a photograph of his wife, and a detailed written description of her. At the inspector's request, he wrote out further identifying information. In response to the officer's questions, the defendant said he would not change his mind because he wanted his wife killed.

In *Adami*, the prosecution appealed the trial judge's dismissal of the attempted murder charge, and the court of appeal affirmed the dismissal, holding that the acts by defendant consisted solely of solicitation or mere preparation. The court noted that the agreement of the inspector to commit the crime was simulated and made without any intent of performing it, and that he did not perform any act toward the commission of the crime intended by defendant. (*Id.* at p. 453.)

Certainly, if the facts of the *Adami* decision did not support a conviction for attempted murder, the facts of this case do not either.

E. Because the Evidence was Insufficient, the Four Convictions for Attempted Murder Must be Reversed

A criminal defendant's state and federal rights to due process of law, a fair trial, and reliable guilt and penalty determinations are violated when criminal sanctions are imposed based on insufficient evidence. (U.S. Const., 5th, 6th, 8th, and 14th Amends.; Cal. Const., art. 1, sections 1, 7, 12, 15, 16,

17; *Beck v. Alabama* (1980) 447 U.S. 635; *People v. Marshall* (1997) 15 Cal.4th. 1, 34-35; *People v. Rowland* (1992) 4 Cal.4th 238, 269.) This rule follows from the requirement that the prosecution must prove beyond a reasonable doubt every element of the crime charged against the defendant. (*In re Winship* (1970) 397 U.S. 358, 364.) Under the federal due process clause, the test is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319 [italics omitted].) Under this standard, a "mere modicum" of evidence is not enough, and a conviction cannot stand if the evidence does no more than make the existence of an element of the crime "slightly more probable" than not. (*Id.* at p. 320.)

Under California law, the reviewing court similarly inquires whether a "'reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.'" (*People v. Memro* (1985) 38 Cal.3d 658, 694-695, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 576.) The evidence supporting the conviction must be substantial, i.e., "reasonably inspires confidence" (*People v. Bassett* (1968) 69 Cal.2d 122, 139; *People v. Morris* (1988) 46 Cal.3d 1, 19) and is of "credible and of solid value." (*People v. Green* (1980) 27 Cal.3d 1, 55; *People v. Bolden* (2002) 29 Cal.4th 515, 533.) Mere speculation cannot support a conviction. (*People v. Marshall* (1997) 15 Cal.4th 1, 35; *People v. Reyes* (1974) 12 Cal.3d 486, 500.)

Although the evidence is viewed in the light most favorable to the judgment, the reviewing court "does not . . . limit its review to the evidence

favorable to the respondent." (*People v. Johnson, supra*, 26 Cal.3d at p. 577 [internal quotations omitted].) Instead, it "must resolve the issue in light of the *whole record* – i.e., the entire picture of the defendant put before the jury – and may not limit [its] appraisal to isolated bits of evidence selected by the respondent. (*Ibid.* [emphasis in original]; see *Jackson v. Virginia, supra*, 443 U.S. at p. 319 ["*all of the evidence* is to be considered in the light most favorable to the prosecution"] [emphasis in original].)

The failure of the prosecution to present substantial evidence of either of the two required elements of attempted murder means that the evidence was insufficient to convict him of attempted murder. (*People v. Marshall, supra,* 15 Cal.4th at p. 81.) Accordingly, appellant's convictions on Counts 2-5 must be reversed.

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VIII.

ADMISSION OF THE INTERVIEW ROOM AUDIOTAPE OF A CONVERSATION BETWEEN APPELLANT AND CO-DEFENDANT VO VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS AND EVIDENCE CODE SECTION 352

A. Factual Background

In proving its case, the State relied, inter alia, on an audiotape of a conversation between appellant and Loi Vo which occurred in an interview room at the Police Administration Building in San Jose the morning after they were arrested.

1. Pre-trial Objections

In a pre-trial motion, appellant requested that the trial court preclude the prosecution from introducing this tape on the grounds that it was inadmissible under section 352 and was irrelevant because it was inaudible. (CT 1614.) The motion also objected to the use of the transcript of the conversation prepared by the District Attorney because it was inaccurate. (CT 1614.)

At a pre-trial hearing on defense motions, trial counsel explained her objections to the audiotape and the transcript prepared by the State. The prosecutor acknowledged the poor sound quality of the tape. (RT 2950.) Even though "enhanced," large portions of the tape remained inaudible; on that basis, appellant's trial counsel objected to it under Evidence Code section 352.[55] (RT 2951.) Co-defendant Vo's counsel also noted that it violated due process to introduce the faulty tape because the jury would be

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[55] The original written motion cited section 352 as the basis for excluding the tape. (CT 1615.) Trial counsel did not specifically cite 352 at the hearing.

reduced to "speculation and surmise" as to the actual contents. (RT 2952.) The trial judge admitted the tape, but not the transcript. (RT 2953.)

2. Presentation of the Tape at Trial

Sergeant Walter E. Robinson, who at the time of the incident in this case was a homicide detective for the San Jose Police Department, testified about the taping of a conversation of appellant and Loi Vo which took place in an interview room in the Police Administration Building on January 19, 1991. According to Robinson, he had interviewed the two separately throughout the evening of January 18th into the early morning hours of January 19th. (RT 3811.) At some point after 3 a.m.[56] on January 19th, he put appellant and Loi Vo together in an interview room with the hope that they would talk about the crime. (RT 3813.) There was a hidden microphone in the room; Sergeant Robinson listened in and the conversation was also tape-recorded. (RT 3814-3815.)

Before the tape (marked as Exhibit 53) was played to the jury, Robinson testified that he had listened to it. He acknowledged that the sound quality of the tape was "fairly poor." (RT 3816.) He stated that the tape really picked up only about fifty to seventy-five percent of the conversation. Moreover, the defendants were mumbling and whispering, and this part of the tape was inaudible and/or unintelligible. (RT 3816.) As the prosecutor played the tape, Robinson used a transcript, which was not in evidence, to follow the conversation.(RT 3816-3817.) Periodically, the prosecutor stopped the tape and asked the officer to identify which of the

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[56] Later it was established, through Robinson's reports, that the defendants were not placed in the interview room together until some time after 6:30 a.m. on January 19, 1991. (RT 3829-3830.)

two defendants was speaking.[57] (RT 3817.)

Outside the presence of the jury, appellant's trial counsel reiterated her earlier request that, after the jury had heard the tape, she be allowed to cross-examine Robinson about his earlier interview of appellant. This was necessary to make sense of statements made by appellant during his conversation with Vo in the interview room. The prosecutor objected that appellant's responses to Robinson's questions in the earlier interview were inadmissible hearsay. (RT 3819.) Trial counsel explained why this evidence should be admitted:

> . . .the reason the defendant's [Hajek] responses are admissible, it goes to explain why my client made the statements he did here on the enhanced tape which the jury just heard, and it also goes on to explain why Sergeant Robinson was saying what he was saying to my client, which will not make sense to the jury unless they hear both sides of it . . .unless they get some context about what was happening in the interrogation of my client it is not going to make sense to the jury and my examination of the sergeant will not be effective and the jury will have no explanation for me to be able to refute legitimately what has been presented here in court.

(RT 3819-3820.)

Defense counsel was allowed to ask Robinson about his interview of appellant. (RT 3839-3845.)

3. Post-trial Proceedings Regarding the Tape

After the jury returned death verdicts against them, both defendants filed motions for a new trial. (CT 2730-2758.) One of the principal grounds for the new trial concerned the tape of the interview room conversation between the defendants. In a discussion with jurors after the conclusion of the trial, counsel learned that a primary reason why some of the jurors had

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[57] By stipulation, the parties agreed that the court reporter did not have to transcribe the portions played in the courtroom. (RT 3785.)

voted for the death sentence was their belief that they had heard both defendants say "we killed her" several times on the tape. Brenda Wilson, an investigator for the Office of the Santa Clara Public Defender, filed a supporting declaration, stating that she interviewed three jurors who said that what they had purportedly heard on the tape was the "most influential piece of evidence" in their decisions to return a death verdict against appellant. (CT 2756.) Ms. Wilson also averred that each of these jurors had told her that during penalty phase deliberations they had spent several days playing the tape, attempting to decipher it. According to Ms. Wilson, the three jurors said they had heard both defendants say "we killed her" several times. (CT 2757.)

At a hearing on the motions for a new trial, defense counsel asked the trial judge to make a factual finding about what was actually audible on the tape. She pointed out that particularly in a capital case, the United States Constitution requires that the evidence be competent and reliable. (10/12/95 hearing, RT 14.) Over the prosecutor's objection, the judge allowed, subject to a motion to strike, two jurors to testify. (10/12/95 RT 17.)

Juror Alice Miller testified that during the penalty phase deliberations she heard a voice, which she identified as belonging to Loi Vo, say three times "we killed her." (10/12/95 RT 19.) Ms. Miller did not believe that she heard appellant say "we killed her." (10/12/95 RT 20.) She didn't hear these statements during the guilt phase deliberations because the tape recorder they had used during those deliberations was of poorer quality. (10/12/95 RT 18.)

Juror Linda Frahm said she heard Vo, but not appellant, say at least two times "we killed her." This occurred during penalty phase

deliberations. (10/12/95 RT 22-24.)

Trial counsel argued that the judge should listen to the tape itself on the machine that the jury used during the penalty phase deliberations to determine whether he could hear either of the defendants say, "we killed her." (10/12/95 RT 26-27.) The prosecutor argued that doing so would violate Evidence Code section 1150 by improperly delving into juror deliberations. (RT 28.) The trial judge denied the motions for new trial; the only explanation given for this ruling was:

> The record reflect [sic] counsel are present. The defendant's [sic] present. I did read the appropriate portions People versus Hedgecock at 51 Cal.3d 395 commencing at page 414, and I did review Witkin and Epstein volume 6, section 350 through – 3050 through 3052. Motion for new trial is denied.

(RT 30.)

B. Given the Indisputably Poor Quality of the Recording, the Trial Judge Erred in Admitting the Tape

The trial judge erred in the first instance by admitting into evidence this tape recording because it was of such poor quality that it constituted unreliable evidence. That fact was apparent before the tape was played during the guilt phase trial.

In order to be admissible as evidence a tape recording of a conversation should be audible and intelligible. (*People v. Stephens* (1953) 117 Cal. App.2d 653, 660.) The California Court of Appeal observed in *People v. Demery* (1980) 104 Cal. App.3d 548, 559, that it is error to admit sound recordings where gaps or unintelligible portions are so significant that they cause "an inference of unfairness or speculation." When the tape contains very substantial portions that are unintelligible, there is a great danger that the jury will speculate that the gaps contained evidence even more prejudicial to the accused than what was heard. (*People v. Rucker*

(1980) 26 Cal.3d 366, 388, superceded on other grounds by constitutional amendment in *People v. Hall* (1988) 199 Cal. App.3d 914, 919-920; *People v. Demery, supra*, 104 Cal. App.3d at p. 559.)

Appellant recognizes that the decision of the trial judge to admit an audiotape is subject to his/her sound discretion. An appellate court will not reverse that decision absent a finding of abuse of discretion.[58] (See, e.g., *People v. Polk* (1996) 47 Cal. App.4th 944, 952.) The facts of this case show, however, that the trial judge did abuse his discretion in admitting this highly unreliable evidence.

In addition, the federal constitutional guarantee of a right to due process and to a fundamentally fair trial requires that the evidence offered by the State be reliable. The Due Process Clause guarantees every defendant the right to a trial that comports with the basic tenets of fundamental fairness. (See, e.g., *Lassiter v. Department of Social Services.* (1981) 452 U.S. 18, 24-25.) Relief will be granted for an erroneous admission of evidence where the "testimony is almost entirely unreliable

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[58] This Court recently described the abuse of discretion standard as follows:

> In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." [Citations omitted.] Second, a "decision will not be reversed merely because reasonable people might disagree." An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge."

(*People v. Carmony* (2004) 33 Cal.4th 367, 376.)

and ... the fact finder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings." (*Barefoot v. Estelle* (1983) 463 U.S. 880, 899.)

The admission of this evidence also violated the Eighth Amendment. The qualitatively different character of the death penalty from all other punishments necessitates a corresponding increase in the need for reliability at both the guilt and penalty phases of a capital trial. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 637 [guilt phase]; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358 [penalty phase].)

As noted previously, the prosecutor conceded pre-trial that the audiotape was not clear. He stated:

> . . .I suggest that we can play the tape in court and that's a beginning point for argument. And eventually, when the jury does get the tape, it may be that they can put their heads next to it or each one-by-one listen to it with head phones on as needed. I don't have any other suggestions as to audibility. That's, obviously, the problem.

(RT 2950.)

Sergeant Robinson testified about the portions of the tape which were played to the jury during the guilt phase of this trial. He described the quality of the recording as follows:

> The sound quality is fairly poor. A good deal of the interview–or I'm sorry, a good deal of the conversation was actually whispering between the two defendants. So there are parts of the tape are undiscernible [sic] or inaudible. Actually what you're hearing is maybe 50 to 75 percent of the actual conversation that's occurring. At points you can hear some mumblings or whispering, but it is inaudible and unintelligible.

(RT 3816.)

Most importantly, the problem with the intelligibility of the tape was established by the fact that during the guilt phase deliberations the jury sent out a note requesting a transcript of the tape. (CT 1823.) This request was

denied because the transcript had not been placed in evidence. (CT 1824.)

C. The Trial Judge's Decision to Exclude the Transcript Established the Inaudible Nature of the Tape

California Rules of Court, rule 203.5 requires, "unless ordered by trial judge," that a party offering a sound recording in evidence must provide a type-written transcript of the recording. Also, the transcript "shall be marked for identification and shall be part of the clerk's transcript in the event of an appeal." (Rule 203.5.) In this case, the State provided two different transcripts of the audio-tape. Because of the inadequacy of the transcripts, the trial judge denied the admission into evidence of the transcript on the ground that it was "misleading" because he heard statements on the tape which were not on the transcript or were in a different order. (RT 2953.) The trial judge said that in terms of certain portions of the tape, he had to listen to it 3 or 4 times. (RT 2953.)

The fact that the trial judge found the State had not produced, and apparently could not produce, a coherent transcript of the tape establishes that the quality of the audiotape was so poor that it amounted to unreliable evidence which should have been excluded.

Where, as here, a disinterested third party cannot make a reasonable transcript, [59] the recording is simply too unreliable to be played for the jury. (*People v. Bernstein* (N.Y.A.D. 1979) 415 N.Y.S.2d 905, 906.) In the *Bernstein* decision, after listening to the audio-tape played at trial, the New York appellate court reversed the drug and conspiracy convictions of the defendants because the sounds on the tape were too "equivocal" and thus

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[59] After arguments by defense counsel about the misleading nature of the transcript of the tape prepared by the District Attorney's Office, the trial judge denied its admission into evidence. (RT 2951-2953.)

not sufficiently audible.

D. The Fact That Jurors Heard Statements for the First Time When They Played the Tape During Penalty Phase Deliberations Establishes That This Evidence was Unreliable

Another factor tending to establish that admission of the audiotape constituted an abuse of discretion is the testimony of two of the jurors at the hearing on the defense motions for a new trial. As discussed *post*, some members of the jury in this case erroneously believed they heard one or both of the defendants say "we killed her" on an audiotape. As noted previously, after the conclusion of the penalty trial in this case the prosecutor, Keenan counsel (Jeane Dekelver) for co-defendant Vo and Brenda Wilson, an investigator who was on appellant's trial team, met with some of the jurors. (CT 2741.) It is undisputed that during the penalty phase deliberations at least two of the jurors believed that they heard statements on the tape which they had not heard during the guilt phase deliberations. (CT 2742; 10/12/95 RT 18, 23.) At the post-trial hearing, juror Miller said she believed that this difference could be explained by the poorer quality of the tape-recorder which they used during the guilt phase deliberations. (10/12/95 RT 18.)

E. The Evidence Code Section 1150 Issue

Neither in the written response of the State to the motions for new trial or during the hearing on these motions did the prosecutor dispute the fact that the statement, "we killed her," was not on the tape. Instead, he objected to the trial court revisiting the issue, arguing that it would violate Evidence Code section 1150. (CT 2778.)

The prosecutor incorrectly asserted that section 1150 prohibited the trial judge from considering the jurors' statements about what they heard on the audiotape during the penalty phase deliberations. Section 1150,

subdivision (a), provides:

> Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent or to dissent from the verdict or concerning the mental processes by which it was determined.

The statute, therefore, distinguishes "between proof of overt acts, objectively ascertainable, and proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved. . . ." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 349.) As this Court reiterated in *People v. Steele* (2002) 27 Cal.4th 1230, the only improper influences that may be proved under section 1150 *to impeach a verdict are those open to sight, hearing, and the other senses* and thus subject to corroboration. (*Id.* at p. 1261[Citations omitted; emphasis added].)

In the instant case, the testimony of the two jurors at the post-trial hearing concerned a *matter of hearing* and thus fell within the exception described *ante.* The trial judge erred in not agreeing, as urged by the defense, to listen to the tape himself on the machine used by the jurors during the penalty phase. If he could not hear the statement, "we killed her," on the tape, then the judge would know that the very poor quality of the audiotape had caused at least some of the jurors literally to hear words that were not spoken.

F. The State Mischaracterized the Nature of the Tape Evidence

Further, the prosecutor wrote in his opposition to the motions for a new trial in this case:

> Defendants fail to provide any grounds for modifying the jury's verdict or granting a new trial under Penal Code section 1118. Instead, they argue that the jurors were just wrong in what they heard the defendants confess on tape. They do not explain this error: did the jurors fabricate evidence? Do counsel claim only their hearing is to be trusted? They cite no authority for this ludicrous proposition. If that were the law, all defense counsel would have to do is claim that they did not see or hear evidence and the evidence would cease to exist.
>
> Instead, when physical evidence is subject to dispute it becomes the exclusive province of the jury as trier of fact. The court is well aware that this jury spent days on days reviewing the evidence in minute detail, no doubt over and over again. Twelve different people, all with varying abilities and perceptions, strained to hear Defendants' words. They pooled their resources into a fact finder greater than any one individual.

(CT 2778-2779.)

This position by the prosecutor is quite simply nonsense. Whether or not a statement is on an audio-tape is not a matter of opinion nor a matter of perception. It is either there, or it is not. This type of evidence is a matter of objectivity not subjectivity. By analogy, the State could not introduce a blue sweater into evidence and then argue that it was for the jurors to decide whether or not it was really purple.

The fact that there is a dispute about whether the audiotape includes the statement "we killed her" mandates a conclusion that the recording is not sufficiently audible or intelligible and should have been excluded on the ground that it was not reliable evidence.

G. The Prejudice Created by Admission of the Audiotape

The audiotape in this case was, as acknowledged by the prosecutor and the police witness, of poor quality and contained significant inaudible portions. The unreliability of the tape, which should have been excluded from the trial, was established without question at the post-trial hearing.

Two jurors testified that when the jury played the tape during the penalty phase deliberations they heard a voice, which they identified as belonging to co-defendant Vo, say several times "we killed her." Both jurors did not hear those statements when the tape was played on a different machine during the guilt phase of the trial. It is also undisputed that none of the transcripts prepared pre-trial by any of the parties, including the State, include this statement.

The statement, "we killed her," was critical to the determination of as least one juror to vote for the death sentence for appellant. (CT 2756-2757 [Declaration of Brenda Wilson].) Even absent such evidence from the jurors, it is highly probable that a belief that one or both of the defendants had said, "we killed her," would have affected the jurors' decision regarding penalty. In addition, the prosecutor used the tape to show the appellant in the most unfavorable light. For example, at the conclusion of his penalty phase, he urged the jurors to remember what they heard on the tape:

> I submit Mr. Hajek is monstrous, voice on that tape. Blood of the 73-year-old woman on his gloves, *is not remorseful*, but howling how he further wants to beat and damage her granddaughter. That's the type of case that deserves the death penalty. Both of these defendants deserve the death penalty for the monstrous crimes that mark no understanding. Thank you.

(RT 6419; emphasis added.)

The record, therefore, establishes that, under the federal constitutional standard (*Chapman v. California* (1967) 386 U.S. 18, 24), prejudice occurred at the penalty phase of this capital trial. The U.S. Supreme Court has repeatedly found that the 8th and 14th Amendments prohibit the use of unreliable evidence in capital cases. (See, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) The prosecution cannot prove that the

federal constitutional error in allowing the jury to hear this confusing and unreliable evidence which at least some of them mistakenly believed contained statements of admission by one of the defendants that "we killed her" was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18.) That is, had the tape not been admitted, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 536.) Accordingly appellant's death sentence must be reversed.

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IX.

THE TRIAL JUDGE ERRED IN ADMITTING EVIDENCE REGARDING APPELLANT'S ALLEGED INTEREST IN SATAN WORSHIP

Over the objections of appellant's trial counsel,[60] the prosecutor in this case introduced evidence, both through testimony and exhibits, regarding appellant's alleged belief in Satan worship. This evidence was irrelevant as well as unduly prejudicial, and its admission constituted reversible error.

A. Testimony of Lori Nguyen

Before the prosecution called Lori Nguyen to testify as a witness during its case-in-chief, appellant's trial counsel noted that she believed that Nguyen's testimony would not add anything substantive to the State's case:

> If I might mention something else I find troubling about this that has been frankly a theme that has run through this case, quite bluntly I think–Mr. Schon [the prosecutor] did the preliminary examination in this case, not Mr. Waite–but there has been this ongoing tendency to put these witnesses, McRobin Vo is one of them and Mr. Leung is one of them, and, frankly, I think Lori Nguyen is going to be one as well, put these witnesses on the stand. They've been interviewed by the district attorney's investigator. They've been interviewed by the San Jose Police Department. And at least

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[60] Earlier in the trial the issue of appellant's alleged interest in Satan worship was introduced. During opening argument in the guilt phase of trial, the prosecutor told the jurors that one of his witnesses, Tevya Moriarty, would testify about a conversation she had with appellant where he said that his parents were concerned that he would sacrifice the family dog to the devil. (RT 3012.) According to Tevya, during a telephone conversation in early January 1991, appellant told her that his parents were afraid that he would "sacrifice" their dog. (RT 3666.) Trial counsel did not object to this testimony.

in regard to Ms. Nguyen there was a taped interview of her. There is nothing that is helpful to the district attorney's in any of those interviews.

(RT 3907.)

Her observations about the testimony of Ms. Nguyen (and that of McRobin Vo and Norman Leung) proved to be prescient. During the course of the prosecutor's examination of her, the prosecutor questioned Nguyen about appellant's interest in Satanism. Trial counsel initially objected to this inquiry on the grounds of relevancy, but the judge overruled the objection.[61] (RT 4090.) The prosecutor continued questioning Nguyen about appellant's interest in Satan, and trial counsel again objected when the prosecutor asked if appellant had said anything about killing someone as part of his belief in Satan. (RT 4091.) That objection was sustained; nonetheless, the prosecutor persisted by asking virtually the same question again. This time the trial judge overruled the objection. (RT 4091.) [62]

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[61] There was a simultaneous objection on hearsay grounds by the co-defendant's counsel.

[62] This series of questions, objections and court rulings follows:

Q [by the prosecutor]: Ever hear Mr. Hajek talking about wanting to do Satanic rituals?
A: No.
Q: Ever hear him say he wanted to kill someone as part of his Satanic beliefs?
Ms. Greenwood: I'll object at this point.
Judge: Sustained.
Q: Did he ever say he would kill the people in this case, Ellen Wang's grandmother, for this reason?
Ms. Greenwood: Objection, there is no good faith.
Judge: Read back the question.
Judge: That objection is overruled. You may answer.
A: No.

(continued...)

B. Exhibits Offered By The State

At the close of the prosecutor's case-in-chief at the guilt phase of the trial, appellant's trial counsel objected to the admission of Exhibit 64 (CT 5888-5890), a letter written by appellant to his co-defendant which referred, inter alia, to Satan worship. Counsel pointed out that this part of the letter, dealing with Satan worship, was not relevant evidence since the prosecution never established any relationship between the killing of Su Hung and appellant's alleged worship of Satan. (RT 4160-4161.)

Counsel argued that such evidence was not probative and also that it had the potential to create undue prejudice in violation of Evidence Code section 352. She also objected to the evidence as unreliable and therefore unconstitutional at a capital trial. (RT 4160.) Counsel observed:

> I will just make this a standing objection that applies to each letter, where there's evidence that's admitted that's inflammatory but does not tend to prove a disputed issue, it doesn't just involve 352 California Evidence Code, but because it's a capital case, involves the constitutional consideration whether the evidence is actually reliable or whether, you know, we are simply presenting evidence that is, in a sense, designed to make him look like a bad person, which is clearly what the district attorney wants to do.

(RT 4161.)

The trial judge denied defense counsel's objections and admitted the letter. (RT 4162.)

C. The Trial Judge Erred in Admitting Irrelevant Evidence

As trial counsel pointed out, this part of the letter written by

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[62](...continued)
(RT 4091.)

appellant and introduced into evidence as Exhibit 64 was not relevant [63] to any disputed fact regarding the crimes with which appellant was charged. Counsel also argued that these references to Satan in appellant's letters were meaningless in that the district attorney did not provide an expert or anyone else to explain the significance of appellant's interest in devil worship:

> . . .if he had [explained the significance of devil worship]—If he [the prosecutor] wanted to bring some expert in here to talk about this particular killing fit that particular cult or something, that would, you know, perhaps be a little different thing. But it's clear what he is doing–what he expects the jury to do which is seize on that as something which looks bad, inflammatory and it doesn't—it doesn't have any meaning unless interpreted in some type of way. So that would be my position on this particular Exhibit 64.

(RT 4162.)

The prosecutor made the following weak argument urging the admission of this portion of the letter:

> His later statements, " The devil made me do it, Satan. I am still trying to get a satanic bible in here." It does reveal his [appellant's] state of mind and is relevant for what he did, the killing, in this case.

(RT 4160.)

Because the prosecutor failed to establish any connection between appellant's interest in devil worship and the killing of Su Hung, the trial judge erred in denying appellant's relevancy objection to the offending portion of Exhibit 64 and the testimony of Lori Nguyen..

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[63] Counsel pointed out that her relevance objection concerned the admissibility of this exhibit at the close of the prosecutor's case-in-chief. (RT 4161.)

D. The Letter Should Have Been Excluded on Section 352 Grounds

Since the challenged part of Exhibit 64 was not relevant, as demonstrated *supra,* its probative value was essentially nonexistent. Section 352 of the California Evidence Code provides in relevant part:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or misleading the jury.

Under Evidence Code section 352,[64] a trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Smithey* (1999) 20 Cal.4th 936, 973.) Evidence should be excluded under section 352 if it uniquely tends to evoke an emotional bias against the defendant as an individual, and yet has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046.) Evidence is substantially more prejudicial than probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v.*

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[64] This Court has held that the trial court "'need not *expressly* weigh prejudice against probative value--or even *expressly* state that it has done so.'" (*People v. Crittenden* (1994) 9 Cal.4th 83, 135, emphasis in original.) Nonetheless, on a motion to exclude evidence under Evidence Code section 352, "the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value." (*People v. Green, supra*, 2 Cal.3d at pp. 24-25; *People v.Zapien* (1993) 4 Cal.4th 929, 960; see also *People v. Karis* (1988) 46 Cal.3d 612, 641, fn. 21.) There is nothing in the colloquy among trial counsel, the prosecutor and the trial judge showing that the trial judge actually engaged in such weighing.

Alvarez (1996) 14 Cal.4th 155, 204, fn. 14.)

The evidence regarding appellant's interest in Satan worship also constitutes improper "propensity" evidence. Evidence Code section 1101, subdivision (a) prohibits the admission of evidence of a person's character, including specific instances of conduct, to prove the conduct of that person on a specific occasion. Section 1101, subdivision (b) provides an exception to this rule when such evidence is relevant to establish some fact other than the person's character or disposition. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Under section 1101, subdivision (b), character evidence is admissible only when "relevant to prove some fact (such as motive, opportunity, intent ...) other than his or her disposition to commit such an act." (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146.)

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

Such evidence is impermissible to "establish a probability of guilt." As the United States Supreme Court stated in *Michelson v. United States* (1948) 335 U.S. 469:

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

prejudice.[65]
(*Id.* at pp. 475-476.)

The admissibility of bad character evidence depends upon the materiality of the fact to be proved or disproved, and the tendency of the proffered evidence to prove or disprove it. (*People v. Catlin, supra*, 26 Cal.4th at pp.145-146.) There must be a strong foundational showing that the evidence is sufficiently relevant and probative of the legitimate issue for which it is offered to outweigh the potential, inherent prejudice of such evidence. (*People v. Poulin* (1972) 27 Cal.App.3d 54, 65.) Because such evidence can be highly inflammatory and prejudicial, its admissibility must be "scrutinized with great care." (*People v. Thompson* (1980) 27 Cal.3d 303, 315, disapproved on another ground, *People v. Williams* (1988) 44 Cal.3d 883, 907, fn. 7.)

When evidence of other bad acts is offered to prove a material fact, the court must employ a case-by-case balancing test of the probative value of the evidence compared with its prejudicial effect in order to determine the admissibility of the evidence. (*People v. Stanley* (1967) 67 Cal.2d 812.) Evidence of other acts "should be scrutinized with great care ... in light of its inherently prejudicial effect, and should be received only when its connection with the charged crime is clearly perceived." (*People v. Elder*

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[65] See also *United States v. Thomas* (7th Cir.2003) 321 F.3d 627, 631, where the Court of Appeals observed: "We fail to see how the redacted photo of the tattoo was admitted for any purpose other than to establish Thomas's propensity to possess guns. The district court's reasons for admitting the photograph, as well as the additional reasons the government provides, all circle back to one basic proposition--because Thomas tattooed a pair of revolvers on his forearm, he is the kind of person who is likely to possess guns."

(1969) 274 Cal. App.2d 381, 393-394, quoting *People v. Durham* (1969) 70 Cal.2d 171, 186.) Thus, other acts evidence is only admissible in very limited circumstances, when the court has carefully weighed the evidence and found that its probative value is so great that it overcomes its inherently strong prejudicial effect on the defense. (*People v. Haslouer* (1978) 79 Cal.App.3d 818, 825.)

E. Admission of the Disputed Portion of the Letter Violated Appellant's Federal Constitutional Rights

The admission of statements made by appellant about his interest in Satan worship violated his right to reliable evidence in a trial where he faced the death sentence. The U.S. Supreme Court repeatedly has stated that in capital cases there is an acute need for reliability in all aspects of the proceedings. (See, e.g., *Lockett v. Ohio* (1978) 438 U.S. 586, 604; Amend. 8th, U.S. Const.) The Court noted in *Gardner v. Florida* (1977) 430 U.S. 349, 358, that the Eighth Amendment requires that "any decision to impose the death sentence be, and appear to be, based on reason, rather than caprice and emotion." Such requirement of reliability, without a doubt, applies to the evidence presented by the prosecution to obtain a death sentence.

The admission of this evidence also denied appellant's right to due process and a fundamentally fair trial. As the United States Supreme Court has observed, the right to a fair trial "disallow[s] resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." (*Michelson v. United States, supra,* 335 U.S. at p. 475; see also *Old Chief v. United States* (1997) 519 U.S. 172, 181.) Certainly, the evidence regarding appellant's interest in Satan worship and obtaining a copy of a satanic bible was designed to show his "evil character."

The prosecutor also questioned Dr. Minagawa, the mental health expert who testified on behalf of appellant at both the guilt and penalty phases, extensively about appellant's alleged interest in Satanism. (RT 4785-4786.)

Indeed, in his arguments to the jury in both the guilt and penalty phases of the trial, the prosecutor made this correlation between appellant's supposed belief in Satan and his evil character, and, in turn, with the murder in this case. For example, in his guilt phase argument, the prosecutor stated: "Anyone have any explanation in all these doctors [the defense mental health witnesses] for sadism? For Satanism?" (RT 5576.) The prosecutor continued:

> He [appellant] may well be cyclothymic, but that's not the reason he commits his crimes. Satanism. No explanation for that in your psycho babble. Happens with Mr. Ramirez in —[66]

(RT 5576-5577.)

The prosecutor further argued:

> This unfortunate boy [the appellant] was not a victim of some terrible illness and showed despair or remorse at the crimes he'd done. On the contrary, this is a psychopath who reveled in them. You read his letters, is interested in Satanism, is interested in being a terrorist, how cool is that. That is not an unfortunate victim of an illness. That's evil.

(RT 5583.)

The admission of this evidence violated appellant's right to due process under the Fourteenth Amendment which "protects the accused against conviction except upon proof [by the State] beyond a reasonable

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[66] Defense counsel objected to this comment on the grounds that it made improper reference to another defendant–in this case, a rather notorious defendant on California Death Row who had been convicted of multiple murders.

doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) The trial court's erroneous admission of the evidence lightened the prosecution's burden of proof, improperly bolstering the credibility of witnesses and permitting the jury to find appellant guilty in large part because of his criminal propensity. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) Moreover, the introduction of the evidence so infected the trial as to render appellant's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67; see also *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

In addition, the admission of this evidence violated appellant's due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code sections 352 and 1101 not to have his guilt determined by inflammatory propensity evidence. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.) By ignoring well-established state law which prevents the State from using evidence admitted for a limited purpose as general propensity evidence and which excludes the use of unduly prejudicial evidence, the trial court arbitrarily deprived appellant of a state-created liberty interest.

The U.S. Supreme Court has also condemned the introduction of evidence of loathsome "abstract beliefs" by a capital defendant in order to obtain a death sentence. In *Dawson v. Delaware* (1992) 503 U.S. 159, 163, the white defendant was convicted of the murder of a white woman, but the prosecution offered evidence that he was a member of the white supremacist prison gang known as the Aryan Brotherhood. The Court found the admission of this evidence to be error; however, it rejected a per se constitutional prohibition against such evidence because in some cases it might be relevant. The Court concluded that defendant's "First

Amendment rights were violated by the admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than Dawson's abstract beliefs. [Citation omitted]" (*Id.* at p. 167.)

In *State v. Leitner* (Kan. 2001) 34 P.3d 42, a case with facts similar to those presented here, the Kansas Supreme Court found the trial court erred in allowing the prosecutor to question the defendant charged with the murder of her husband about her involvement with Wicca, a pagan religion practicing witchcraft. The *Leitner* Court concluded that the defendant's participation in Wicca had no relevance to the crimes charged against her. It also found that such evidence was unfairly prejudicial, given that "the idea of witchcraft has generated terror and contempt throughout American history." (*Id.* at p. 55.) Nonetheless, the Kansas Supreme Court declined to overturn Ms. Leitner's conviction because there was overwhelming evidence contradicting her claim of self-defense in the murder of her husband.

In *Flanagan v. State* (Nev. 1993) 846 P.2d 1053, the Nevada Supreme Court reversed the defendant's death sentence because the prosecution introduced evidence at the penalty hearing regarding his and his co-defendant's participation in a "coven." The Nevada court noted: "The prosecution may not raise the issue of appellants' religious beliefs for the bare purpose of demonstrating appellants' bad character. . .' Our Constitution, and our criminal justice system, protect other values besides the reliability' of the jury's deliberation [citation omitted]." (*Id.* at p. 1058.)

F. The Prejudice Created By Admission of This Evidence

In this case, the prosecutor failed to justify admission of evidence of appellant's interest in the worship of Satan. According to the State, the core reason for the defendants' decision to go to the Wang's house, which

ultimately resulted in the murder of Su Hung, was to avenge Ellen Wang's mistreatment of appellant and Lori Nguyen. (RT 3010-3014.) Whether or not appellant worships Satan or wants a copy of a "satanic bible" was immaterial to this motive. In addition, as trial counsel pointed out, there was no evidence that the manner in which the murder itself was carried out had anything to do with satanic worship. (RT 4162.) Thus, appellant's interest in Satan was immaterial to the crimes in this case, and the prosecutor's invocation of it constituted the proverbial red herring. The probative value of this evidence was non-existent while its prejudicial effect on appellant's case was significant.

As the Kansas Supreme Court noted in *State v. Leitner, supra*, "the idea of witchcraft has generated terror and contempt throughout American history." (*Id.*, 34 P.3d at p. 55.) The same could be said of devil worship; certainly, few in our society condone Satanism. Therefore, the evidence offered to prove that appellant believed in Satan was unquestionably prejudicial to him. Unlike the *Leitner* case, the evidence in this case showing that appellant committed first degree murder or a special circumstance murder was not overwhelming. Given the relatively weak evidence offered by the prosecution and the strong evidence supporting the mental state defense presented by appellant, the introduction of this highly prejudicial evidence about appellant's interest in Satan worship cannot be deemed harmless under either *Watson* [67] or *Chapman* [68] standards.

Even if considered harmless at the guilt phase, this improper evidence necessarily skewed the careful balancing process required in the penalty phase. This inflammatory evidence became unauthorized and thus

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[67] *People v. Watson* (1956) 46 Cal.2d 818, 836.

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

improper aggravation,[69] adding undue weight to the side of the scales favoring death. In this case, not only did the State proffer irrelevant evidence regarding appellant's unorthodox and unpopular belief in Satan worship, but the prosecutor referred to this evidence in his closing argument to the jury as a reason to choose the death sentence. Citing a letter [70] written by appellant while incarcerated in the Santa Clara County Jail, the prosecutor told the jury:

> He [appellant] says, "Hail, Satan." Describes in the letter how he would like to get a hold of a Satanic Bible. That's what Mr. Hajek is about. Worship of evil.

(RT 6393.)

Such injection of improper evidence and argument into the penalty phase of appellant's capital trial violated state law as well as the Eighth and Fourteenth Amendments to the United States Constitution. Because the State cannot prove this error to be harmless beyond a reasonable doubt, defendant's convictions and death sentence should be reversed.

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[69] See *Boyd v.California* (1985), where this Court held that the prosecution may not present evidence which is not relevant to the factors listed in Penal Code section 190.3. The question of whether appellant worships Satan is not relevant to any of these factors.

[70] The prosecutor "quoted" or paraphrased a letter, Exhibit 73, which was identified but never admitted into evidence. (CT 2671.)

X.

THE TRIAL JUDGE ERRED IN ALLOWING CO-DEFENDANT VO TO INTRODUCE PROPENSITY AND BAD ACTS EVIDENCE AGAINST APPELLANT [71]

As part of his defense in this case and over appellant's objections, co-defendant Vo introduced "other crimes" evidence concerning appellant.

In his argument in support of the motion for severance, trial counsel for Vo explained how he intended to portray appellant:

> And he [appellant] kills the victim, in our view, because if you look at the psychiatric reports and the psychiatric materials, it shows a significant history of psychiatric problems, psychiatric hospitalizations, psychiatrist [sic] and an indication that *when Mr. Hajek does not take his psychiatric—his anti-psychotic medication, that he suffers from a significant problem in controlling his behavior.* So our view is that Vo is there for his limited purpose and that *Mr. Hajek is there, loses control for the psychiatric reasons and ultimately ends up killing this elderly lady, killing an elderly lady that Mr. Vo doesn't even know about before he goes into the house.* And there's nothing to show that he has any interest in harming this 75 year old lady.

(RT 102, emphasis added.)

Further, Vo's attorney described some of the evidence--including an incident in which appellant lost his temper and destroyed jail property-- he planned to introduce in support of his claim that it was appellant who killed Su Hung. (RT 104.) Counsel explained that Vo's defense was designed to show that "Mr. Hajek is unable to control his behavior and lashes out." (RT 104.)

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[71] In Argument II *ante*, appellant discussed the impropriety of this evidence as it related to the trial judge's error in denying the defendants' motions for severance.

Appellant's counsel objected to this evidence, stating that if the trial judge was going to allow Vo to introduce this highly prejudicial evidence, he should grant appellant's request for severance. (RT 106-107.) Ultimately, the trial judge denied the motions for severance. (RT 170.)

The issue of appellant's destruction of jail property came up in another context later in the trial. Appellant filed a motion in limine, *Defendant Hajek's Motion No. 7: Objections to Specific Evidence* (CT 1612-1614), which included an objection to the prosecution's introduction of evidence regarding an incident when appellant had destroyed property within the jail. (CT 1613.) During the discussion about this motion, Vo's trial counsel said he planned to use this evidence during his defense. (RT 327.) He also explained that he did not want to be accused later of having waived Vo's rights to urge the admissibility of this evidence. Counsel stated that he would be prepared at some later time to make a more in-depth offer of proof and to explain to the court why he thought this evidence was admissible. (RT 328.) He argued that the evidence was clearly relevant and constituted an appropriate defense for Vo. (RT 328.)

Before co-defendant Vo began presenting his defense, appellant's trial counsel objected to allowing Vo to call a correctional officer, Douglas Vander Esch, to testify about appellant's destruction of jail property:

> I do take a position as to proving up the jail acting out incident and the Round Table Pizza disturbance. And the reason is because the jury has heard extensive testimony about that and it's clear that Mr. Hajek and I are not disputing those facts. So why there has to be additional testimony in order to simply confirm it when we are not denying it, in any event, and what we, in fact, put in front of the jury, I think is not necessary. And under 352, [it]would be my belief that all it does is to prejudice Mr. Hajek because Mr. Blackman certainly wants to make whatever arguments he can from those incidents and he is free to do so. But the addition of the

> live witnesses is something that, at this point, is superfluous and comes into the realm, I think, of bad character evidence at that point. I would make the same objection if Mr. Waite [the prosecutor] were attempting to present that evidence in rebuttal and I think it's the same type of thing.

(RT 4854.)

Later, in this discussion, counsel also explained that the information needed by the co-defendant already had been disclosed during the testimony of appellant's mental health witnesses: ". . . if the court's going to weigh the rights of the two defendants, [Vo's counsel] has what he needs to argue the situation, and I think anymore than that prejudices [appellant] necessarily." (RT 4855.)

Despite this objection, the trial court permitted Vo to present the testimony of Mr. Vander Esch. (RT 4936.)

A. Testimony of Douglas Vander Esch

Over the objection of appellant's trial attorney, Douglas Vander Esch, a correctional officer at the Santa Clara County main jail north, testified concerning an incident on May 16, 1992, involving appellant in the day room. Appellant asked to speak to a sergeant about being reclassified, and Vander Esch told him to make a written request on the appropriate form. (RT 4942.) Appellant replied that he didn't want to fill out a request form because he never got an answer. (RT 4974.) Shortly after this conversation, the officer heard a noise coming from the shower area of the day room. He saw appellant in that area, and he had a mop wringer in his hand. There was broken glass on the floor near appellant and glass in the showers. (RT 4943.) According to Vander Esch, appellant then said that he bet he could see a sergeant now. (RT 4945.)

B. Testimony of James O'Brien

Over appellant's objection (RT 4854), Loi Vo also presented the testimony of James O'Brien about an incident which occurred with appellant when both worked at Round Table Pizza in June, 1989. Appellant was seventeen years old, and O'Brien was fifteen; they both worked in the kitchen. (RT 4930.) According to O'Brien, when he got off work one evening, appellant punched him in the face and broke his nose. (RT 4930-4931.) O'Brien testified that, prior to appellant's attack, there had never been any kind of dispute between them. (RT 4930.) When the incident occurred, O'Brien was unlocking his bicycle, and appellant said something indicating that he was unhappy that O'Brien was getting off work early. (RT 4928.) O'Brien testified that this attack appeared to be totally irrational. (RT 4934.)

C. The Admission of This Evidence Violated Evidence Code Sections 1101 and 352

Evidence of other crimes or misconduct by a defendant is only admissible if it "logically, naturally, and by reasonable inference [tends to] . . . establish any fact material for the People, or to overcome any material matter sought to be proved by the defense." (*People v. Peete* (1946) 28 Cal.2d 306, 315.) Evidence Code section 1101, subdivision (b), provides for the admission of such evidence only "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than [the defendant's] disposition to commit such [crimes or bad acts]." (Evid. Code, § 1101, subd. (b).) Evidence of other crimes or misconduct is inadmissible when its only tendency is to show that a defendant had the criminal disposition or propensity to commit the crimes charged. (Evid. Code, § 1101, subd. (a).)

In this case, Vo's objective in presenting the testimony of Vander Esch and O'Brien was exactly that which is prohibited by section 1101; that is to prove that appellant had the propensity or disposition to have killed Su Hung. Therefore, admission of this evidence violated the provisions of Evidence Code section 1101, subdivision (a). The prejudice of such evidence is manifest: "[e]ven if evidence of other crimes is relevant under a theory of admissibility that does not rely on proving disposition, it can be highly prejudicial." (*People v. Thompson* (1980) 27 Cal.3d 303, 318; accord *People v. Griffin* (1967) 66 Cal.2d 459, 466 ["Regardless of its probative value, evidence of other crimes involves the risk of serious prejudice"].)

The disputed evidence also violated Evidence Code section 352 because any probative value it might have had—beyond proving mere disposition to have committed the crime – was greatly outweighed by its prejudicial effect. (See *People v. Alcala* (1984) 36 Cal.3d 604, 631; see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 384 [admission of evidence of other crimes should not contradict other policies limiting admission, such as the policies underlying Evidence Code section 352].) Section 352, which provides that a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury," applies to evidence that uniquely tends to evoke an emotional bias against the defendant as an individual and has very little effect on the issues. (*People v. Coddington* (2000) 22 Cal.4th 529, 588.) Evidence is substantially more prejudicial than probative if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14.) That is precisely the type of evidence that was at issue in this instance.

Under section 352, prejudice occurs where there is a "possibility" the evidence will be used "by the trier of fact for a purpose for which the evidence is not properly admissible." (*People v. Hoze* (1987) 195 Cal.App.3d 949, 954; see also *People v. Edelbacher* (1989) 47 Cal.3d 983, 1016.) There clearly was such a possibility in this case. The issue of who actually killed Su Hung was hotly disputed. Allowing these two witnesses, Vander Esch and O'Brien, to testify about uncharged violent conduct engaged in by appellant obviously tended to support co-defendant Vo's strategy to blame the crime on appellant. Consequently, the erroneous admission of this evidence was harmful and requires reversal.

D. The Admission of this Evidence Also Violated Appellant's Federal Constitutional Rights

The admission of this evidence violated appellant's right to due process under the Fourteenth Amendment which "protects the accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) The trial court's erroneous admission of the evidence lightened the prosecution's burden of proof, improperly bolstering the credibility of witnesses and permitting the jury to find appellant guilty in large part because of his criminal propensity. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) Moreover, the introduction of the evidence so infected the trial as to render appellant's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67; see also *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

In addition, the admission of this evidence violated appellant's due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code sections 352 and 1101 not to have his guilt determined by

inflammatory propensity evidence. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.) By ignoring well-established state law which prevents the State from using evidence admitted for a limited purpose as general propensity evidence and which excludes the use of unduly prejudicial evidence, the trial court arbitrarily deprived appellant of a state-created liberty interest.

Given the relatively weak evidence offered by the prosecution and the strong evidence supporting appellant's mental state defense, the introduction of this highly prejudicial evidence about uncharged misconduct cannot be deemed harmless. Under either the federal standard of prejudice (*Chapman v. California* (1967) 386 U.S. 18, 24) or the state standard (*People v. Watson* (1956) 46 Cal.2d 818, 836), this evidentiary error, taken together [72] with other improperly admitted evidence discussed in this brief, requires the reversal of appellant's convictions and death sentence.

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[72] See, e.g., *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622 [state law errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial that is fundamentally unfair].

XI.

THE TRIAL JUDGE ERRED IN ALLOWING NORMAN LEUNG TO TESTIFY

Counsel for both appellant and his co-defendant objected to the presentation of testimony by Norman "Bucket" Leung. The trial judge erred in overruling those objections, and such error requires reversal of the convictions and death sentence.

A. Factual Background

From the pre-trial stages through the trial proceedings, defense counsel, both for appellant and for co-defendant Loi Vo, objected to the prosecution's use of items seized from both defendants' cells in the Santa Clara County Jail, as well as Vo's diary seized from his apartment. Co-defendant Vo filed a motion to suppress items taken from his cell and his apartment, alleging that the underlying search warrant was defective because it did not specify the items to be seized with sufficient particularity. (CT 1541.) In addition, appellant's trial counsel filed a motion [73] objecting, inter alia, to the introduction of various items of evidence, including papers and letters seized from appellant's cell. (CT 1613.)

The trial judge ruled that the search warrant was valid. (RT 2936.) He also declined to rule on the in limine motions filed by the defendants regarding items of evidence which the prosecutor intended to enter into evidence. (RT 2936-2937.) The judge said that he would rule on objections to evidence at the time a party sought to introduce it, observing:

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[73] Appellant's lawyer filed a motion entitled "Defendant Hajek's Motion No. 7: Objections to Specific Evidence." (CT 1612-1614.) That motion included objections to the introduction by the prosecutor of documents seized from the jail cells of both appellant and Loi Vo.

It's always been my theory that I am never bound by my in limine rulings because as soon as the aspects [sic] change, so does my ruling. (RT 2937.)

Just before the prosecutor called Leung as a witness, he stated his intention to question the witness about letters seized from the defendants: Exhibits 65, 75 and 78. (RT 3896.) He argued that the letters were admissible because they were evidence of a conspiracy not only between the two defendants but also involving Norman Leung. (RT 3896-3899.) Appellant's counsel objected, arguing inter alia:

> I also think that essentially what the district attorney is trying to do is to use Mr. Leung as a way in which to establish a broad conspiracy which does not apply to the 187 [the murder charge].

(RT 3900.)

Counsel also made the following points about the impropriety of this evidence:

> So I think there are three problems. One, there is not a clear, logical connection established. Number two, in number 65 [one of the letter exhibits] it is not clear Norman Leung is involved at all. Number three, anything having to do with threats is not germane to the issues before this jury at this time. And number four, introduction of evidence with [a] prior bad act is also not relevant at this time.

(RT 3902.)

Vo's counsel argued, also based on Evidence Code section 352 grounds, that the prosecutor's claim that such exhibits showed some kind of "conspiracy" and thus were both relevant and admissible was wrong:

> . . .They're irrelevant and 352 as to my client because the prosecution will seek to have the jury speculate without an adequate foundation in any of these three letters. One, you don't know who the parties to this conspiracy are. You don't know whether the conspiracy is a robbery conspiracy or a homicide conspiracy. And the vice in it is once it gets before the jury they're allowed to

> speculate as to what does it all mean without adequate foundation, without adequate guidance. . .

(RT 3903.)

Both defense counsel also reminded the judge that to the extent to which the prosecutor wanted to admit the letters as statements in furtherance of a conspiracy, pursuant to Evidence Code section 1223, he could not use the statements themselves to establish the existence of a conspiracy. (RT 3905.) Because of the problems posed by these exhibits as well as questions about how the prosecutor was going to use them in his examination of witness Norman Leung, Vo's counsel asked the trial judge for a hearing outside the presence of the jury where Leung would be questioned and the prosecutor would have to establish the foundational basis for his claim that Leung was part of a conspiracy involving the defendants. The judge refused this request. (RT 3907.)

B. The Trial Judge Erred in Denying Counsel's Request For a Hearing Pursuant to Evidence Code Section 402

In effect, the request by defense counsel for a hearing on the "foundational basis" for the State's use of Leung as a witness was a request for a hearing as provided by Evidence Code section 402. Counsel for co-defendant Vo argued:

> My request would be—I know the Court, because I've tried cases in this department before, is generally disinclined to do this, but this – it's tricky, difficult testimony, where the defense has significant question as to whether the prosecution's evidence can meet the foundational requirements, I'd ask the Court take this testimony out of the presence of the jury.

(RT 3907.)

The trial judge rejected this request, noting: "I really don't like to try a case twice. Once outside the presence of the jury and have kind of a like a dress

rehearsal and try the case then in front of the jury." (RT 3907.) Counsel for appellant explained why she believed the proposed testimony of Norman Leung would be so prejudicial to appellant:

> If I might mention something else I find troubling about this that has been frankly a theme that has run through this case, quite bluntly I think – [Deputy District Attorney] Schon did the preliminary examination in this case, not Mr. Waite [the trial prosecutor] – but there has been this ongoing tendency to put these witnesses, McRobin Vo is one of them and Mr. Leung is one of them, and, frankly, I think Lori Nguyen is going to be one as well, put these witnesses on the stand. They've been interviewed by the district attorney's investigator. They've been interviewed by the San Jose Police Department. And at least in regard to Ms. Nguyen there was a taped interview of her. There is nothing that is helpful to the district attorney's in any of those interviews. *What they are getting from Mr. Leung, what Bill Clark from the D.A.'s office got from Mr. Leung is nothing, nothing, nothing, nothing.* So then what he [the district attorney] seeks to do is get him up in front of the jury and confront him with all this stuff. And, frankly, there's no question—just by asking the questions in and of themselves, were you threatened by Mr. Hajek, isn't it a fact he asked you to participate in this, that, and the other, it is inherently prejudicial. It is exactly the type of thing that frankly can lead a jury astray, no matter how much you instruct them the questions of the attorneys are not evidence. I think there's a good faith problem.

(RT 3907-3908, emphasis added.)

After this argument and after expanding further on both the impropriety of and prejudicial effect of the proposed testimony, Vo's counsel renewed his request for a short hearing to determine exactly what the prosecutor intended to ask Norman Leung and what Leung's responses would be:

> Again, I'm not asking for a two-day evidentiary hearing, but I think the Court will get some idea of how Mr. Leung will respond to these various issues, and a relatively short preview, and we'll all know where this is.

(RT 3910.)

The trial judge refused to allow such a hearing, and Mr. Leung was called as a prosecution witness. As discussed above, Leung's testimony proved as troublesome as defense counsel had prophesied.

C. It was an Abuse of Discretion to Refuse to Have a Hearing

As the California Court of Appeal observed:

> Evidence Code section 402 [74] provides a procedure to determine outside the presence of the jury whether there is sufficient evidence to sustain a finding of a preliminary fact, upon which the admission of other evidence depends.

(*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1156.)

On appeal, a trial judge's decision whether or not to admit evidence, made either in limine or as a result of a section 402 hearing, is reviewed for an abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1167.)

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[74] Evidence Code section 402 states:

Procedure for determining foundational and other preliminary facts

(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.

(b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.

(c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

A review of the questions asked of Mr. Leung and the answers he gave (RT 3912-3943) fully supports the defense concern that the evidence produced would not be probative but would instead be highly and improperly prejudicial to the defendants.

Basically, Mr. Leung testified that he could not really recall any of the events which the prosecutor questioned him about. As appellant's counsel had stated before his testimony, based on the police reports and on Leung's testimony at the preliminary examination, "He's not going to say anything." (RT 3909.) As she also warned: "So to throw him up there like spaghetti and see what sticks is inappropriate in a capital case." (RT 3909.) Both counsel pointed out that the prejudice would be created, not necessarily by Mr. Leung's statements, but by the questions the prosecutor would ask him. As counsel for Mr. Vo put it:

> And, frankly, there's no question — just by asking the questions in and of themselves, were you threatened by Mr. Hajek, isn't it a fact he asked you to participate in this, that, and the other, it is inherently prejudicial. It is exactly the type of thing that frankly can lead a jury astray, no matter how much you instruct them the questions of the attorneys are not evidence. I think there's a good faith problem.

(RT 3908.)

The record in this case contains many examples of questions by the prosecutor which did not elicit any meaningful testimony from Norman Leung but placed prejudicial information before the jury. The following colloquy provides an example:

Q. Mr. Hajek ever ask you to go with him and Mr. Vo to the Wang's [sic] house to help him get revenge on Ellen Wang for that fight?

A. Not that I recall of [sic].

Q. On Friday, January 19, 1991, did he tell you where he was going to go that day?

A: I can't even recall if I talked to him.

Q: You remember Mr. Vo and Mr. Hajek getting arrested for murder, right?

A: It was broadcast on TV.

Q: So you were aware of that, right?

A: My mom told me that, yes.

Q: You remember them that day coming over and asking you ahead of time, that day or day before, to go with them?

A: Not that I recall of [sic].

Q: Did Mr. Hajek ever threaten to get you if you talked to the police about this?

A: No. I haven't even had any contact with him.

Q: You haven't had any contact with him after his arrest?

A: After his arrest, no. Except I do recall I came and visited him one time.

Q: Well, that's some contact, isn't it, Sir?

A: Just say "Hi."

Q: Do you recall getting letters from him threatening you if you talked?

A: Um–not that I recall of [sic].

Q: Did your parents become aware of Mr. Hajek's threat and ask you to call the police because he threatened you?

A: I can't recall that.

Q: Well, sir, you would recall someone threatening your life and

your parents being concerned enough to ask the police, wouldn't you?

A: You're asking me something that's how long ago?
(RT 3927-3928.)

The above colloquy illustrates the truth of the defense claim that Mr. Leung's testimony would have little or no probative value, but that the prosecutor's questioning would be highly prejudicial. What is particularly troubling about the questions quoted above is that they violated an earlier ruling by the trial judge made just before Leung took the stand. Appellant's counsel asked for clarification of the trial judge's ruling on the defense 352 objections both to Leung's testimony and to certain letters in which appellant had supposedly made threats concerning Leung. Counsel asked:

> *Judge, I just wanted to ask in connection with your ruling, the district attorney is going to be allowed to ask, for instance, were you threatened?* My question then would be is he–and you've indicated he'll be allowed to use the letters – would the use of the letters mean he would show the letter, the exhibit, to the witness and then see if that refreshes his recollection or, you know, what his position is in relation to it, or does it mean they're going to be read in any type of way into the record?

(RT 3911-3912, emphasis added.)

The judge responded: "No. He can show it to him just like you would any other written document." (RT 3912.)

In the short colloquy above, the prosecutor referred to alleged threats by appellant four times; Leung responded repeatedly that he could not recall such threats.

The record, therefore, establishes that the trial judge abused his discretion in this case by failing to grant the defense motion for a 402 hearing where the prosecutor would have been required to show how

Norman Leung's testimony would be both relevant and probative.

D. The Evidence Also Should Have Been Excluded Under Evidence Code Section 352

Under Evidence Code section 352,[75] a trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Smithey* (1999) 20 Cal.4th 936, 973.) Evidence should be excluded under section 352 if it uniquely tends to evoke an emotional bias against the defendant as an individual, and yet has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046.) Evidence is substantially more prejudicial than probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14.)

For all of the reasons urged in the previous subsection of this argument, the record establishes that the questions posed by the prosecutor and the answers given by Leung failed to provide any probative evidence regarding the disputed issues in this case. Rather, the prosecutor repeatedly

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[75] This Court has held that the trial court "'need not *expressly* weigh prejudice against probative value--or even *expressly* state that it has done so.'" (*People v. Crittenden* (1994) 9 Cal.4th 83, 135, emphasis in original.) Nonetheless, on a motion to exclude evidence under Evidence Code section 352, "the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value." (*People v. Green, supra*, 2 Cal.3d at pp. 24-25; *People v.Zapien* (1993) 4 Cal4th 929, 960; see also *People v. Karis* (1988) 46 Cal.3d 612, 641, fn. 21.) There is nothing in the colloquy among trial counsel, the prosecutor and the trial judge showing that trial judge actually engaged in such weighing.

asked questions which accused the defendants of conspiracy and of threatening a witness, and the witness repeatedly said he could not recall the incidents referred to in the prosecutor's questions. In effect, Leung's testimony added nothing of legitimate evidentiary value while the prosecutor's questions improperly contained assertions that were unduly prejudicial to the defendants.

Not only was the admission of this evidence improper under Evidence Code section 352, it violated appellant's right to due process under the Fourteenth Amendment which "protects the accused against conviction except upon proof [by the State] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) The trial court's erroneous admission of the evidence lightened the prosecution's burden of proof, improperly bolstering the credibility of witnesses and permitting the jury to find appellant guilty in large part because of his criminal propensity. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) Moreover, the introduction of the evidence so infected the trial as to render appellant's convictions fundamentally unfair. (*Estelle v. McGuire* (1993) 502 U.S. 62, 67; see also *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378.)

In addition, the admission of this evidence violated appellant's due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code sections 352 not to have his guilt determined by inflammatory evidence which lacked probative value. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.) By ignoring well-established state law which prevents the State from using unduly prejudicial evidence, the state trial court arbitrarily deprived appellant of a state-created liberty interest.

Appellant was also deprived of his right to a reliable adjudication at all stages of a death penalty case. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 603-605; *Beck* v. *Alabama* (1980) 447 U.S. 625, 638; *Penry* v. *Lynaugh* (1989) 492 U.S. 302, 328, abrogated on other grounds, *Atkins v. Virginia* (2002) 536 U.S. 304.)

E. Prejudice

As discussed above, the prosecution's improper use of Norman Leung as a witness unduly prejudiced the defendants in this case. The prosecutor knew before he called Leung that he expected Leung to not cooperate. For example, when he sought admission of certain letters written by appellant and found in his co-defendant's jail cell, the prosecutor stated: "I don't think Norman Leung is going to agree with them [the letters] at all. They're going to have come in on my own." (RT 3910.) As appellant's trial counsel aptly observed, the real intention of the prosecutor in calling Leung as a witness was ". . .to throw him up there like spaghetti and see what sticks. . ." (RT 3909.) As counsel also noted such improper use of evidence should not be tolerated in a capital case. (RT 3910.)

Not only were the prejudicial questions of the prosecutor put before the jury, but the fact that Leung persisted in answering that he could not recall tended to make it appear that his seemingly disingenuous lack of memory was somehow the fault of the defendants. The testimony of Leung did not have any bearing on any disputed issue in this case. It was offered merely to portray the appellant and his co-defendant in a bad light before the jury. Reversal is required because the State cannot prove the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

XII.

THE TRIAL JUDGE ERRED WHEN HE ALLOWED THE PROSECUTOR TO MAKE IMPROPER USE OF McROBIN VO AS A WITNESS IN THIS CASE

The prosecutor called co-defendant Vo's brother, McRobin Vo (hereinafter "McRobin"), during his case-in-chief. He asked McRobin whether he had talked to appellant after appellant's arrest, and if so, what they talked about. McRobin testified that he visited appellant more than 20 times in jail and received about two or three collect telephone calls from him. (RT 3531.) According to McRobin, when he asked appellant what had happened in the Wangs' house, appellant didn't want to talk about it. (RT 3532.) Appellant's trial counsel objected to any further questioning of McRobin about his visits and conversations with appellant. Counsel requested a hearing outside the presence of the jury. (RT 3532.)

Appellant's trial counsel stated that the preliminary examination testimony of McRobin Vo proved that he had no substantive evidence to provide the prosecution and that his testimony would have no relevance to any disputed issues in the case:

> And I provide, as an offer of proof, the preliminary examination transcript volumes eight and nine in which Mr. Shone [the prosecutor], for two days, basically went on a fishing expedition with the witness. And substantially, all that happens is that it gives the appearance that a relative from Mr. Vo's family in some way doesn't remember, is being evasive in some type of way. Mr. Waite knows that full well it has no relevance. There's no way to establish any type of connection between my client and McRobin Vo. And as–as result, it's my feeling that it has no relevancy to the disputed issues of the case.

(RT 3533.)

A. The Trial Court Should Not Have Denied Appellant's Objections

1. Federal Constitutional Error

Responding to appellant's objections, the trial judge noted that the previous week a habeas corpus petition was granted out of San Mateo County. It had to do with a father failing to deny his culpability when confronted by his daughter. (RT 3534.)

When the hearing continued the next day, appellant's trial counsel raised the San Mateo case cited by the trial judge the previous day. She argued that asking McRobin about appellant's reluctance to talk about the charges against him violated appellant's Fifth Amendment right against self-incrimination. (RT 3535.) Appellant's lawyer also objected on grounds that both the question and answer violated Evidence Code section 352 because McRobin's testimony didn't provide any relevant evidence for the prosecution but prejudiced appellant. (RT 3536.) The trial judge denied appellant's objections, stating:

> I think the difference between the case of San Mateo there was state action or possibility of state action, and from what I've heard so far there is no state action involved between Mr. McRobin Vo and any police agency or–Way I understood it, Mr. Waite was just to be asking questions appropriately and what was his affect [sic] I guess.

(RT 3536.)

The trial judge erred in denying appellant's objections to the questions of the prosecutor and the responses by McRobin Vo.

First, his description of the San Mateo case was inaccurate.[76] The

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[76] Appellant's trial counsel was mistaken about the name of the case. She referred to it as the Burgess case, when in fact the defendant/appellant

(continued...)

George Franklin case involved his prosecution and conviction of first degree murder for a crime which had remained unsolved for twenty years before his arrest. The only evidence tying Franklin to the crime came from one of his daughters, Eileen Franklin-Lipsker, who claimed to have suppressed the memory of witnessing the sexual assault and killing of her childhood friend, Susan, by her father. After her father's arrest, Franklin-Lipsker told the prosecutor that she intended to visit her father in jail and attempt to get him to admit his guilt. The prosecutor said he could not ask her to do that but also agreed that it might be a good idea.

At trial, over Franklin's Fifth Amendment objection, his daughter was allowed to testify about her visit with her father and his response to her question of why he had murdered Susan. She told the jury that after she asked her father this question, her father remained silent and pointed to a sign in the visiting room which warned that their conversation might be monitored by jail personnel. The judge at Franklin's trial agreed with the prosecutor that an innocent man would have denied his guilt when faced with this direct accusation by his daughter. The trial judge further found that this testimony of Franklin-Lipsker was admissible as an adoptive admission and did not implicate Franklin's constitutional right to remain silent.

After Franklin's conviction for first degree murder, the California Court of Appeal found that the trial court had committed *Doyle* [*Doyle v. Ohio* (1976) 426 U.S. 610, 619] error by permitting the introduction of evidence of petitioner's silence. Nonetheless, the state appellate court did

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[76](...continued)
was George Franklin. The case title and citation are: *Franklin v. Duncan* (N.D. Cal.1995) 884 F.Supp. 1435, 1447.

not reverse because it found the error to be harmless. Mr. Franklin then filed a petition for a writ of habeas corpus in the federal district court, which found that the admission of this evidence violated Franklin's Fifth Amendment right to remain silent.

The federal district court found that Franklin's trial judge had violated the principle set forth in *Doyle v. Ohio, supra*, that the government cannot use, at trial, a defendant's post-Miranda silence as substantive evidence of guilt. The court observed:

> Petitioner chose to remain silent, knowing that he was in custody and that the government was listening to his calls. In declining to answer his daughter's question, Franklin explicitly pointed to the sign saying that the government monitored conversations. His pointing to the sign indicates that the desire not to talk to the government was his motivating factor in remaining silent. If this is not an invocation of the right to remain silent, it is difficult for the Court to imagine what would be. Surely petitioner need not state, 'I am not answering your question, Eileen, because I am invoking my Fifth Amendment right against self-incrimination' in order not to have his silence used against him. The compelling inference to be drawn from Franklin's conduct is that he was relying on the right to silence guaranteed by the Fifth Amendment.

(Franklin v.Duncan, supra, 884 F.Supp. at p. 1447.[77])

The trial judge in appellant's case erred when he stated that the absence of "state action" justified his denial of appellant's objection to the prosecutor's questioning of McRobin Vo about appellant's response to his questions about what happened in the Wangs' house on the day the charged crimes occurred. In the *Franklin* case, both the California Court of

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[77] This opinion was affirmed by the Court of Appeals. (See *Franklin v v. Duncan* (9th Cir. 1995) 70 F.3d 75.)

Appeal[78] and the federal district court deciding the habeas petition agreed that there could be *Doyle* error regardless of who the parties were. The federal district court observed:

> *Even if petitioner had not pointed at the sign*, the Court believes that the circumstances are such that it would have been improper for the government to use petitioner's silence against him at trial. *Doyle* explains that the state may not use a defendant's post-*Miranda* silence against him at trial because silence in the wake of *Miranda* warnings is "insolubly ambiguous" and "may be nothing more than the arrestee's exercise of these *Miranda* rights." *Doyle,* 426 U.S. at 617, 96 S.Ct. at 2244. *Doyle* does not place a burden on the defendant to prove that he was exercising his *Miranda* rights in remaining silent. Because post - *Miranda* silence is "insolubly ambiguous," such silence may not be used against the defendant at trial. When a defendant is in the presence of the government, he has the right to remain silent in the face of questioning, whether the questioning is from a private individual or the police. Although the government was not visibly present when Franklin-Lipsker questioned Franklin, the government was audibly present. Franklin knew that the government could be monitoring his conversation. Therefore, his silence may not be used against him at trial.
>
> For these reasons, the Court concludes that the trial court violated petitioner's privilege against self-incrimination by allowing the state to present evidence of petitioner's failure to respond to Franklin-Lipsker's accusation and then to argue that his silence was indicative of guilt.

(*Franklin v. Duncan, supra,* 855 F. Supp. at pp. 1447-1448, emphasis added.)

2. Evidence Code Section 352 Error

As noted *ante*, appellant's trial counsel also objected to this evidence

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[78] The opinion of the Court of Appeals was not published, so it cannot be cited in this brief. The published opinion of the federal district court, however, cites the unpublished opinion of the Court of Appeals.

on the ground that it was not relevant on any disputed issue and prejudiced appellant. (RT 3535-3536.) The judge did not address this claim. (RT 3536.) This was error.

Under Evidence Code section 352, a trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Smithey* (1999) 20 Cal.4th 936, 973.) Evidence should be excluded under section 352 if it uniquely tends to evoke an emotional bias against the defendant as an individual, and yet has very little effect on the issues. (*People v. Coddington* (2000) 23 Cal.4th 529, 588 (2000), overruled on other grounds, *Price v. Superior Court* (2001) 25 Cal.4th 1046.) Evidence is substantially more prejudicial than probative under section 352 if it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." (*People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14.)

By questioning McRobin Vo about appellant's refusal to discuss the alleged crimes in this case, the prosecutor did not offer evidence relevant to any disputed fact. As appellant's trial counsel observed, the evidence was prejudicial rather than probative:

> I think the net effect of it is it gives the appearance that my client won't talk and doesn't produce anything for the district attorney.

(RT 3536.)

As noted previously in this brief, the evidence offered in support of the prosecutor's theory that the killing of Su Hung was a first degree murder with special circumstances was far from overwhelming. In addition, appellant presented a strong mental state defense. (See Statement of Facts, *ante*, pp.19-29) Given this record, the use of improper and

prejudicial evidence, such as McRobin Vo's testimony about appellant's statement that he did not want to talk about the alleged crimes, did not constitute harmless error. Certainly, when this evidentiary error is taken together with all instances of error discussed in this brief, the State cannot prove that admission of McRobin's testimony was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Reversal is also required under *People v. Watson* (1956) 46 Cal.2d 818, 836, because it is reasonably probable that, absent this error and the other evidentiary errors identified here, the jury would have reached a verdict more favorable to appellant.

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XIII.

THE TRIAL JUDGE ERRED IN DENYING DEFENSE OBJECTIONS TO HOPELESSLY CONFUSING INSTRUCTIONS IN THE GUILT PHASE OF THE TRIAL

During discussion among trial counsel, the prosecutor and the trial judge about the proposed jury instructions at the guilt phase, counsel for co-defendant Loi Vo made the following objection:

> There's a broad objection which I would have as to the instructions as a whole and that is that because of the number and multiplicity of theories offered by the prosecution, conspiracy, aider and abettor, felony murder, there are such a number of instructions and that each deal with the issues of intent and knowledge in a somewhat different way. So that the net effect of giving the type of instructions and the particular instructions that you are contemplating is to cause irreparable confusion on the part of a jury insofar as it relates to intent and knowledge, either as to a principal or an aider and abettor, and it makes it virtually impossible for the jury, in an understanding way, to sort out the criminal liability based upon the remaining circumstances of this particular case. And that this causes problems as far as just basic jury confusion, but also the effect of it is that there is not a set of understandable instructions so as to appropriately and adequately instruct the jury on the issues that they should be instructed on.

(RT 5287.)

Appellant's counsel joined in this objection. (RT 5289.) The trial judge did not rule on this objection on the record because he had already ruled on all objections to jury instructions in an earlier off-the-record meeting. (CT 1815; RT 5282.) Nonetheless, given that he read to the jury the full panoply of confusing instructions, it is apparent that the trial judge overruled this defense objection.

In this case, the prosecution offered numerous theories regarding the

murder of Su Hung. First, the prosecutor claimed that the murder was a first degree premeditated murder. (RT 5368-5369.) He also contended that the defendants committed first degree lying-in-wait murder and torture murder.(RT 5361, 5375-5376.) In addition, he claimed that the murder was a burglary felony murder. (RT 5380-5381.) Although the crime of conspiracy was not charged in this case, the prosecutor argued to the jurors that the defendants were in a conspiracy to commit premeditated murder. (RT 5369.) Shortly after making that argument, he then told the jurors that if they did not believe that the killing was intentional they could still find the defendants guilty of first degree murder based on the theory that Su Hung's death was the "natural and probable consequences of the purpose of the conspiracy." (RT 5370.) Offering yet another theory for finding the defendants guilty of first degree murder, the prosecutor argued that the defendants were liable as aiders and abettors:

> The last area of liability for murder is for an aider and abettor. Under this rule, the People don't have to show you who actually did the killing in this case. If both parties participated in this crime, they're both aiders and abettors and they're liable under the law.

(RT 5382.)

This plethora of murder theories [79] generated a confusing array of jury instructions. There were ten instructions concerning conspiracy, which was not even charged as a crime against the defendants. (CT 1981-1990, 2022; RT 5294-5297, 5314.) In addition, there were two instructions regarding premeditated first degree murder. (CT 2017-2018, 2036; RT 5311-5312, 5316.) Further, there was one for first degree torture murder (CT 2020; RT 5313-5314) and one concerning first degree lying-in-wait

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[79] This summary does not include the two special circumstance allegations of torture and lying-in-wait.

murder. (CT 2021; RT 5314.) There was also one instruction describing first degree felony murder based on a burglary. (CT 2019; RT 5312-5313.) The jury received three instructions discussing the general theory of aiding and abetting (CT 2004-2006; RT 5307-5309) as well as one regarding aiding and abetting a felony-- burglary-- which results in a killing, whether unintentional, accidental or intentional. (CT 2023; RT 5314-5315.)

As the California Court of Appeal has noted: "It cannot be overemphasized that instructions should be clear and simple in order to avoid misleading a jury." (*People v. Carrasco* (1981) 118 Cal.App.3d 936, 944.) In *Boyde v. California* (1990) 494 U.S. 370, 380, the United States Supreme Court determined the standard to be applied when the constitutionality of an ambiguous jury instruction is challenged. The Court held:

> We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.

(*Id.* at p. 380.)

This standard mandates a finding in this case that there is a reasonable likelihood that the many jury instructions regarding first degree murder, aiding and abetting, and conspiracy were too numerous and confusing to provide adequate guidance to the jury which decided appellant's case. As discussion *post* in this brief will establish, the problems with the jury instructions were exacerbated by the fact that the prosecutor's guilt phase closing arguments to the jury were far from models of clarity.

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XIV.

THE TORTURE SPECIAL CIRCUMSTANCE INSTRUCTION GIVEN AT APPELLANT'S TRIAL WAS CONTRADICTORY, CONFUSING AND UNCONSTITUTIONAL

During the guilt phase of appellant's trial, the jury was instructed about both first degree torture murder and the torture special circumstance.

The following instruction was given regarding the special circumstance:

> To find that the special circumstance referred to in these instructions as involving infliction of torture, is true, each of the following facts must be proved:
>
> 1. A defendant intended to kill, or with intent to kill, aided and abetted in the killing of a human being;
>
> 2. The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose;
>
> 3. The torturous acts were committed while the victim was alive;
>
> 4. A defendant did in fact inflict extreme cruel physical pain and suffering upon a living human being no matter how long its duration.
>
> Awareness of pain by the deceased is not a necessary element of torture.

(CT 2033; RT 5319-5320.) [80]

This instruction violated appellant's rights to due process, trial by jury and a reliable guilt determination (U.S. Const. Amends., 6th, 8th, and 14th) because while it mentioned the element of intent to kill it did not require a finding that appellant intended to kill. Instead, it instructed that "a" defendant intended to kill. Additionally, the instruction was defective because there is a reasonable possibility that lack of consistency in referring

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[80] This instruction was a modification of the 1991version of CALJIC No. 8.81.18.

to "a" defendant and "the" defendant within the instruction confused the jury.

A criminal defendant has a due process right under both the California and United States Constitutions to accurate jury instructions on all elements of an offense. This right correlates with the prosecution's duty to prove each of the elements of a crime beyond a reasonable doubt. (See, e.g., *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *People v. Flood* (1998) 18 Cal.4th 470, 480-481.) These constitutional protections are equally applicable to the determination of a special circumstance allegation. As the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (See also *People v. Hughes* (2002) 27 Cal.4th 287, 345.)

A failure to give proper instructions on the elements of a special circumstance allegation violates the Eighth Amendment of the U.S. Constitution. (*Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1319.) The U.S. Supreme Court has repeatedly held that any death penalty statute must provide a principled way to distinguish between murders which deserve the death penalty from the majority of murders which do not. (See, e.g., *Zant v. Stephens* (1983) 462 U.S. 862, 876-877.) In order to provide this principled basis for distinguishing capital murders, a jury must receive proper jury instructions regarding the special circumstance allegations.

A. Definition of Intent to Kill

The first requirement set out in the instruction quoted *ante* is "*A* defendant intended to kill, or with intent to kill, aided and abetted in the killing of a human being."(CT 2033; emphasis added.) Therefore, the

instruction informed the jurors the torture murder special circumstance applied to appellant so long as any of the participants in the killing of Su Hung intended to kill the victim.

In *People v. Petznick* (2003) 114 Cal.App.4th 663, 683, the California Court of Appeal held that a similar error amounted to a violation of the defendant's Fourteenth Amendment right to due process as well as his Sixth Amendment right to a trial by jury. At issue in *Petznic*k was the second element of the instruction, that is, the requirement that *a* defendant intended to inflict cruel physical pain and suffering. The *Petznick* court agreed that by referring to "a" rather than "the" defendant, the instruction "permitted the jury to find the special circumstance true without finding that [appellant Petznick] personally intended to torture–a violation of his right to due process and trial by jury." (*Id.* at p. 686.) The court of appeal also pointed out the torture murder special circumstance requires proof of both the defendant's intent to kill and his intent to torture the victim. (*Ibid.*) Rejecting the Attorney General's argument that the instruction was not erroneous since defendant was the *only* defendant at trial, the *Petznick* decision concluded:

> While that may be so, the jury was aware of the participation of three other persons. The other three participants, although not technically defendants, were referred to as defendants throughout the instructions. Thus, the jury could easily have understood a defendant as referring to any one of the four participants. The error is prejudicial because we cannot say, beyond a reasonable doubt, that it did not contribute to the jury's finding.

(*Ibid.*)[81]

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[81] According to the Use Note for CALJIC No. 8.81.18, the instruction has been revised to conform with the holding of *People v.*

(continued...)

B. Confusion in Terms Used in the Instruction

The instruction given in this case and quoted *ante* lists four elements or requirements; two of them refer to "the" defendant and two refer to "a" defendant. (CT 2033.) The copy of the instruction that was sent out with the jury shows that the elements referring to "a" involved crossing out "the" and writing in "a." It seems likely that the jurors would be confused by this instruction as a result of the varying articles appearing before the references to "defendant." Neither these variations nor the striking out of "the" in two of the elements were explained to the jurors.

C. The Confusion Was Exacerbated by the Prosecutor's Closing Argument

In his closing argument to the jurors at the guilt phase, the prosecutor conflated the two crimes of first degree torture murder and the torture special circumstance. He gave the following confusing and incorrect explanation to the jurors:

> There's two others [theories] that they get you that kind of premeditated planned first degree murder. One is–they're actually both the same fact situation as the special circumstances are based on. A torture murder is, under the law, if you find that happened, that's a first degree killing. And you get the instructions on that. That will take a second to read it to you.
>
> Essential elements of murder by torture are one person murders another, number one. Number two, the perpetrator committed murder with the willful, deliberate and premeditated intent to inflict extreme and prolonged pain on a living human being for the purpose of revenge, extortion, persuasion or any sadistic purpose. So what that instruction focuses on most is the intention of the killers. The purpose of revenge is shown by Mr. Hajek when he talks to Tevya

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[81](...continued)
Petznick,supra.

Moriarty. The whole purpose is to get revenge on Ellen. He is gonna kill them one-by-one, so he is gonna look in her eyes when she watches and kills her last. And also shows his sadistic state of mind, sadistic purpose to make her suffer more. And that's shown by the killing in this case, by the multiple suffering, the multiple wounds this woman suffered. That's the key element to a torture murder. That gets a finding of first degree.

Then from there, if you find that first degree murder happened, you can find the special circumstance true that would be also proven in the torture murder.

The third requirement, the act or acts taken by the perpetrator to inflict extreme and prolonged pain were a cause of the victim's death. That was shown by Dr. Ozoa, the strangling, the knife wounds. The torturous acts were committed while the victim was alive. And certainly, the severe ones in this case, the doctor said, she was alive. He cannot say whether those five smaller little stab wounds to her chest, whether she was alive or not. The one inch stab wound in her, the slice through her neck, strangling, she was alive all during that. Those are the four elements the people proved to show this was a torture. The instruction goes on to say, the crime of murder by torture does not require any proof that the perpetrator intended to kill his victim or any proof that the victim or any proof that the victim was aware of pain or suffering. I don't have to show you how long it took for her to die. I don't have to show you whether she passed out or whether she was alive and feeling this pain. Obviously, Dr. Ozoa couldn't describe that and that's not a requirement, according to this statute.

The legal definitions on the intent of the killer. And again, it requires that it be deliberate, which means formed at or arrived to determine as result of careful thought and weighing considerations and premeditated.

(RT 5375-5377.)

As noted previously in this argument, the elements of first degree torture murder include the willful, deliberate and premeditated intent to inflict extreme and prolonged pain on a living human being for the purpose of revenge, extortion, persuasion or any sadistic purpose. (*People v. Raley* (1992) 2 Cal.4th 870, 888-889.) The above-quoted portion of the

prosecutor's closing argument notes such requirements.

The error in the prosecutor's argument occurred at the point when he stated "That gets a finding of first degree," and then goes on to say that the torture special circumstance involved two other requirements: that the torture caused the victim's death and that the victim was alive when the torture occurs. In fact, there is a causation requirement for first degree murder but not for the special circumstance. (*People v. Proctor* (1993) 4 Cal.4th 499, 530-531.) Further, contrary to the statements made later in this portion of the prosecutor's argument quoted *ante*, the torture special circumstance (but not the first degree torture murder) requires that the perpetrator intended to kill the victim. (*People v. Cole* (2004) 33 Cal.4th 1158, 1226.)

This confabulation of what each crime –first degree torture murder and the torture special circumstance– required was especially confusing in the context of this case. As noted previously, the prosecutor offered numerous theories of murder liability, including premeditated murder, burglary felony murder, torture murder, lying-in-wait murder as well as conspiracy to commit murder and aiding and abetting murder. In addition, he argued that the defendants were guilty of both torture and lying-in-wait special circumstance murder. Given this hodgepodge of theories and the concomitant stew of jury instructions, misstatements of the law and of the facts by the prosecutor were especially prejudicial to appellant who, because he was facing the death sentence, was entitled to heightened reliability in the fact-finding process. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604; U.S. Const., Amend. 8th.)

CALJIC No. 8.81.18 [82] was revised in 2005, and that version, which was based on the decision in *People v. Petznick, supra,* 114 Cal.App.4th 663, discussed *ante*, would have obviated the problems with the instruction given in this case.

D. Prejudice

As noted previously, the instruction quoted *ante* violated not only state law governing torture murder but also appellant's federal constitutional rights to due process and trial by jury. This failure to provide appellant's jury with a complete instruction describing the elements of the torture special circumstance violated appellant's rights to due process under the Fourteenth Amendment; to trial by jury under the Sixth Amendment; and to a principled basis for determination of penalty under the Eighth Amendment.

By mixing up the requirements for first degree torture murder and those for the torture murder special circumstance during his closing

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[82] The 2005 version of No. 8.81.18 states:
SPECIAL CIRCUMSTANCES – MURDER INVOLVING THE INFLICTION OF TORTURE
(Penal Code§ 190.2, subdivision (a) (18))

To find that the special circumstance referred to in these instructions as murder involving infliction of torture is true, each of the following facts must be proved:

1. The murder was intentional; and

2. The defendant intended to inflict extreme cruel physical pain and suffering upon a living human being for the purpose of revenge, extortion, persuasion or for any sadistic purpose; and

3. The defendant did in fact inflict extreme cruel pain and suffering upon a living human being no matter how long its duration.

4. Awareness of pain by the deceased is not a necessary element of torture.

argument to the jury, the prosecutor contributed to the prejudice already created by the improperly worded jury instruction. Assuming arguendo that the State presented evidence of torture in the present case, given the instructional error, this Court has no way of determining which act or acts by which defendant the jury relied upon in finding the torture murder special circumstance true as to appellant. Accordingly, the error was prejudicial since the State cannot establish beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 16, 24.) [83]

The torture-murder special circumstance finding must be set aside, and the death sentence reversed.

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[83] This Court has held the failure to instruct on an element of the torture murder special circumstance must be evaluated under the federal *Chapman* standard for harmless error. (*People v. Morales* (1989) 48 Cal.3d 527, 561; .) Moreover, this Court has noted:

> To find instructional error harmless beyond a reasonable doubt, a reviewing court must assess 'not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.'

(*People v. Kobrin* (1995) 11 Cal.4th 416, 428.)

XV.

THE TRIAL JUDGE ERRED IN FAILING TO GIVE, SUA SPONTE, AN ACCOMPLICE INSTRUCTION

Appellant's co-defendant, Loi Tan Vo, testified in his own defense at the guilt phase of their joint trial. He claimed that when appellant and he went to Ellen Wang's house to look for her, their only purpose was to talk to her. Appellant was the one who had a problem with Ellen, according to Vo. Supposedly, he accompanied appellant just in case Ellen and her friends should become hostile. (RT 4987-4988.) Vo testified that appellant told him that all he wanted to do was to tell Ellen to leave him alone and to scare her off. (RT 4987.) Appellant supposedly never said anything about intending to kill anyone. Vo also stated that he did not kill Su Hung nor did he play any part in killing her. (RT 4992.)

During the prosecutor's cross-examination, Vo blamed appellant for the decision to go to the Wang residence and for the fact that they stayed there so long waiting for Ellen Wang to return. (RT 5140-5142.) He maintained that he told appellant that they should leave the Wangs' house, but appellant wanted to wait for Ellen. (RT 5156.)

Vo also claimed that after Tony Wang came home and after they had taken him upstairs and tied him up, appellant told Vo that Su Hung was dead. At first he thought Hajek might be joking. Vo supposedly ran upstairs to Su Hung's bedroom and found her body under a comforter. (RT 5175.)

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A The Trial Judge Should Have Given CALJIC No. 3.18

Despite the fact that under the prosecution's various theories of the case, Vo was clearly appellant's accomplice [84] and that Vo's testimony at their joint trial clearly prejudiced appellant, the trial judge failed to give the standard accomplice instruction to the jury, CALJIC No. 3.18.[85] This instruction should have been given sua sponte as it was "necessary to avoid any unfairness to the accused." (*People v. Hill* (1998) 17 Cal.4th 800, 842-843.) The fact that defense counsel did not request an accomplice instruction does not waive the issue because the error "affected [appellant's] right to a fair trial." (*Id.* at p. 843, fn. 8.)[86]

CALJIC No. 3.18, the standard cautionary instruction on accomplice testimony, states:

> You should view the testimony of an accomplice with distrust. This does not mean that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.

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1. The prosecutor repeatedly urged that the two defendants worked in tandem; therefore, they were each the accomplice to the other. Penal Code section 1111 defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

2. The jury in this case did receive the following instructions dealing with accomplices: CALJIC Nos. 3.10, 3.11, 3.12, 3.13 and 3.14. None of these instructions, however, directed the jurors to view the testimony of co-defendant Vo's accomplice testimony with caution, as CALJIC No. 3.18 would have.

3. Penal Code section 1259 permits appellate courts to review instructional error that affected the appellant's substantial rights, whether or not he requested such instructions

The rule in California has been that when an accomplice is called as a witness by the prosecution, the trial judge is required, sua sponte, to instruct the jurors to view the testimony of an accomplice with distrust. (*People v. Guinan* (1998) 18 Cal.4th 558, 564 [citation omitted].) Accomplice testimony on behalf of the prosecution should be viewed with distrust, in the words of this Court, because ". . . such witness has the motive, opportunity and means to help himself at the defendant's expense . . . ." (*Ibid.*) When the accomplice is called only by a defendant, however, the instruction should only be given at the request of the defendant. (*Ibid.*) When an accomplice is called as a witness by both the prosecution and defense, the trial judge should tailor the instruction to relate only to his or her testimony on behalf of the prosecution. (*Id.*, 18 Cal.4th at p. 567.)

In the instant case, the formula stated in *Guinan, supra*, is not workable because neither the prosecutor nor appellant called Loi Vo as a witness. Rather, Vo testified as his own witness, hoping to save his own skin at the expense of appellant's.[87] When accomplice testimony occurs as a result of a co-defendant's decision to testify on his or her own behalf, the situation created for the non-testifying defendant is more akin to the calling of an accomplice by the prosecution because a co-defendant testifying on his behalf (particularly when he is laying off the crime on the other defendant) has a motive to lie.

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4. As discussed in Argument II *ante* (which describes the problems created by the trial court's failure to grant the defendants' numerous requests for separate penalty phase trials), the present fact situation demonstrates the problem created by a joint trial, where one of the defendants testifies and points the finger of blame at his co-defendant.

This Court recognized this principle in a subsequent decision, *People v. Box* (2000) 23 Cal.4th 1153, 1208, where it noted that the motive to lie was present when a defendant testifies against his co-defendant. In the *Box* decision, this Court stated:

> . . .'just as in the case of an accomplice called to testify by the prosecution, (the co-defendant's) testimony was "subject to the taint of an improper motive, i.e., that of promoting his ... own self interest by inculpating the defendant.'[Citation omitted] Thus, there appears to be no persuasive reason not to require such an instruction when requested by a defendant in a case where the co-defendant testifies.

(*People v. Box, supra,* 23 Cal.4th at p. 1209.)

Under any theory of this case proffered by the prosecution, Loi Vo was an accomplice to appellant and vice-versa. Penal Code section 1111 provides:

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense or circumstances thereof. An accomplice is hereby defined as one who is liable to the prosecution for the identical offense charged against the defendant in trial in the cause in which the testimony of the testimony of the accomplice is given.

The term accomplice thus includes aiders and abettors, co-conspirators and perpetrators. (*People v. Gordon* (1973) 10 Cal.3d 460, 468.) Accordingly, it was crucial, indeed mandatory, that the trial judge give, sua sponte, the standard instruction that accomplice testimony should be viewed with distrust.

In this case, there was no evidence offered by the prosecution (or for that matter by co-defendant Vo) corroborating Vo's version of events in the Wang house which resulted in the murder of Su Hung. Therefore, under the facts of this case, it was crucial that the jury receive the instruction that accomplice testimony should be viewed with distrust and that Vo's

testimony about the crime required corroboration.

In addition, the failure to give the accomplice instructions deprived appellant of his due process rights in violation of the Fourteenth Amendment to the United States Constitution and its state constitutional counterpart. The error denied appellant a fair trial because the jury (1) was not instructed to view Vo's testimony with distrust, and (2) was permitted to consider this testimony without requiring it to find that such testimony was corroborated by other evidence. (See, e.g., *Estelle v. Williams* (1976) 425 U.S. 501, 503.)

Moreover, this instructional error deprived appellant of a state-created liberty interest, which also is protected by the Fourteenth Amendment. By creating the statutory right to independent corroboration of an accomplice's testimony (Pen. Code § 1111), California has created a liberty interest on the part of a criminal defendant to have a jury consider accomplice testimony (when factually applicable) only if it has been sufficiently corroborated and the jury has been instructed to view it with distrust. The U.S. Supreme Court has described the principle of a state-created liberty interest as follows:

> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent it is determined by the jury in the [proper] exercise of its . . . discretion . . . and that liberty is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

(*Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

The jury should have been instructed to view the accomplice testimony of Loi Vo with mistrust. It is reasonably probable that a proper instruction would have caused at least some of the jurors to discredit Vo's testimony. (*People v. Watson* (1956) 46 Ca.2d 818, 836.) Moreover, there is a "reasonable likelihood" that the jury applied this instruction is a way that violated the U.S. Constitution (*Boyde v. California* (1990) 494 U.S. 370, 380), and the State cannot prove beyond a reasonable doubt that the error complained of did not contribute to the verdicts against appellant. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Accordingly, reversal is required.

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XVI.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INCOMPLETE AND CONFUSING INSTRUCTIONS ON CONSPIRACY

The United States Supreme Court has stated repeatedly the importance of ensuring that jurors in criminal cases are instructed adequately on the applicable law. "It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (*Gregg v. Georgia* (1976) 428 U.S. 153, 193 [opn. of Stewart, Powell, and Stevens, JJ.].) "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depend[s] on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612.) "Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

This Court has also recognized the necessity of complete instructions on the applicable law. A trial court must instruct sua sponte on those general principles of law which are " . . . closely and openly connected with the facts before the court, and which are necessary for a jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715.) A trial court has a sua sponte duty to instruct on the "general principles relating to the evaluation of evidence." (*People v. Daniels* (1991) 52 Cal.3d 815, 885; see *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884 [credibility of witnesses]; *People v. Yrigouyen* (1955) 45 Cal.2d 46, 49 [circumstantial evidence]; *People v. Reeder* (1976) 65 Cal.App.3d 235, 241 [expert testimony].)

In appellant's case, the trial court failed to give complete and accurate instructions relating to the law of conspiracy. Assuming arguendo that it is proper to base liability on an uncharged conspiracy (see Argument II *ante*), complete instructions on the law of conspiracy are at least required, not simply CALJIC No. 6.10.5 and an incomplete set of other instructions on conspiracy. Full and fair instructions were necessary because conspiracy served as one of the bases for the murder verdict. The jury's ability to fairly apply the conspiracy theory of liability depended on a proper determination of the existence of a conspiracy. That could not happen in appellant's case where the jury received only partial instructions on the law of conspiracy.

By failing to identify any overt acts, failing to identify the object or objects of the conspiracy and failing to require unanimous agreement on the object or objects and overall finding of conspiracy as well as failing to require proof beyond a reasonable doubt, the trial court violated appellant's federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments to a fair jury trial, reliable guilt determination and due process. It also violated appellant's state constitutional and statutory rights as explained below. These errors resulted in a fundamentally unfair trial and unreliable conviction that must be reversed.

A. The Failure to Identify the Alleged Overt Acts

As noted previously, the prosecutor used an uncharged conspiracy as one possible basis for finding first degree murder. The jury heard ten instructions concerning conspiracy, including CALJIC NO. 6.10.5, which requires that a conspirator must have committed at least one "overt act" in furtherance of the object of the conspiracy. The instruction states:

> In order to find a defendant to be a member of a conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of

> at least one overt act. It is not necessary to such a finding as to any particular defendant that defendant personally committed the overt act, if [he] was one of the conspirators when such an act was committed.
>
> The term "overt act" means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a public offense and which step or act is done in furtherance of the accomplishment of the object of the conspiracy.
>
> To be an "overt act," the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor is it required that such step or act, in and of itself, be a criminal or unlawful act.

(CT 1881-1982; RT 5294-5295.)

This instruction failed to allege any specific overt acts supposedly performed by any conspirators. Since conspiracy was not charged as a crime in this case, the information also failed to allege any overt acts. Even the prosecutor's argument to the jury failed to identify any alleged overt acts. The prosecutor merely stated: "You have got a specific instruction on what – what a conspiracy requires . . . It limits as to [sic] first you have to find an overt act, they actually did something in addition to conspiring. And you will get that instruction." (RT 5370.) Later in the argument, the prosecution remained equally vague, merely stating: "The overt acts are many." (RT 5373.) He never identified any.

The silence of the information, instructions and prosecutor's argument concerning any particular overt act left the jury with no guidance on this critical component of a conspiracy and left appellant with no reasonable opportunity to defend against the uncharged conspiracy. This error constituted a violation of both state law and federal constitutional law.

The crime of conspiracy is defined in Penal Code section 182. The statute specifically mandates that one or more alleged overt acts must be "expressly alleged in the indictment or information" and at least one of the alleged overt acts must be proved. (Pen. Code § 182(b).) An overt act allegation is also necessary to establish the proper venue. (Pen. Code §182(a);[88] Pen. Code § 184.[89]) CALJIC No. 6.23 also requires that the jury be instructed with the specific overt acts alleged.

Even where no conspiracy is charged, assuming arguendo that such a procedure is valid, the trial court is still required to instruct on the law of conspiracy when the prosecution hinges liability on a theory of conspiracy. (*People v. Ernest* (1975) 53 Cal.App.3d 734, 744-745.) To follow the prosecution's theory that appellant could be found liable for murder based on his participation in a conspiracy, the jury necessarily first needed to make a valid finding of a conspiracy. No such valid finding could be made without complete instructions on conspiracy.

The conspiracy instructions were incomplete because of the failure to allege specific overt acts. The allegation of overt acts serves important purposes and is necessary to a proper determination of the existence of a conspiracy. "One purpose of the overt act requirement is to provide a *locus penitentiae*–an opportunity to repent–so that any of the conspirators may

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[88] This subsection provides in relevant part: "All cases of conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect the conspiracy shall be done."

[89] Penal Code section 184 provides: "No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracy may be had in any county in which any such act be done."

reconsider and abandon the agreement before taking steps to further it, and thereby avoid punishment for conspiracy." (*People v. Russo* (2001) 25 Cal.4th 1124, 1131; *People v. Morante* (1999) 20 Cal.4th 403, 416, fn. 4; see also, *Hyde v. United States* (1912) 225 U.S. 347, 358.) "Another purpose is 'to show that an indictable conspiracy exists' because 'evil thoughts alone cannot constitute a criminal offense.'" (*People v. Russo* (2001) 25 Cal.4th 1124, 1131, quoting *People v. Olson* (1965) 232 Cal.App.480, 489.)

As the statutory law identified above shows, to establish a conspiracy specific overt acts must be alleged and found by the jury. Case law also makes clear that allegation and a finding of at least one overt act is necessary to find a conspiracy. (*People v. Russo, supra,* 25 Cal.4th at p. 1134; *People v. Morante, supra,* 20 Cal.4th at p. 416.) In *Russo* ten specific overt acts were alleged. (*People v. Russo, supra,* 25 Cal.4th at p. 1130.) Although this Court held in *Russo* that the jury did not have to agree unanimously on which overt acts were committed, the Court recognized that "the requirement of an overt act is an element of the crime of conspiracy in the sense that the prosecution must prove it to a unanimous jury's satisfaction beyond a reasonable doubt. But that element consists of *an* overt act, not a *specific* overt act." (*Id.* at p. 1134, emphasis in original text.) That does not mean that there is no requirement that an overt act be alleged for such an allegation is required by Penal Code section 182, subdivision (b) which, as recognized in *Russo*, also requires that at least one overt act be proved. (*People v. Russo, supra,* 25 Cal.4th at p. 1134.)

The failure to allege any overt acts was exacerbated by the failure to instruct the jurors on CALJIC No. 6.21 which provides: "No act or declaration of a conspirator committed or made after the conspiracy has

been terminated is binding upon co-conspirators, and they are not criminally liable for that act." The prosecution presented evidence in the form of letters by appellant *after his arrest* which by law terminated the conspiracy. (See *Krulewich v. United States* (1949) 336 U.S. 440, 442-443 [conspiracy terminated once criminal objective attained or goal defeated]; *People v. Hardy* (1992) 2 Cal.4th 86, 152-153; *People v. Leach* (1975) 15 Cal.3d 419, 436.) But without adequate instructional guidance on this rule, the jurors may have relied on these letters as overt acts proving an element of the conspiracy.

The failure of the State to identify any overt acts allegedly performed by the defendants violated not only state law, but also federal constitutional requirements. "The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense . . . Jury instructions relieving States of this burden violate a defendant's due process rights." (*Carella v. California* (1989) 491 U.S. 263, 265.) Error of this type, which lightens the prosecution's burden of proof, violates the federal constitutional guarantees of due process and the right to trial by jury. (U.S. Const., 5th, 6th & 14th Amends.; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 740; *In re Winship* (1970) 397 U.S. 358, 364.) Appellant also had a protected liberty interest in proper application of the California statutory scheme for alleging crimes. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

B. The Failure to Properly Allege the Object of the Conspiracy

Adding to the confusion surrounding the jury's task of determining whether a conspiracy existed, already made difficult by the failure to allege

any overt acts, the prosecution and trial court failed to provide clear guidance on the alleged object of the conspiracy. Designation of the alleged object is essential because the jury must determine whether the purported conspirators had the specific intent to agree to commit a criminal offense. (*People v. Morante, supra,* 20 Cal.4th at p. 416.)

In this case, the trial court gave conflicting instructions relating to the alleged object. Pursuant to CALJIC No. 6.10.5, the trial court instructed: "A conspiracy is an agreement between two or more persons with the specific intent to agree, to commit a public offense such as *Burglary & Murder*, and with the further specific intent to commit such offense . . ."[90] (CT 1981, emphasis added; RT 5294-5295.) Rather than directly alleging burglary and murder as the alleged objects of the conspiracy, the version of CALJIC No. 6.10.5 used at appellant's trial contained the inexact and confusing phrase, "*such as Burglary and Murder.*" This imprecise language suggested that burglary and murder were possible examples of offenses constituting the object of the conspiracy rather than clearly setting out the alleged target crimes or objects.[91] This confusion was exacerbated by a subsequent conspiracy instruction, CALJIC No. 8.26, that seemed to identify burglary as the object. (CT 2022; RT 5314 [If a number of persons conspire together to commit *Burglary* . . ."].)

The trial court also instructed the jury with CALJIC No. 6.11 which stated in pertinent part: "You must determine whether the defendant is

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[90] The portions of the instruction quoted in this argument that are highlighted in italics represent parts of the printed instruction which were handwritten by the trial judge and given to the jurors to use in their deliberations.

[91] The current version of CALJIC No. 6.10.5 has eliminated the confusing "such as" phrase.

guilty as a member of a conspiracy to commit the crime originally contemplated, and, if so, whether the crime alleged [in Count[s] *1 (murder)* was a natural and probable consequence of the originally contemplated criminal objective of the conspiracy." (CT 1983, emphasis added; RT 5295.) Since CALJIC No. 6.10.5 seemed to identify murder as one of the alleged objects, CALJIC No. 6.11 left the jury with the strange task of determining whether murder could be the natural and probable consequence of an agreement to commit murder.

These conflicting and confusing instructions failed to provide adequate guidance to the jury about how to determine the object or crime originally contemplated by the conspiracy. Case law often refers to the "originally contemplated" criminal objective as the "target crime." This Court has recognized the importance of properly identifying any target crimes. As the Court explained in *People v. Prettyman* (1996) 14 Cal.4th 248, 267: "[I]n an aiding and abetting case involving application of the 'natural and probable consequences' doctrine, *identification of the target crime* will facilitate the jury's task of determining whether the charged crime allegedly committed by the aider and abettor's confederate was indeed a natural and probable consequence of any uncharged target crime that, the prosecution contends, the defendant knowingly and intentionally aided and abetted." (Emphasis added.)

While the "natural and probable consequence" doctrine in *Prettyman* involved aiding and abetting, the Court stated the doctrine applied equally to conspiracy. (*Id.* at pp. 260-261.) As noted in *Prettyman*, "a conviction may not be based on the jury's generalized belief that the defendant intended to assist and/or encourage unspecified nefarious conduct." (*Id.* at p. 268.) This Court concluded that defining the target crime would

eliminate the risk that the jury would "rely on such generalized beliefs as a basis for conviction." (*Ibid.*)

In appellant's case, the failure to identify the object of the alleged conspiracy permitted such improper "generalized belief" on the part of the jurors. (Cf. *People v. Liu* (1996) 46 Cal.App.4th 1119, 1134 [instruction specifically referred to allegations in the information charging conspiracy which identified the target offense].) The instructions failed to provide adequate guidance to the jury regarding whether the alleged objects consisted of (1) burglary and murder, (2) burglary only, or (3) some other crime altogether since the "such as" language suggested that burglary and murder were just examples.

C. Failure to Instruct on Findings of the Objects of the Conspiracy

The failure to require jury findings on the issue of whether the crime consisted of a conspiracy to commit burglary, a conspiracy to commit murder, or a conspiracy to commit burglary and murder led to further error. The trial court failed to give CALJIC No. 6.25 which provides:

> Defendant[s] [is] [are] charged [in Count[s] _____] with conspiracy to commit the crime of _____, in violation of _____ Code, § _____, and the crime of _____, in violation of _____ Code, § _____.
>
> In order to find the defendant[s] guilty of the crime of conspiracy, you must find beyond a reasonable doubt that the defendant[s] conspired to commit one or more of the crimes, and you also must unanimously agree as to which particular crime or crimes [he] [they] conspired to commit.
>
> If you find the defendant[s] guilty of conspiracy, you will then include a finding on the question as to which alleged crimes you unanimously agree the defendant conspired to commit. A form will be supplied for that purpose [for each defendant].

As stated in the Use Note for CALJIC No. 6.25, "[t]his instruction is designed for use where it is charged that defendant conspired to commit two or more felonies and the commission of such felonies constitute but one offense of conspiracy." (See CALJIC No. 6.26 for the form of the jury finding.) This instruction should have been given in appellant's case because one of the theories presented by the prosecution seemed to center on a claim of a conspiracy to commit burglary or murder or burglary and murder.[92]

Although CALJIC No. 6.25 refers to a charged conspiracy, it is irrelevant that the prosecution did not charge conspiracy in this case. The prosecution's decision to present multiple theories of liability, including conspiracy, required the jury to make certain foundational findings. To find murder under the conspiracy theory, the jury first had to determine properly that a conspiracy existed to commit a specific offense and to make that determination unanimously and based upon proof beyond a reasonable doubt.

That determination could not be made in any rational and reliable fashion when the jury did not receive adequate instructions requiring a finding of a specific object or objects unanimously and by proof beyond a reasonable doubt. As a result, some of the jurors may have found that the object was burglary, while others found murder as the object, or even some other criminal offense such as false imprisonment or assault. But an object such as assault would not support a murder conviction because, as a matter of law, murder is not a natural and probable consequence of simple assault

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[92] As noted previously, much confusion stemmed from the failure to specify the object of the conspiracy which resulted in other instructional error.

unless the assault is committed with a deadly weapon or by means of force likely to produce great bodily injury. (*People v. Prettyman, supra,* 14 Cal.4th at p. 267; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 9.) Nor would an object such as false imprisonment necessarily suffice to support a murder conviction. As Justice Brown discussed in her concurring and dissenting opinion in *People v. Prettyman, supra,* 14 Cal.4th at p. 289, the "natural and probable consequences" theory of accomplice, and in this case conspirator, liability requires a fact specific assessment of causation. Citing *People v. Keefer* (1884) 65 Cal. 232, 233-234, Justice Brown provided as an example of the causation requirement:

> In the case at bar, if defendant simply encouraged the *tying* of the deceased-a misdemeanor which did not and probably could not cause death or any serious injury-as the killing by Chapman was neither necessarily nor probably involved in the battery or false imprisonment, nor incidental to it, but was an independent and malicious act with which defendant had no connection, the jury were not authorized to find defendant guilty of the murder, or of manslaughter. If the deceased had been strangled by the cords with which he had been carelessly or recklessly bound by Chapman, or had died in consequence of exposure to the elements while tied, defendant might have been held liable. But, if the testimony of defendant was true-and as we have said, he was entitled to an instruction based upon the assumption that the facts were as he stated them to be-the killing of deceased was an independent act of Chapman, neither aided, advised, nor encouraged by him, and not involved in nor incidental to any act by him aided, advised, or encouraged.

(*People v. Prettyman, supra,* 14 Cal.4th at p. 289 (conc. & dis. opn. of Brown, J.)

The failure to give complete and accurate instructions on conspiracy could have resulted in an erroneous determination of guilt on the murder charge. The failure to give CALJIC No. 6.25 also resulted in the absence of

any instructions specifying that a finding of conspiracy must be unanimous and based upon proof beyond a reasonable doubt.

A jury verdict in a criminal case must be unanimous. (*People v. Russo, supra,* 25 Cal.4th at p. 1132; *People v. Collins* (1976) 17 Cal.3d 687, 693; see Cal. Const., art. I, §16 [expressly stating that in a civil case a verdict may be rendered by agreement of the three-fourths of the jury which implies a unanimity requirement in criminal cases].) "Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime." (*People v. Russo, supra,* 25 Cal.4th at p. 1132, original emphasis; *People v. Diedrich* (1982) 31 Cal.3d 263, 281.) The requirement of unanimity as to the criminal act "is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." (*People v. Russo, supra,* 25 Cal.4th at p. 1132, quoting *People v. Sutherland* (1993) 17 Cal.App.4th 602, 612.)

Lower courts have held that there need not be unanimous jury agreement on a specific object of the conspiracy so long as the jurors agree that the conspiracy had some crime as the object. (See, e.g., *People v. Vargas* (2001) 91 Cal.App.4th 506, 558.) But this Court has held that while there need not be unanimous agreement on the overt acts, the jurors must agree on a particular crime. (*People v. Russo, supra,* 25 Cal.4th at p. 1134.) In the context of conspiracy, this means that the jurors must agree on the particular object of the conspiracy because a conspiracy to commit burglary is a different crime from a conspiracy to commit murder or conspiracy to falsely imprison. Each of these is a separate crime subject to different punishment. (See Pen. Code, § 182 ["When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony"].) Without a

unanimity requirement and instruction, there is a danger that some jurors will think a defendant was guilty of one conspiracy and others will think he was guilty of a different one. (*People v. Russo, supra,* 25 Cal.4th at p. 1135.) Such an instruction "is necessary to minimize the risk that the jury, generally unversed in the intricacies of criminal law, will 'indulge in unguided speculation' when it applies the law to the evidence adduced at trial." (*People v. Prettyman, supra,* 14 Cal.4th at p. 267, quoting *People v. Failla* (1966) 64 Cal.2d 560, 564.)

It makes no difference that in this case no crime of conspiracy was charged. This Court has held that "as long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty." (*People v. Santamaria* (1994) 8 Cal.4th 903, 918.) That holding applied, however, to the issue of whether the jury had to decide unanimously whether the defendant was an aider and abettor. (*Ibid.* ["More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator"].) Aiding and abetting, which is only a theory of culpability and not a discrete and separate offense, differs fundamentally from conspiracy which is a separate crime and not merely a theory of culpability. In appellant's case, guilt on the murder charge could have been predicated on a theory dependent on appellant's guilt of a conspiracy. That means to sustain the murder conviction, the jury should have been required to find appellant guilty of a conspiracy beyond a reasonable doubt and unanimously.

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In*

re Winship, supra, 397 U.S. at p. 364.) That requirement applies not only to every "element," as that term is formally understood, but also to each of the "facts necessary to establish each of those elements." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278.) Instructional error relating to the reasonable doubt requirement vitiates "all the jury's findings" and constitutes structural error. (*Id.* at p. 281, original emphasis.) And state constitutional law requires that any jury findings must be unanimous. (*People v. Collins, supra,* 17 Cal.3d at p. 693.) Appellant had a protected due process liberty interest in enforcement of this state law requirement. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

The failure to instruct the jury completely on the law of conspiracy meant there wasn't any instruction specifying that a conspiracy must be proved beyond a reasonable doubt and by the unanimous agreement of the jury. That instructional error violated appellant's state and federal constitutional rights.

D. Reversal is Required

Instructional error occurs if there is a "reasonable likelihood" that the jury has applied any challenged instruction in a way that violates the U.S. Constitution. (*Boyde v. California* (1990) 494 U.S. 370, 380.) Appellant has established that the incomplete and confusing jury instructions on conspiracy law violated his federal constitutional rights to trial by jury, a reliable guilt determination and due process. Where the prosecution present alternative theories of guilt and the general verdict leaves the reviewing court unable to determine whether the guilty verdict may have had a proper basis, "the unconstitutionality of any of the theories requires that the conviction be set aside." (*Id.* at pp. 379-380.) Reversal is required here where the murder conviction may have been based on

unconstitutional application of the instructions on conspiracy.

The conspiracy instructions were incomplete, vague and reasonably susceptible to misunderstanding by the jurors. Extensive empirical research has demonstrated that juries often misapprehend jury instructions. (See, e.g., Hans, *Jury Decision Making* in Handbook of Psychology and Law (Kagehiro & Laufer, eds. 1992) pp. 56, 67 ["Jury researchers are nearly unanimous in the view that jurors have trouble understanding and following the judge's legal instructions"]' May, *"What Do We Do Now?" Helping Juries Apply the Instructions* (1995) 28 Loy. L.A. L.Rev. 869, 872 ["Studies literally abound demonstrating the extent to which jurors misapprehend the relevant law"].) The incomplete and conflicting instructions on uncharged conspiracy made it even less likely in this case that the jurors could apply the instructions fairly and correctly in order to reach a valid murder verdict.

The instructions were particularly deficient in failing to require proof beyond a reasonable doubt and unanimity. The failure to provide adequate instruction on the reasonable doubt requirement constitutes structural error requiring reversal. (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 281.) Thus, the failure to provide any instruction that a conspiracy finding must be based on proof beyond a reasonable doubt is reversible per se.

Even under harmless error analysis, reversal is required. An instruction that omits an element of an offense violates a defendant's due process right to a jury trial and is subject to the *Chapman* federal constitutional standard of harmless error. (*Chapman v. California, supra,* 386 U.S. at p. 24; *Neder v. United States* (1999) 527 U.S. 1, 15; *People v. Williams* (1997) 16 Cal.4th 635, 689; *Evanchyk v. Stewart* (9th Cir. 2003) 340 F.3d 933, 940.) Incomplete and confusing instructions constitute

harmless error under the *Chapman* test only if the State can establish beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

The State cannot meet that burden here where the murder conviction may have depended on conspiracy findings without the jury making valid findings as to the overt acts and objects of the conspiracy and without finding proof beyond a reasonable doubt and unanimously. Indeed, these errors were so fundamental and unfair that even under the state law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, it is "reasonably probable" that a different result would have been reached absent the errors.

Vo's testimony contradicted much of the prosecution's conspiracy theory. But it is possible that some of the jurors may have had a reasonable doubt but nonetheless improperly concluded there was a conspiracy because of a combination of faulty instructions and/or acts or declarations by appellant or Vo after their arrests. The failure to identify expressly the purported target crimes left jurors free to speculate which, in turn, probably distorted the culpability analysis. That is, at least some of the jurors may have relied on objects for which murder is not a natural and probable consequence. Most significantly, the murder conviction may have flowed from a finding of guilt on conspiracy even though the prosecution had not met the prosecution's burden of establishing that crime unanimously and based upon proof beyond a reasonable doubt. These errors cannot be considered harmless, and reversal of appellant's murder conviction and death sentence are required.

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XVII.

THE TRIAL JUDGE ERRED IN FAILING TO INSTRUCT THE JURY REGARDING THE EFFECT OF MENTAL ILLNESS ON THE MENTAL STATE NECESSARY TO CONVICT UNDER A THEORY OF AIDING AND ABETTING

The State relied upon a number of different theories for convicting the appellant and Loi Vo (the "defendants) of first degree murder with special circumstances. First, the prosecutor claimed that the murder was a first degree premeditated murder (RT 5368-5369) He also contended that the defendants committed first degree lying-in-wait murder and torture murder. (RT 5361, 5375-5376.) In addition, he claimed that the murder was a burglary felony murder. (RT 5380.) Although the crime of conspiracy was not charged in this case, the prosecutor argued to the jurors that the defendants were in a conspiracy to commit premeditated murder. (RT 5369.) Shortly after making that argument, he then told the jurors that if they did not believe that the killing was intentional they could still find the defendants guilty of first degree murder based on the theory that Su Hung's death was the "natural and probable consequences of the purpose of the conspiracy." (RT 5370.)

Further confusing the matter, the prosecutor argued to the jury that it could find either defendant guilty of first degree murder as an aider and abettor or as the actual killer. His meandering disquisition on this subject was as follows:

> The last area of liability for murder is for an aider and abettor. Under this rule, the people don't have to show you who actually did the killing in this case. If both parties participated in this crime, they're both aiders and abettors and they're liable under the law. The instruction says persons

> concerned in the commission or attempted commission of a crime are regarded by law as principals in the crime thus committed or attempted and equally guilty thereof include, one, those who directly or actively commit or attempt to commit the act constituting the crime. The actual killer. Or two those who aid and abet in the commission or attempted commission of the crime.
> I *think the evidence is clear they both were cooperating together. They aided each other for their joint purposes. We are not gonna [sic] show you who actually killed nor are we even required to.*
> An instruction that defines what constitutes aiding and abetting. That requires knowledge of the unlawful purpose of committing, encouraging or facilitating the commission of the crime by act or advice aids, promotes, encourages or instigates. And your aider and abettor can be liable if he does nothing more than encourage or gives advice.

(RT 5382-5383; emphasis added.)

These statements by the prosecutor about aiding and abetting liability and its applicability to the facts of this case misstated the law. His description of the legal requirements for aiding and abetting, quoted above, failed to mention the key mental state requirement. In *People v. Beeman* (1984) 35 Cal.3d 547, this Court held an aider and abettor must share the intent of the actual perpetrator. When the charged crime requires a specific intent, the prosecutor must show specific intent on the part of any defendant charged with aiding and abetting such crime. (*Id.* at p. 560.) [93]

Appellant's defense in this case was that he suffers from a serious mental disease or defect which affected his ability to form the intent required for first degree murder and the special circumstances alleged against him. Two jury instructions focused on this defense and its

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[93]Despite the prosecutor's faulty description of the legal requirements for aiding and abetting, the instruction given in this case on aiding and abetting correctly includes an intent component. (RT 1882.)

relationship to the crimes of murder and attempted murder. One of these instructions, based on CALJIC No. 4.21.1, stated:

> In the crimes of first degree premeditated and deliberated murder, torture murder, murder by means of lying in wait and attempted murder, a necessary element is the existence in the mind of the defendant of a certain mental state, namely premeditation and deliberation. The definition of this mental state is set forth elsewhere in these instructions.
> If the evidence shows that a defendant was mentally ill, suffered from a mental disease or defect at the time of the alleged crime, you should consider that fact in determining whether or not such defendant had such mental state, in other words, whether he did in fact premeditate and deliberate.
> If from all the evidence you have a reasonable doubt whether the defendant had such mental state, you must find that defendant did not have such mental state.

(CT 2036; RT 5316.)

The other instruction regarding appellant's mental defense read as follows:

> Evidence has been received regarding a [mental disease] [mental defect] [or] [mental disorder] of the defendant Stephen Hajer [sic] at the time of the commission of the crime charged namely, Murder and Attempted Murder in Count(s) 1, 2, 3, 4 and 5. You may consider such evidence solely for the purpose of determining whether the defendant Stephen Hajer [sic] actually formed the mental state, [premeditated, deliberated] which is an element of the crime charged [in Count[s] 1, 2, 3, 4 and 5, to-wit: Murder and Attempted Murder.

(CT 2037; RT 5316-5317.)

A. The Jury Instructions on Mental Disease and Defect Were Deficient Because They Failed to tie the Defense to the State's Contention That Appellant may be Liable as an Aider and Abettor

The instructions quoted above failed to explain the effect of a mental disease or disorder on the State's claim that one of the defendants may have been an aider and abettor rather than the actual killer. This was error, and a decision of this Court involving the intoxication defense provides the

analysis which should be applied to this error. [94]

In *People v. Mendoza* (1998) 18 Cal.4th 1114, this Court concluded that because the required mental state of the aider and abettor does not vary from crime to crime, the admissibility of evidence of intoxication also should not vary. (*Id.*) Accordingly, in order to make the law understandable to the jury, the court should "instruct that the jury may consider intoxication in determining whether a defendant tried as an aider and abettor had the required mental state." (*Id.* at p. 1134.) In the *Mendoza* case, there were three co-defendants, each charged with five counts of attempted murder, one count of murder and one count of discharging a firearm at an occupied building. This Court granted the petition for review of one of the co-defendants, Juan Manuel Valdez, who had been charged and convicted solely on a theory of aiding and abetting.

The trial judge in the *Mendoza* case gave instructions on voluntary intoxication but did not explain how those instructions related to the charge of aiding and abetting made against defendant Valdez. This Court granted review on the question of "whether the jury may consider the effect of voluntary intoxication on the existence of the mental state necessary for aiding and abetting." (*Id.* at p. 1122 .) Quoting from *People v. Beeman* (1984) 35 Cal.3d 547, 560, the Court noted in *Mendoza*: "an aider and abettor...must act with knowledge that the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Mendoza, supra,* 18 Cal.4th at p. 1123; italics in the original.)

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[94]Indeed, the first instruction quoted above, based on CALJIC No. 4.21.1, actually focuses on the effect of voluntary intoxication on formation of the mental state or specific intent of a criminal defendant.

The analysis in the *Mendoza* opinion begins with a description of section 22 of the California Penal Code, which governs the legal effect of voluntary intoxication on a person's culpability for a criminal act. Section 22 was originally enacted in 1872 and later amended in 1981 and 1982.[95] In *Mendoza*, this Court noted that the 1982 amendment to section 22 clarified that the 1981 amendment did not extend the admissibility of evidence of intoxication to general intent crimes. (*Id.* at p. 1124.)

The *Mendoza* decision discusses some of this Court's decisions regarding how voluntary intoxication affects the mental states required for certain crimes. Earlier decisions of this Court distinguished between "specific intent" and "general intent" crimes for purposes of determining the relevance of voluntary intoxication to the defendant's ability to have the requisite state of mind to be guilty of the charged crime. For example, in *People v. Hood* (1969) 1 Cal.3d 444, 445-459, this Court held that intoxication was relevant to negate the existence of a specific intent but not a general intent. The *Hood* decision acknowledged that the distinction between specific and general intent is not always clear. Indeed, in that case, the Court observed that assault could be characterized as either a specific or general intent crime.

The *Mendoza* opinion also cites this Court's decision in *People v. Williams* (1997) 16 Cal.4th 635, 676, for the proposition that aiding and abetting requires both knowledge and intent. ("One cannot intend to help someone do something without knowing what that person meant to do.") The Court also pointed out that the mental state for an aider and abettor is independent of the perpetrator's mental state and thus voluntary intoxication

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[95]The 1995 amendment to section 22 does not apply to this case because the murder in this case took place on January 18, 1991.

is relevant even if the perpetrator has engaged in a general intent crime. The *Mendoza* court observed:

> Because of the natural and probable consequences doctrine, limiting the admissibility of intoxication evidence for an alleged aider and abettor to crimes which require the perpetrator to have a specific intent would often effectively prevent that person from relying on intoxication even in defense to a specific intent crime. The rule would be arbitrary and have no relation to culpability. For example, in the hypothetical of a person handing a baseball bat to another who then uses it to assault a third party, assume that the assault was fatal but also that the person was unaware, due to intoxication, of the perpetrator's criminal intent. That person could be charged as an aider and abettor of both assault with a deadly weapon and murder, with assault being the target offense and murder a reasonably foreseeable consequence. If the aider and abettor were precluded from presenting evidence of intoxication in defense to the assault charge because it is a general intent crime, the alleged aider and abettor would effectively be precluded from relying on intoxication as the defense even to the specific intent crime of murder . . . ."

(*Id.* at p. 1132.)

In the instant case, it was prejudicial error for the trial judge to fail to instruct about the legal effect of appellant's mental disease or defect if the jury were to find that appellant had merely aided and abetted the crimes charged. Appellate courts evaluate claims of "instructional error" in "the context of the overall charge" to the jury. (*People v. Williams, supra*, 16 Cal.4th at p. 675.) The overall charge to the jury at the guilt phase of this case was confusing and ambiguous, largely because the State refused to commit itself to a theory of how the murder had been committed and what role each individual defendant played in that scenario. In particular, the instructions failed to require the jury to consider the evidence of appellant's serious mental problems and their relationship to the aiding and abetting

theory of culpability. The two instructions on appellant's mental disease were not adequate to explain this issue to the jury.

A criminal defendant has a federal constitutional right to ensure that the prosecution bears the burden of establishing each element of an offense beyond a reasonable doubt. (*In re Winship, supra*, 397 U.S. at p. 364.) Deficient instruction on the application of a mental disease defense to aiding and abetting liability constitutes federal constitutional error because it deprives the jury of its proper fact finding role with regard to the burden of proof. (*Martinez v. Borg* (9th Cir. 1991) 937 F.2d 422, 423.)

In addition, misleading and confusing instructions violate due process where they "are likely to cause an imprecise, arbitrary or insupportable finding of guilt." (*Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 943, 949.) Thus, the failure to provide adequate instructions to the jury directing them to consider the potential effects of appellant's mental disease or defect on the theory of aiding and abetting violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Because the basis for the murder conviction in this case cannot be determined and the jury may have relied on an incomplete and inadequate instructions concerning appellant's mental state defense, the error was not harmless and appellant's convictions and death sentence must be reversed. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

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XVIII.

INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

In this case, the prosecutor emphasized the "evil" motive of the defendants, beginning in his opening statement to the jury and culminating in his closing statement. This emphasis on motive, together with the instructions, allowed the jurors to find appellant guilty based on motive alone.

The trial court instructed the jury under CALJIC No. 2.51, as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(CT 2067; RT 5336 [oral version].)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive in order to establish his innocence, thereby lessening the prosecution's burden of proof. The instruction violated federal and state constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const. art. I, §§ 7 & 15.)

A. The Prosecutor's Emphasis on Motive Could Have Mislead the Jurors

As noted *ante*, the State's emphasis on the alleged motives of the appellant and his co-defendant tended to undercut the proviso of CALJIC No. 2.51 that motive is not an element of a crime.

During his opening statement, the prosecutor made the following statements about the motives of appellant and Loi Vo:

> Things like motive are very useful but they're not an element. I will prove to you the motive in this case, motive of revenge, for a slight instance [sic]. But it is not an element and I don't have to prove it beyond a reasonable doubt. It is just a guideline of what to expect.

(RT 3004.)

While cautioning the jury that he did not need to prove motive beyond a reasonable doubt, the prosecutor returned, time and time again, to the alleged motive of revenge during his opening statement to the jury. During his long description of the phone call between appellant and Tevya Moriarty about the argument with Ellen Wang, the prosecutor told the jury:

> In essence, he [appellant] says he's going to get revenge against these girls. . . They're going to break into this girl's house to make it look like a robbery. They're going to wait for her family members to come home, for her to come home. They were going to kill her family one by one, and then they were going to kill her last, Hajek was going to kill her last, so he could look into her eyes after he made her watch her family die . . .He wanted enjoy [sic] killing her last. He was going to do it for revenge.

(RT 3012-3014.)

He again returned to the revenge motive later in the opening statement in his description of a conversation between the defendants and Ellen's father at the Wang house:

> We want to straighten her [Ellen] out, just want to scare her. So that's important to lay the revenge motive on Mr. Vo and Mr. Hajek, *an element of intention.*

(RT 3018, emphasis added.)

The prosecutor concluded his very long opening statement, by stating:

> The case is about these gentlemen [who] wanted to be mass murderers. Facts will show from a stupid high school dispute with Ellen and her friends who didn't even think about it, these two went to get revenge from an entire family they didn't know, five people.

(RT 3026.)

The prosecutor's closing statement at the guilt phase also emphasized the motives of the defendants. He reminded the jurors that they did not have to find motive beyond a reasonable doubt standard. (RT 5366.) In discussing the torture murder theory, the prosecutor talked about motive:

> So what the instruction focuses on most is the intention of the killers. The purpose of revenge is shown by Mr. Hajek when he talks to Tevya Moriarty. The whole purpose is to get revenge on Ellen. He is gonna kill them one-by-one, so he is gonna look in her eyes when she watches and kills her last. And also shows his sadistic state of mind, sadistic purpose to make her suffer more. And that's shown by the killing in this case, by the multiple suffering, the multiple wounds this woman suffered. That's the key element to a torture murder.

(RT 5376.)

The above-quoted statements show how easily the concepts of motive and intent can be conflated. This same problem arose again when the prosecutor was discussing the planning which allegedly went into the murder:

> The evidence shows that Mr. Hajek did have a plan. He had thought about it for four days. And the plan was to get revenge for a rational motive [sic] on this girl, not just some stranger, not some random event, but someone he had picked out. We also have shown evidence of motive for both of these defendants, and neither one was working. Mr. Vo admitted that to you. And you will see in his diary that Mr. Vo, in particular, writes a complaint about his need of money. And that's a motive for robbery in this case, not just as an afterthought, but to actually get money from these people.

(RT 5391.)

B. The Instruction Allowed the Jury to Determine Guilt Based on Motive Alone

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 320 [a "mere modicum" of evidence is not sufficient].) It also requires proof of each element of a crime beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (*See, e.g., United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [poverty as a motive is insufficient to prove theft or robbery].)

Another problem with the motive instruction is that it stood out from the other standard evidentiary instructions given to the jury. Notably, each of the other instructions that addressed an individual circumstance expressly admonished that it was insufficient evidence to establish guilt. (See CT 2068; RT 5336-5337 [CALJIC No. 2.52 stating with regard to an attempt to suppress evidence and flight that each circumstance "*is not sufficient* by itself to prove guilt . . . ."] emphasis added.) [96] The placement of the motive instruction, which was read immediately before the flight instruction, served to highlight its different standard. (RT 5336-5337.)

Because CALJIC No. 2.51 is so obviously aberrant, it undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have

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[96] See also the jury instruction on consciousness of guilt and attempt to suppress evidence, CALJIC No. 2.06. (CT 1926; RT 5331.)

concluded that if motive were not sufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 557.) [97]

Here, the context highlighted the omission, so the jury could have understood that motive alone could establish guilt. Accordingly, the instruction violated appellant's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends; Cal. Const., art. 1, §§ 7 & 15.)

C. The Instruction Impermissibly Lessened the Prosecutor's Burden Of Proof and Violated Due Process

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[97] See also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is made applicable specifically to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].

As noted previously in this brief, the State proceeded on a number of theories of first degree murder. One of those theories was torture murder.[98] The instruction for first degree torture murder includes the requirement that the infliction of extreme and prolonged pain be for "the purpose of *revenge,* extortion, persuasion or for any sadistic purpose." (CALJIC No. 8.24; CT 1895, emphasis added; RT 5313.)

As described earlier in this argument, the prosecutor made several references to revenge as the motive for the killing of Su Hung during both his opening and closing arguments at the guilt phase. (RT 3004, 3012-3014, 3018, 3026, 5346.)

Another of the theories of first degree murder posited by the State was burglary felony murder. The jury was instructed that an unlawful killing during the commission of a burglary is first degree murder when the perpetrator has the specific intent to commit burglary. (CT 1894; RT 5312-5313.) Further, the trial judge instructed the jury that the alleged burglary, which was part of the prosecution's first degree felony murder theory and also was charged as a separate crime in Count 11, required that at the time of entry into the Wang residence the defendants had "the specific intent to commit the crime [sic] of Murder, Robbery and/or False Imprisonment." (CT 1918; RT 5328.)

As noted *ante,* the prosecutor argued to the jury:

> We also have shown evidence of motive for both of these defendants, and neither one was working. Mr. Vo admitted that to you. And you will see in his diary that Mr. Vo, in particular, writes a complaint about his need of money. And that's a motive for robbery

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[98] One of the two special circumstance allegations was torture murder.

in this case, not just as an afterthought, but to actually get money from these people.

(RT 5391.)

By informing the jurors that "motive was not an element of the crime," however, the trial court reduced the burden of proof on elements of two different theories of first degree murder offered by the prosecution. First, as to the first degree torture murder, the intent to inflict pain for the purpose of revenge was a contested element. Second, for purposes of the theory of burglary felony murder, the question of whether appellant entered the Wang residence in order to commit robbery was also contested. The instruction violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (See *Sandstrom v. Montana* (1979) 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

There was no logical way to distinguish motive from intent in this case. Under these circumstances, the jury would not have been able to separate instructions defining "motive" from "intent." Accordingly, CALJIC No. 2.51 impermissibly lessened the prosecutor's burden of proof.

The distinction between "motive" and "intent" is difficult, even for judges, to maintain. The following excerpts from various opinions demonstrate this problem of using the two terms almost synonymously:

> An aider and abettor's fundamental purpose, *motive and intent* is to aid and assist the perpetrator in the latter's commission of the crime. He may so aid and assist with knowledge or awareness of the wrongful purpose of the

perpetrator [citations] or he may so act because he has the same evil intent as the perpetrator. [Citations.]"
(*People v. Vasquez* (1972) 29 Cal.App.3d 81, 87, emphasis added.)

A person could not kidnap and carry away his victim to commit robbery if the *intent* to rob was not formed until afte the kidnaping had occurred." [citation] . . . . Thus, the commission of a robbery, the *motivating* factor, during a kidnaping for the purpose of robbery, the dominant crime, does not reduce or nullify the greater crime of aggravated kidnaping.
(*People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008, emphasis added.)

[T]he court as a part of the same instruction also stated to the jury explicitly that mere association of individuals with an innocent purpose or with honest *intent* is not a conspiracy as defined by law; also that in determining the guilt of appellants upon the conspiracy charge the jury should consider whether appellants honestly entertained a belief that they were not committing a wrongful act and whether or not they were acting under a misconception or in ignorance, without *any criminal motive*; the court further stating, "Joint evil *intent* is necessary to constitute the offense, and you are therefore instructed that it is your duty to consider and to determine the good faith of the defendants and each of them." Considering the instruction as a whole, we think the jury could not have misunderstood the court's meaning that a corrupt *motive* was an essential element of the crime of conspiracy.
(*People v. Bowman* (1958) 156 Cal.App.2d 784, 795, emphasis added.)

In *Union Labor Hospital v. Vance Lumber Co.* [citation], the trial court had found that the defendants had entered into certain contracts detrimental to plaintiff's business solely for the purpose and with the *intent* to subserve their own interests. The Supreme Court said [citation]: "But if this were not so, and their *purpose* were to injure the business of plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil *motive* which may inspire the doing of an act not unlawful will not of itself make the act unlawful."

(*Katz v. Kapper* (1935) 7 Cal.App.2d 1, 5-6, emphasis added.)

Quite clearly, the terms "motive" and "intent" are commonly used interchangeably under the rubric of "purpose."

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the defendant was charged with child annoyance, which required that the forbidden acts be "'motivated by an unnatural or abnormal sexual interest or intent.'" (*Id.* at pp. 1126-1127.) The court of appeal emphasized, "[we] must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at p. 1127.) It found that giving the motive instruction (CALJIC No. 2.51) – that motive was not an element of the crime charged and need not be proved – was reversible error. (*Id.* at pp. 1127-1128.)

There is a similar potential for confusion in this case. The jury was instructed to determine if appellant had the intent to commit burglary including for the purpose of robbery, but was also told that motive was not an element of the crime similarly, the jury was asked to determine if the evidence showed a first degree torture murder where the instruction set forth the follow up "intent" requirement.. As in *Maurer*, the motive instruction was federal constitutional error.

D. The Instruction Shifted the Burden of Proof to Imply That Appellant had to Prove Innocence

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction, therefore, effectively placed the burden of proof on appellant to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived appellant of his federal constitutional rights to due process and fundamental

fairness. (*In re Winship, supra*, 397 U.S. at p. 368 [due process requires the prosecution prove a crime beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement of reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase in a capital case].)

E. Reversal is Required

As described above (see Arguments IV and VI, *ante*), the evidence to prove either torture first degree murder (and/or the torture special circumstance) and burglary felony murder was not strong; therefore, the prosecutor emphasized during both his opening and closing arguments at the guilt phase the alleged motive of the defendants either to inflict pain for purposes of revenge or to commit burglary for the purpose, inter alia, of robbery. The various arguments made regarding such motives are catalogued *ante*. It is reasonably likely that the jury reached its guilt verdict for first degree murder against appellant relying on "motive" as argued by the prosecutor and instructed by the court. On this record, it cannot be said that the trial court's motive instruction to the jury was harmless beyond a reasonable doubt (*Chapman v. California, supra,* 386 U.S. 18, 23-24), and appellant's guilt conviction must be overturned.

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XIX.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY REGARDING FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

The trial judge instructed the jury that they could convict appellant of first degree murder if he committed a deliberate and premeditated murder (CALJIC No. 8.20; CT 2017-2018; RT 5311-5312) or killed during the commission of burglary. (CALJIC No. 8.21; CT 2019; RT 5312-5313.) The jury found appellant guilty of murder in the first degree. (CT 2098.) The instructions on first degree murder were erroneous, and the resulting conviction of first degree murder must be reversed, because the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[99]

Count 1 of the amended information alleged that "in the County of Santa Clara, on or about January 18, 1991, the said defendants, STEPHEN EDWARD HAJEK and LOI TAN VO, committed a felony, to wit: a violation of CALIFORNIA PENAL CODE SECTION 187 (MURDER) in that said defendants did unlawfully, and with malice aforethought, kill SU HUNG, a human being." (CT 1991.) Both the statutory reference ("California Penal Code Section 187") and the description of the crime ("did unlawfully, and with malice aforethought, kill") establish that

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[99]Appellant is not contending that the information was defective. On the contrary, as explained hereafter, count 1 of the amended information was an entirely correct charge of second degree malice murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crimes of first degree premeditated murder and first degree felony murder in violation of Penal Code section 189.

appellant was charged exclusively with second degree malice murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.[100]

Penal Code section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.) Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.) [101]

Because the information charged only second degree malice murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which

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[100]The amended information also alleged two special circumstances. (CT 1991.) However, these allegations did not change the elements of the charged offense. "A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 661.)

[101]In 1991, when the murder at issue occurred, Penal Code section 189 provided in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.

charges that specific offense. (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of Penal Code section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187. Under this view, an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and murder in the second degree.[102] It has many times been

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[102]This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in Penal Code section 187, includes a first

(continued...)

> decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

However, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

The *Witt* decision reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that Penal Code section 187 was *not* "the statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe [Penal Code] *section 189* as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, emphasis added, fn. omitted.)

Moreover, in rejecting the claim that *People v. Dillon*, *supra*, 34 Cal.3d 441, requires the jury to agree unanimously on the theory of first

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[102](...continued)
degree murder committed with premeditation or with the specific intent to commit a felony listed in Penal Code section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony murder rule. A crime cannot both include another crime and be included within it.

degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord, *People v. Box* (2000) 23 Cal.3d 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder (see Pen. Code, § 664, subd. (a) [referring to "willful, deliberate, and premeditated murder, as defined by Section 189"]) or murder during the commission of a felony, and *People v. Dillon*, *supra*, 34 Cal.3d at p. 472, expressly held that the first degree felony-murder rule was codified in Penal Code section 189. Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes" (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; but see Argument , arguing the contrary). First degree murder of any type and second degree malice murder clearly *are* distinct crimes. (See *People v. Hart*, *supra*, 20 Cal.4th at pp. 608-609 [discussing the differing elements of those crimes]; *People v. Bradford*, *supra*, 15 Cal.4th at p. 1344 [holding that second degree murder is a lesser offense included within first degree murder].) [103]

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[103]Justice Schauer emphasized this fact when, in the course of arguing for affirming the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he

(continued...)

The greatest difference is between second degree malice murder and first degree felony murder. By the express terms of Penal Code section 187, second degree malice murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the U.S. Supreme Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189 (*id.* at pp. 185-186, fns. 2 & 3) and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense." (*Id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the U. S. Supreme Court declared that, under the notice and jury trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a

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[103](...continued)
stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements for conviction.* This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, 60 Cal.2d at pp. 502-503 (dis. opn. of Schauer, J.), original italics.)

reasonable doubt." (*Id.* at p. 476, emphasis added, citation omitted.) [104]

Premeditation and the facts necessary to bring a killing within the first degree felony murder rule (commission or attempted commission of a felony listed in Penal Code section 189 together with the specific intent to commit that crime) are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. (Pen. Code, § 190, subd. (a).) Therefore, those facts should have been charged in the information. (See *United States v. Allen* (8th Cir. 2004) 357 F.3d 745, 758 [vacating death sentence because failure to allege aggravating factor in indictment was not harmless error]; *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1027-1028, 1035 [holding prospectively that in capital cases aggravating factors must be submitted to grand jury and returned in the indictment].)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the

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[104]See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1027-1028, 1035.) Therefore, appellant's conviction for first degree murder must be reversed.

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XX.

THE INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO DISREGARD SOME OF THE EVIDENCE

Permitting a jury, at its option, to disregard evidence which has been admitted violates a defendant's state and federal constitutional rights to due process, fair trial by jury, confrontation, compulsory process, effective assistance of counsel and a reliable verdict. (Calif. Const. Art. I, sections 1, 7, 15, 16 and 17; U.S. Const., 6th, 8th and 14th Amendments.) All of these rights depend on fair consideration by the jury of all evidence presented at trial.

Jury instructions which give the jurors the option to disregard portions of the evidence therefore constitute error which undermines the most fundamental underpinnings of the judicial process. (See *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734 [right to present evidence is meaningless if jury is not required to consider it]; cf., *People v. Williams* (2001) 25 Cal.4th 441, 457 [jury instructions may not permit juror nullification]; *People v. Cox* (1991) 53 Cal.3d 618, 696 [defendant as well as the prosecution has a right to the reasoned, dispassionate and considered judgment of the jury].)

Using the term "should" instead of "must" effectively tells the jurors that while it is recommended that they consider the defense evidence, it is not obligated to do so. In this case, appellant's mental impairments and his capacity to form the intent necessary to convict him of the crimes charged was a major issue at trial. Appellant presented evidence that at the time of the offenses at issue in this case he suffered from a serious affective disorder, which in turn made it impossible for him to form the intent necessary to commit first degree murder and other offenses. However, the instructions given regarding the evidence of appellant's mental illness were

defective because they informed the jury that consideration of this evidence was permissive rather than mandatory. For example, one of the instructions was a modified version of CALJIC No. 4.21.1, which stated in part:

> If the evidence shows that a defendant was mentally ill, or suffered from a mental disease or defect at the time of the alleged crime, you *should* consider that fact in determining whether or not such defendant had such mental state, in other words, whether he did in fact premeditate and deliberate.

(CT 1911; RT 5316; emphasis added.)

The jurors were further instructed:

> Evidence has been received regarding a mental disease, mental defect or mental disorder of the defendant Stephen Hajek at the time of the commission of the crime charged namely, murder and attempted murder in Counts 1, 2, 3, 4 and 5. You *may* consider such evidence solely for the purpose of determining whether the defendant Stephen Hajek actually formed the mental state [premeditated, deliberated] which is an element of the crime charged in counts 1, 2, 3, 4 and 5, to wit: murder and attempted murder.

(CT 1912; RT 5316-5317; emphasis added.)

The words "should" and "may" in the two instructions quoted above should have been "must." To assure the defendant's constitutional right to consideration of *all* the evidence, the jury should be instructed that it *must* consider evidence of mental disease or defect. (See, e.g., *Commonwealth v. Gould* (Mass. Sup. Ct. 1980) 405 N.E.2d 927, 935 [jury should be instructed to consider evidence of substantial mental impairment in determining degree of murder].) [105]

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[105] In the context of the defense of intoxication, see *State v. Ortiz* (Conn. Sup.Ct. 1991) 588 A.2d 127, 137-38 [jury properly instructed that it "*must*" consider evidence of intoxication on issue of specific intent. (Emphasis added.)]; see also *Commonwealth v. Perry* (Mass. Sup.Ct. 1982)

(continued...)

The federal constitutional rights to fair trial by jury and due process under the 6th and 14th Amendments require that the jury consider exculpatory evidence upon which the defendant relies. (See, e.g., *Rock v. Arkansas* (1987) 483 U.S. 44, 61 [State rule of evidence may not be used to exclude crucial defense evidence]; *Martin v. Ohio* (1987) 480 U.S. 228, 233 [instruction that jury could not consider self-defense evidence in determining whether there was a reasonable doubt about the State's case would violate *In re Winship* (1970) 397 U.S. 358]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302].)

Jury consideration of all the evidence is also required by the federal constitutional rights to due process, trial by jury, compulsory process, confrontation and right to present a defense as set forth in the 6th and 14th Amendments. (See, e.g., *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Chambers v. Mississippi, supra,* 410 U.S. at p. 302; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Gilmore v. Taylor* (1993) 508 U.S. 333.) The United States Constitution requires that criminal defendants be afforded "a meaningful opportunity to present a complete defense." (*California v. Trombetta, supra*; *Chia v. Cambra* (9th Cir.2004) 360 F.3d 997, 1003.) This guarantee arises from the Confrontation Clause and the Due Process Clause of the U.S. Constitution. (See *United States v. Lopez-Alvarez* (9th Cir. 1992) 970 F.2d 583, 588.) A criminal defendant has the right to jury consideration of any competent evidence offered in his or her defense, and our traditional notions of fair play require no less.

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[105](...continued)
433 N.E.2d 446, 453 [jury should be instructed to consider evidence of intoxication in determining degree of criminal culpability].)

(*McMillan v. Pennsylvania* (1986) 477 U.S. 79, 85.) [106]

The foregoing rights are violated by jury instructions which permit the jurors to convict the defendant without having considered all of the evidence. (See *Conde v. Henry, supra,* 198 F.3d at pp. 739-742; *People v. Cox, supra*, 53 Cal.3d at p. 696; *Giles v. State* (Ark. Sup.Ct. 1977) 549 S.W.2d 479, 484-485, overruled on other grounds *Grillot v. Arkansas* (Ark. Sup.Ct. 2003) 107 S.W.3d 136 [it was misconduct for jurors to arbitrarily and completely disregard mitigating evidence of defendant's severe cognitive impairment due to organic brain syndrome]; *Duckworth v. State* (Ark.Sup.Ct. 1907) 103 S.W. 601, 602 [relevant and competent testimony in a criminal case should not be arbitrarily disregarded by the jury]; *People v. Sumner* (Ill. Ct. App. 1982) 437 N.E.2d 786, 788 [jury must consider all of the evidence; trier of fact cannot simply ignore exculpatory evidence].)

Further, because the error arbitrarily denied appellant of his state-created rights under the California Constitution (Art I., sections 1, 7, 15, 16 and 17), it violated his right to due process under the 14th Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App. 4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Additionally, the state law errors discussed in the present argument and throughout this brief cumulatively produced a trial which was

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[106] "[T]he thing that we purport to care about in guaranteeing the right to trial by jury [is] providing for the kind of decisionmaker who is most likely to listen to, actually hear, and be open to full and separate consideration of, each and every item of evidence an accused may offer in support of his or her case." (Katherine Goldwasser, *Vindicating the Right to Trial By Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*(1998) 86 Geo. L. J. 621, 639.)

fundamentally unfair and violated the Due Process Clause of the 14th Amendment to the United States Constitution. (See *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

Because of the permissive language in the two instructions, quoted above, regarding the evidence of appellant's mental disease, the jury was allowed to disregard crucial portions of the evidence in violation of the above-described constitutional principles.

Moreover, because the error violated appellant's federal constitutional rights, the judgment should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility the error could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24; see also *In re Rodriguez* (1987) 119 Cal.App.3d 457, 469-70 [*Chapman* standard applied to combined impact of state and federal constitutional errors]; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [same].)

In this case, there was substantial evidence that appellant did not have the mental capacity to form the intent necessary to convict him of first degree murder, the special circumstances as well as the other crimes charged. Therefore, the prosecution cannot meet its burden to prove beyond a reasonable doubt that there is no reasonable likelihood that these two erroneous instructions affected the verdicts. The judgment should be reversed under the standard articulated in the *Chapman* decision, *supra*, the federal harmless-error standard.

Finally, even if the error were not prejudicial as to guilt determinations, it was prejudicial as to penalty, under both the state and federal standards of prejudice, because it undermined the mitigating theory

of lingering doubt. Reversal of appellant's corrections and death sentence are required.

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XXI.

THE INSTRUCTIONS IN THIS CASE IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

A. The Constitutional Requirements

Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia*, *supra*, 433 U.S. at p. 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra*, 397 U.S. at p. 363) and is at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial judge in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

B. The Instructions on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt (CALJIC Nos. 2.90, 2.02, 8.83, and 8.83.1)

The jury was instructed that "a criminal defendant in a criminal action was presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (CT 1978; RT 3002.) These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC No. 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(CT 1978; RT 3002.)

The terms "moral evidence" and "moral certainty" as used in the reasonable doubt instruction are not commonly understood terms. While this same reasonable doubt instruction, standing alone, has been found to be constitutional (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 13-17), in combination with the other instructions, it was reasonably likely to have led the jury in this case to convict appellant on proof less than beyond a reasonable doubt in violation of his Fourteenth Amendment right to due process.

The jury was given three interrelated instructions – CALJIC Nos. 2.02,[107] 8.83, and 8.83.1 (CT 2035; RT 5321) – that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. (CT 1971; RT 5305-3506 [sufficiency of circumstantial evidence to prove specific intent or mental state]; CT 2034; RT 5320-5321 [special circumstances – sufficiency of circumstantial evidence]; CT 2035; RT 5321 [special circumstances – sufficiency of circumstantial evidence to prove required mental state].) These instructions, addressing different evidentiary issues in almost identical terms, advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (CT 1971, 2034, 2035; RT 5305-5306, 5320-5321.) These instructions informed the jurors that if appellant *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt.

This thrice repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th, & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17); see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

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[107]While a written version of CALJIC No. 2.01, another instruction concerning the sufficiency of circumstantial evidence, appears in the Clerk's Transcript (CT 1971), it apparently was not given orally because it does not appear in the Reporter's Transcript.

First, these instructions not only allowed, but compelled, the jury to find appellant guilty on all counts and to find the special circumstances to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship, supra*, 397 U.S. at p. 364.) The instructions directed the jury to find appellant guilty and the special circumstances true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia, supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana, supra*, 508 U.S. at p. 78 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty," emphasis added].) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions in this case were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314, emphasis added, fn. omitted.)

Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, all three instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." (CT 1971; RT 5305-3506, emphasis added; see also CT 2034; RT 5320-5321; CT 2035; RT 5321.) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. *A fortiori*, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The constitutional defects in the circumstantial evidence instructions were likely to have affected the jury's deliberations. First, they allowed the jurors to accept one or more of the prosecution's theories about the first degree murder and the special circumstances simply because the theory (or theories) was "reasonable" even though the evidence might not be sufficient. The circumstantial evidence instructions, therefore, permitted and indeed encouraged the jury to convict appellant of first degree murder and to find the two special circumstance allegations true upon a finding that the prosecution's theory was reasonable, rather than upon proof beyond a reasonable doubt.

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced appellant in another way – by requiring that he prove his defense was reasonable before the jury could deem it credible. Of course, "[t]he accused has no burden of proof or persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.) The instructions, however, undercut the defense by requiring that appellant prove that his mental state defense was reasonable rather than requiring that the prosecution meet its reasonable doubt burden.

For all these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant guilty on a standard that is less than constitutionally required.

C. Other Instructions Also Vitiated The Reasonable Doubt Standard (CALJIC Nos. 1.00, 2.21.1, 2.21.2, 2.22, 2.27, 2.51 And 2.52)

The trial court gave seven other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 1.00, regarding the respective duties of the judge and jury (CT 1836-1837; RT 2995); CALJIC No. 2.21.1, regarding discrepancies in testimony (CT 1845; RT 2999); CALJIC No. 2.21.2, regarding willfully false witnesses (CT 1846; RT 2999-3000); CALJIC No. 2.22, regarding weighing conflicting testimony (CT 1847; RT 3000); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (CT 1977; RT 5292); CALJIC No. 2.51, regarding motive (CT 1942; RT

5336);[108] and CALJIC No. 2.52 regarding flight (CT 2068; RT 5336-5337).[109] Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, supra, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)

As a preliminary matter, several instructions violated appellant's constitutional rights as enumerated at the beginning of this argument by misinforming the jurors that their duty was to decide whether appellant was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. For example, CALJIC No. 1.00 told the jury that pity or prejudice for or against the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." (CT 1836-1837; RT 2995.) CALJIC No. 2.51, regarding motive, informed the jury that the presence of motive "may tend to establish guilt," while the absence of motive "may tend to establish innocence." (CT 1942; RT 5336.) CALJIC No. 2.52, regarding flight, further framed the issue before the jury as "deciding the question of his guilt or innocence." (CT 2068; RT 5336-5337.)

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[108]In Argument XVIII *ante*, appellant demonstrates that this instruction unconstitutionally permitted the jury to find him guilty on the basis of motive alone.

These instructions diminished the State's burden by erroneously telling the jurors they were to decide between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt. They encouraged jurors to find appellant guilty because he had not proven that he was "innocent."[110]

Similarly, CALJIC Nos. 2.21.1 and 2.21.2 lessened the prosecution's burden of proof. CALJIC No. 2.21.2 authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (CT 1847; RT 3000, emphasis added.) This instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].) [111] The essential mandate of *Winship* and its

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[110]As one court has stated:

> We recognize the semantic difference and appreciate the defense argument. We might even speculate that the i nstruction will be cleaned up eventually by the CALJIC committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect *standing alone.*

(*People v. Han* (2000) 78 Cal.App.4th 797, 809, emphasis in the original.)

The *Han* decision concluded there was no harm because the other standard instructions, particularly CALJIC No. 2.90, made the law on the point clear enough. (*Ibid.*, citing *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739.) The same is not true in this case.

[111]The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on

(continued...)

progeny – that each specific fact necessary to establish the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(CT 1847; RT 3000.)

This instruction informed the jurors that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence

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[111](...continued)
evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." As with CALJIC No. 2.21.2 discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (CT 1977; RT 5292), also was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." However, CALJIC No. 2.27, by telling the jurors that "testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact" and that "[y]ou should carefully review all the evidence upon which the proof of such fact exists" – without qualifying this language to apply only to *prosecution* witnesses – permitted reasonable jurors to conclude that (1) appellant had the burden of convincing them that the homicide was not a felony murder or a premeditated and deliberate murder and (2) that this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.)

The above-quoted observation from the *Turner* decision does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this

Court should find the instruction unconstitutional as it violates the Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction upon a lesser showing – that he or she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights enumerated in the beginning section of this argument.

D. The Court Should Reconsider its Prior Rulings Upholding the Defective Instructions

Although each one of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See, e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC Nos. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].) [112] While recognizing the shortcomings of some of the

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[112]Although this Court has not specifically addressed the implications of the constitutional error contained in CALJIC Nos. 2.22 and 2.51, the courts of (continued...)

instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the U.S. Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally

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[112](...continued)
appeal have echoed the pronouncements by this Court on related instructions. (See *People v. Salas*, *supra*, 51 Cal.App.3d at pp. 155-157 [challenge to former version of CALJIC No. 2.22 "would have considerable weight if this instruction stood alone," but the trial court properly gave CALJIC No. 2.90]; *People v. Estep*, *supra*, 42 Cal.App.4th at pp. 738-739, citing *People v. Wilson* (1992) 3 Cal.4th 926, 943 [CALJIC No. 2.51 had to be viewed in the context of the entire charge, particularly the language of the reasonable doubt standard set out in CALJIC No. 2.90].)

infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Moreover, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[113] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. The jurors in this case heard seven separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: the oft-criticized and confusing language of Penal Code Section

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[113]A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

1096 as set out in former CALJIC No. 2.90.[114] This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson*, *supra*, 3 Cal.4th at p. 943, citations omitted.) Under this principle, it cannot seriously be maintained that a single, quite imperfect instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

E. Reversal is Required

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) Here, that showing cannot be made. The questions of guilt of first degree murder and the truth of the two special circumstances were so demonstrably close (assuming arguendo that

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[114]As this Court has noted, the statutory language – with its references to "moral evidence" and "moral certainty" – is problematic. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503.) In combination with the instructions discussed in this argument, it is reasonably likely that CALJIC No. 2.90 allowed the jurors to convict appellant on proof less than beyond a reasonable doubt in violation of his right to due process. (*In re Winship*, *supra*, 397 U.S. 358.)

there even was legally sufficient evidence to support the verdicts on these charges) that the dilution of the reasonable doubt requirement by the guilt phase instructions, particularly when considered cumulatively with the other instructional errors set forth in Arguments and , must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra,* 33 Cal.3d at p. 505.)

Accordingly, the judgment on count 1 and the true findings for the two special circumstances must be reversed.

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XXII.

THE TRIAL JUDGE ERRED IN FAILING TO INSTRUCT THE JURY THAT IT WAS REQUIRED TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY MURDER BEFORE FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

The trial judge instructed the jury on first degree premeditated murder (CALJIC No. 8.20; CT 2017-2018; RT 5311-5312) and on first degree felony murder predicated on burglary. (CALJIC No. 8.21; CT 2019; RT 5312-5313.)[115] The trial judge also instructed that if the jurors found that appellant had committed an unlawful killing, in order to convict him, they had to agree unanimously on whether he was guilty of first degree murder or second degree murder. (CALJIC No. 8.74; CT 2027; RT 5315-5316.) The trial judge failed, however, to instruct the jurors that they must agree unanimously on a theory of first degree murder in order to find appellant guilty of that charge. This error denied appellant's right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Appellant acknowledges that this Court has rejected the claim that the jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a

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[115]The trial judge also instructed the jury on first degree torture murder (CT 2020; RT 5313-5314) and first degree lying-in-wait murder (CT 2021; RT 5314).

premeditated murder or a felony murder. (See, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at pp. 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 394-395.) However, this conclusion should be reconsidered, particularly in light of recent decisions of the United States Supreme Court.

This Court consistently has held that the elements of first degree premeditated murder and first degree felony murder are not the same. In the watershed case of *People v. Dillon* (1983) 34 Cal.3d 441, this Court acknowledged first that "[i]n every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime. [Citations.]" (*Id.* at p. 475 .) The Court next declared that "in this state the two kinds of murder [felony murder and malice murder] are not the 'same' crimes and malice is not an element of felony murder." (*Id.* at p. 476, fn. 23; see also *id.* at pp. 476-477.) [116]

In subsequent cases, this Court retreated from the conclusion that felony murder and premeditated murder are not the same crime (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 712, holding that "[f]elony murder and premeditated murder are not distinct crimes"), but it has continued to hold that the elements of those crimes are not the same. Thus, in *People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, this Court explained that the language from footnote 23 of *People v. Dillon*, *supra*, 34 Cal.3d at p. 476, quoted above, "meant that the elements of the two types of murder

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[116]"It follows from the foregoing analysis that the two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. . . . [This is a] profound legal difference . . . ." (*People v. Dillon*, *supra*, 34 Cal.3d at pp. 476-477, fn. omitted.)

are not the same." Similarly, the Court has declared that "the elements of the two kinds of murder differ" (*People v. Silva*, *supra*, 25 Cal.4th at p. 367) and that "the two forms of murder [premeditated murder and felony murder] have different elements" (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1131.)

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.) Examination of the elements of the crimes at issue is the method used both to determine whether crimes that carry the same title in reality are different and distinct offenses (see *People v. Henderson* (1963) 60 Cal.2d 482, 502-503 (dis. opn. of Schauer, J.)) and to determine to which facts the constitutional requirements of trial by jury and proof beyond a reasonable doubt apply. (See *Jones v. United States* (1999) 526 U.S. 227, 232.) Both of those determinations are relevant to the issue of whether the jury must find those facts by a unanimous verdict.

Comparison of the elements of the crimes at issue is the traditional method used by the United States Supreme Court to determine if those are different or the same. The question first arose as an issue of statutory construction in *Blockberger v. United States* (1932) 284 U.S. 299, when the defendant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections described different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact that the other does not. (*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockberger* was elevated to

a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment (*United States v. Dixon* (1993) 509 U.S. 688, 696-697); the Sixth Amendment right to counsel (*Texas v. Cobb* (2001) 532 U.S. 162, 173); the Sixth Amendment right to trial by jury, and the Fifth and Fourteenth Amendment right to proof beyond a reasonable doubt. (*Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.);[117] see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 (lead opn. of Scalia, J.).)[118]

Malice murder and felony murder are defined by separate statutes and "each . . . requires proof of an additional fact that the other does not." (*Blockberger v. United States*, *supra*, 284 U.S. at p. 304.) Malice murder requires proof of malice and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony murder does not. Rather, felony murder requires the commission or the attempted commission of a felony listed in Penal Code section 189 as well as the specific intent to commit that felony; malice murder does not. (Pen. Code,

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[117]"The fundamental distinction between facts that are elements of a criminal offense and facts that go only to the sentence provides the foundation for our entire double jeopardy jurisprudence – including the 'same elements' test for determining whether two 'offence[s]' are 'the same,' see *Blockberger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and the rule (at issue here) that the Clause [regarding double jeopardy] protects an expectation of finality with respect to offences but not sentences. The same distinction also delimits the boundaries of other important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt." (*Monge v. California*, *supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.).)

[118]The Fifth Amendment guarantee against double jeopardy, like other fundamental trial protections secured by the Bill of Rights, is enforceable against the States through the Due Process Clause of the Fourteenth Amendment. (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717.)

§§ 187 & 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.)

Therefore, it is incongruous to say, as this Court did in *People v. Carpenter*, *supra*, 15 Cal.4th 312, that the language in *People v. Dillon*, *supra*, 34 Cal.3d 441, on which appellant relies "*only* meant that the *elements* of the two types of murder are not the same." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, first italics added.) If the elements of malice murder and felony murder are different, as *Carpenter* acknowledges they are, malice murder and felony murder are perforce different crimes. (*United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

Examination of the elements of a crime also is the method used to determine which facts must be proved to a jury beyond a reasonable doubt. (*Monge v. California*, *supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.); see *People v. Sakarias* (2000) 22 Cal.4th 596, 623.) Moreover, the right to trial by jury attaches even to facts that are not "elements" in the traditional sense if a finding that those facts are true will increase the maximum sentence that can be imposed. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 476.)

When the right to jury trial applies, the jury's verdict must be unanimous. The right to a unanimous verdict in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163 & 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693) and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

Because this is a capital case, the right to a unanimous verdict also is guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See *Schad v. Arizona* (1991) 501 U.S. 624, 630-631 (plur. opn.) [leaving this question open].) The purpose of the unanimity requirement is to insure the accuracy and reliability of the verdict (*Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352), and there is a heightened need for reliability in the procedures leading to the conviction of a capital offense. (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.) Jury unanimity is therefore required in capital cases.

This conclusion cannot be avoided by simply re-characterizing premeditation and the facts necessary to invoke the felony-murder rule as "theories" rather than "elements" of first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 160, citing *Schad v. Arizona*, *supra*, 501 U.S. 624.) First, in contrast to the situation reviewed in *Schad*, where the Arizona courts had determined that "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element" (*Schad v. Arizona*, *supra*, 501 U.S. at p. 637), the California courts repeatedly have characterized premeditation as an element of first degree premeditated murder. (See, e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 899 [premeditation and deliberation are essential elements of premeditated first degree murder]; *People v. Gibson* (1895) 106 Cal. 458, 473-474 [premeditation and deliberation are necessary elements of first degree murder]; *People v. Albritton* (1998) 67 Cal.App.4th 647, 654, fn. 4 [malice and premeditation are the ordinary elements of first degree murder].) The specific intent to commit the underlying felony likewise has been characterized as an element of first degree felony murder.

(*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258; *id.* at p. 1268 (conc. opn. of Kennard, J.).)

Furthermore, this Court has recognized that the Legislature intended to make premeditation an element of first degree murder. In *People v. Stegner* (1976) 16 Cal.3d 539, the Court declared:

> We have held, "By conjoining the words 'willful, deliberate, and premeditated' in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require *as an element of such crime* substantially more reflection than may be involved in the mere formation of a specific intent to kill." [Citation.]

(*Id.* at p. 545, emphasis added, quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.)[119]

As the United States Supreme Court has explained, the *Schad* decision held only that jurors need not agree on the particular means used by the defendant to commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was established by the evidence that the defendant used a knife or by the evidence that he used a gun. (*Richardson v. United States*,

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[119]Specific intent to commit the underlying felony, the *mens rea* element of first degree felony murder, is not specifically mentioned in Penal Code section 189. However, ever since its decision in *People v. Coefield* (1951) 37 Cal.2d 865, 869, this Court has held that such intent is required (see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 346, and cases there cited; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), and that authoritative judicial construction "has become as much a part of the statute as if it had written by the Legislature." (*People v. Honig* (1996) 48 Cal.App.4th 289, 328; accord, *Winters v. New York* (1948) 333 U.S. 507, 514; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 839.) Moreover, Penal Code section 189 has been amended and reenacted several times in the interim, but none of the changes purported to delete the requirement of specific intent, and "[t]here is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, citations and internal quotation marks omitted.)

supra, 526 U.S. at p. 817.) This case involves the elements specified in the statute defining first degree murder (Pen. Code, § 189), not means or the "brute facts" which may be used at times to establish those elements.

Second, no matter how they are labeled, premeditation and the facts necessary to support a conviction for first degree felony murder are facts that operate as the functional equivalent of "elements" of the crime of first degree murder and, if found, increase the maximum sentence beyond the penalty that could be imposed on a conviction for second degree murder. (Pen. Code, §§ 189 & 190, subd. (a).) Therefore, they must be found by procedures which comply with the constitutional right to trial by jury (*Ring v. Arizona* (2002) 536 U.S. 584, 603-605; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 494-495), which, for the reasons previously stated, includes the right to a unanimous verdict.

Third, at least one indisputable "element" is involved. First degree premeditated murder does not differ from first degree felony murder only in that the former requires premeditation while the latter does not. The two crimes also differ because first degree premeditated murder requires malice, while felony murder does not. "'The mental state required [for first degree premeditated murder] is, of course, a deliberate and premeditated intent to kill with malice aforethought. (See . . . §§ 187, subd. (a), 189.)'" (*People v. Hart*, *supra*, 20 Cal.4th at p. 608; accord, *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Under any interpretation, malice is a true "element" of murder.

Accordingly, the trial court should have instructed the jury that it must agree unanimously on whether appellant had committed a premeditated murder or a felony murder. Because the jurors were not required to reach unanimous agreement on the elements of first degree

murder, there is no valid jury verdict in this case on which harmless error analysis can operate. The failure to instruct was a structural error; therefore, reversal of appellant's murder conviction is required. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.)

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XXIII.

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S PINPOINT MITIGATION INSTRUCTION

Appellant sought the following "pinpoint" instruction to guide the jury's consideration of mitigation evidence:

> Evidence has been produced regarding Stehen [sic] Hajek concerning the following: his history of disrupted foster and adoptive placements; emotional abuse inflicted upon him in foster and adoptive placements; his history and treatment of his mental illness with medication; his work history; his remorse for the effects of this crime on the victims; his stabilization, maturation and change since he has been incarcerated for this offense; his parents' love for him.
>
> Any or all of the above may be considered as factors in mitigation.
>
> In this phase of the case, you may consider sympathy, pity, mercy or compassion in determining the appropriate penalty. These may be considered by you as factors in mitigation.

(CT 2597.)

Citing *People v. Robbins,*[120] appellant's counsel argued that this "expanded" Penal Code section 190.3, subsection (k) instruction was necessary because:

> . . .it's important for the jury to hear directly from the court that in addition to just generally being able to consider anything which they feel has value in mitigation, that additionally, it should be specified in some type of way.

(RT 6347-6348.)

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[120] *People v. Robbins* (1988) 45 Cal.3d 867, 887.

The trial judge agreed to include the last part [121] of this proposed instruction as part of the CALJIC No. 8.84 instruction that he would deliver to the jury (CT 6348.) He did read this sentence (see footnote 2 *ante*); however, he did not add it to the written version of CALJIC No. 8.84 (CT 2642), as he had promised. (RT 6348.) The record shows that the jurors did use the written instructions during their penalty phase deliberations. (CT 2621.)

A. Refusing the Proposed Instruction Violated Substantial Constitutional Rights

The trial court refused a very important specially tailored instruction requested by the appellant, which would have addressed the important mitigation aspects of the penalty determination. A criminal defendant is entitled upon request to instructions which either relate the particular facts of his case to any legal issue or pinpoint the crux of his defense. (*People v. Saille* (1991) 54 Cal.3d 1103, 1119; *People v. Hall* (1980) 28 Cal.3d 143, 158-59; *People v. Sears* (1970) 2 Cal.3d 180, 190; see *Penry v. Johnson* (2001) 532 U.S. 782, 797.) The special instruction at issue in this case is not cumulative or argumentative, nor does it contain incorrect statements of law. (See *People v. Mickey* (1991) 54 Cal.3d 612, 697.) It was offered to address particular aspects of appellant's theory of the case and was thus appropriate. (See, e.g., *People v. Kraft* (2000) 23 Cal.4th 978, 1068; *People v. Andrian* (1982) 135 Cal. App.3d 335, 338.)

Moreover, this instruction was required so that the jury could consider adequately the mitigating evidence presented by appellant. A trial

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[121] This portion reads: "In this phase of the case, you may consider sympathy, pity, mercy or compassion in determining the appropriate penalty." (RT 6377.)

court is under an affirmative duty to give instructions on a defendant's theory of defense where it is obvious that the defendant is relying upon such a defense, or if there is substantial evidence to support the theory. (*People v. Stewart* (1976) 16 Cal.3d 133, 140.)

The trial court's refusal to give appellant's requested instruction violated his right to present a defense (U.S. Const., 8th & 14th Amends.; Cal. Const. art. 1, §§ 7 & 15; *Chambers v. Mississippi* (1973) 410 U.S. 284, his right to a fair and reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const. art. 1, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638), and his right to the presumption of innocence, the requirement of proof beyond a reasonable doubt, and a fair trial secured by due process of law. (U.S. Const., 14th Amend.; Cal. Const. art. 1, §§ 7 & 15; *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In addition, the errors violated appellant's right to trial by a properly instructed jury (U.S. Const., 6th & 14th Amends.; Cal. Const. art. 1, § 16; Carter v. Kentucky (1981) 450 U.S. 288, 302; *Duncan v. Louisiana* (1968) 391 U.S. 145) and violated federal due process by arbitrarily depriving him of his state right to the delivery of requested pinpoint instructions supported by the evidence. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1991) 997 F.2d 1295, 1300.)

Appellant acknowledges that this Court has often upheld the denials by trial courts of instructions, such as the one proposed by appellant, on the ground that they duplicated CALJIC No. 8.85, factor (k), and/or the definition of "mitigation" in CALJIC No. 8.88. (See, e.g., *People v. Stansbury* (1992) 4 Cal.4th 1066 [factor k is adequate]; *People v. Champion* (1995) 9 Cal.4th 879 [same]; *People v. Cunningham* (2001) 25 Cal.4th 926 [CALJIC No. 8.88 definition of "mitigation"adequate].) This Court's routine rejection of such instructions should be reconsidered, however, in light of the circumstances of appellant's case.

B. The Trial Court Erred in Refusing to Give Appellant's Proposed Instruction Which Pinpointed Appellant's Evidence

Appellant's requested instruction quoted *ante* was drafted to identify in detail for the jury all the mitigation evidence introduced by him at trial. As stated above, the defendant is entitled, upon request, to instructions which relate particular facts to a legal issue or pinpoint the crux of his defense. Pinpoint instructions "are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*People v. Saille, supra*, 54 Cal.3d at p. 1119.) Appellant requested the pinpoint instruction at issue here, and the trial court was obliged to deliver it. (*Ibid.*; see *People v. Webster* (1991) 54 Cal.3d 411, 443.) Even when the other instructions given are legally sufficient, the defendant is still entitled to an instruction, such as the one requested here, which plainly states his theory of defense. (See *People* v. *Castillo* (1997) 16 Cal.4th 1009, 1020-21 [conc. opn. of Brown, J].)

This point was forcefully stated in *People v. Cook* (1905) 148 Cal. 334, 347, where this Court declared:

> The court, however, refused the instruction, and its refusal is justified on the ground that another instruction framed by the judge on the same point was given. It is true that the instruction given stated the law correctly, but it was brief, general, and colorless in comparison with the instruction asked, and had the effect of minimizing the importance of a consideration which could not have been stated with too much emphasis.

Cook also found that two other instructions requested by the defendant should have been given because, although the instructions given on the same point were "entirely correct and proper," they "contained only an implication of the proposition which the defendant had a right to have stated to the jury in direct terms." (*Id.* at pp. 347-48.)

Here, appellant had the right to instruct the jury regarding illustrative examples of the types of evidence that could be considered as factors in mitigation beyond those specified by statute. The proposed instruction at issue here would have focused the jury's attention on particular theories of mitigation on which the defense was relying. It also clarified that the evidence appellant introduced could only be mitigating. The instruction therefore clarified and illustrated in a non-argumentative manner the application of the general principle to appellant's case. Had the instruction been given, it would have guarded against the possibility that the jury did not understand the breadth of the evidence which it could consider as mitigating. In prior opinions of this Court, similar language has been cited with approval as insuring that the jury fully understood the concept of mitigation. (See *People v. Hunter* (1989) 49 Cal.3d 957, 988.)

Appellant was also entitled to an instruction which told the jury that mitigating factors are unlimited, and includes anything about the defendant, or the defendant's background. (*People v. Robbins* (1988) 45 Cal.3d 867, 886 [approving an instruction detailing the kinds of mitigation the jury could consider]; see also *People v. Kelly* (1990) 51 Cal.3d 931, 969 fn.12 [same].) This instruction clarified, also in a non-argumentative manner, the scope of mitigation. It would have assured that the jury in this case understood the great breadth of mitigation evidence.

C. The Written Instruction Submitted to the Jury Omitted the Crucial Information About the Jury's Right to Consider Mercy in its Penalty Phase Deliberations

As noted previously, the trial judge agreed to include the following portion of appellant's proposed pinpoint mitigation instruction: "In this phase of the case, you may consider sympathy, pity, mercy or compassion in determining the appropriate penalty." While this sentence was included in the oral instructions to the jury (RT 6377), it was not included in the written

instruction, CALJIC No. 8.84. (CT 2642.)

In previous decisions, this Court has found that when the oral instructions differ from the written instructions given to the jurors, it is presumed that the jurors followed the written version of the instructions. (*People v. Crittenden* (1994) 9 Cal.4th 83, 138.) In *People v. Osband* (1996) 13 Cal.4th 622, 717, this Court observed: ". . . as long as the court provides the jury with the written instructions to take into the deliberation room, they govern in any conflict with those delivered orally."

Therefore, it must be presumed that the jurors in this case followed the written instructions which means that they did not know that they could consider mercy (and sympathy, pity and compassion) during their penalty phase deliberations.

This Court has acknowledged the role of mercy in the consideration of all mitigating evidence relevant to the jurors' determination of the appropriate sentence. In *People v. Lewis* (1990) 50 Cal.3d 262, 284, the Court advised that in death penalty cases trial courts "should allow evidence and argument on emotional albeit relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction."[122] This statement implicitly recognizes that mercy plays a legitimate role in a jury's decision not to impose the ultimate penalty. The United States Supreme Court has also acknowledged the role of mercy in death penalty systems which comply with federal constitutional requirements. The capacity to show mercy is personal to the jurors; it is their part of a "reasoned moral response" to mitigating evidence. (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328.)

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[122] See also *People* v. *Haskett* (1982) 30 Cal. 3d. 841, 864 [Trial courts "should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction."]

In this sense, mercy is a consideration which jurors superimpose over the balance of statutory factors in aggravation versus those in mitigation in order to determine whether death is an appropriate penalty notwithstanding the defendant's culpability in the commission of the murder and not withstanding what a jury thinks the defendant deserves. (See *People* v. *Lanphear* (1984) 36 Cal.3d 164, 169 [trial counsel's plea for "mercy" and "compassion" relevant only to whether death was an appropriate penalty for this individual notwithstanding his culpability in the commission of the murder].)

Without instructional guidance, however, there is a substantial likelihood in this case that the jury excluded any consideration of mercy – even when the concept was implicated by the evidence and arguments of counsel. The jury could have been misled into believing mitigating evidence relating to mercy must be ignored, which belief conflicts with a capital jury's "obligation to consider all of the mitigating evidence introduced by the defendant." (See *California v. Brown* (1987) 479 U.S. 538, 542-43, 546.)

D. The Errors Require Reversal

The requested instruction delineated above should have been given. The failure to give this instruction constitutes reversible error. This Court has routinely held that the pattern CALJIC instructions are sufficient. As regards appellant's request for an instruction pinpointing his mitigation evidence, it is patently not true that the pattern instructions were sufficient. Moreover, where the death penalty is involved, and there is a heightened need for reliability, accurately crafted instructions regarding mitigation should be given upon request to assure a constitutionally acceptable sentence. It remains the law that if the death penalty is to be imposed at all, jurors must be permitted to take into account all evidence the defense offers in support of his argument that death is not appropriate. (*Woodson v. North*

Carolina (1976) 428 U.S. 280, 304-305.) Moreover, this Court has also said that California has an independent interest in the reliability of its death penalty system. (*People v. Chadd* (1981) 28 Cal.3d 739, 751-753.)

The United States Supreme Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." (*Parker v. Dugger* (1991) 498 U.S. 308, 321.) This Court cannot say that it is certain, as it is required to do so, that the jury in fact considered all of appellant's evidence, when the only instruction given was a "one size fits all" mitigation instruction.

The trial court's refusal to give the requested instruction discussed above violated appellant's federal constitutional rights, and reversal is required unless the prosecution can establish beyond a reasonable doubt that the error was harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The state law prejudice standard for errors affecting the penalty phase of a capital trial is the "same in substance and effect" as the federal test for reversible error under *Chapman*. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965.) Under any standard of review, reversal is required. The case for death was far from overwhelming. The fact that the jury deliberated at the penalty phase over the course of five days demonstrates that fact. (CT 2618, 2622, 2626, 2627, 2666.)

Appellant presented in mitigation, including evidence that he was abandoned after birth by his mother. (RT 5741.) He was then placed in a loving foster home with a couple with whom he developed a strong bond, which was abruptly broken when a Florida social services agency precipitously wrested him from that placement. (RT 5741-5742.) After that traumatic removal, appellant was placed with a family who agreed to adopt him. (RT 4637-4378) Thereafter, when the mother gave birth to a son, that family rejected him. (RT 5758-5763, 5807.) Appellant was finally adopted by Bob and Linda Hajek when he was about two and a half years old. (RT

4638.)

Although the Hajeks provided a loving and caring home for appellant, the evidence presented at trial showed that he had been emotionally damaged by the troubling events of his first two and a half years of life. After the age of fifteen, appellant had some trouble with the law and, as a result, was seen for mental and emotional problems. (RT 4469-4470, 4477-4478.) His mental problems were significant enough that he received in-patient care. After being medicated with lithium, his behavior improved. (RT 4552.) Unfortunately, appellant stopped taking lithium and was not receiving medication at the time he entered the Wangs' house. Appellant was just 18 years old [123] when the murder occurred in this case.

All of this evidence was delineated in the pinpoint mitigation instruction. Had the jurors been properly instructed, there is a reasonable likelihood that they would have chosen a sentence of LWOP rather than death for appellant. Because there is a reasonable likelihood that the jury applied the penalty phase instructions in a way that prevented the consideration of constitutionally relevant evidence (*see Boyde* v. *California* (1990) 494 U.S. 370, 380), to uphold the instructions as given would "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) The prosecution cannot show that the error was harmless beyond a reasonable

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[123] In *Roper v. Simmons* (2005)__U.S.__125 S.Ct. 1183, the U.S. Supreme Court held that it was unconstitutional to execute defendants for crimes committed when they were under the age of 18. The Court reiterated: "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." (*Id.* at pp. 1190-1191, quoting from the plurality opinion in *Thompson v. Oklahoma* (1988) 487 U.S. 815, 835.) While the *Roper* decision does not prohibit the execution of appellant, its principles do apply to the mitigation case here as appellant was just 18 years old at the time of the murder.

doubt. "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Chapman v. California, supra*, 386 U.S. at p. 24.) Appellant's judgment of death must be reversed.

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XXIV.

THE TRIAL JUDGE DID NOT COMPLY WITH THE MANDATE OF PENAL CODE SECTION 190.9 THAT ALL PROCEEDINGS IN A CAPITAL CASE BE RECORDED BY A COURT REPORTER

Penal Code section 190.9[124] states in relevant part:

> In any case in which a death sentence may be imposed, all proceedings, conducted in the municipal and superior courts, including all conferences and proceedings, whether in open Court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present.

As the following discussion will show, the trial judge[125] allowed numerous proceedings in this case to be go forward without a court reporter present.

A. The Off-the-Record Proceedings

1. Preliminary Examination

The record in this case shows that the following proceedings were not recorded as required by section 190.9. On June 3, 1991, there were two off-the-record discussions. (CT 11.) On June 4, 1991, there were two off-the-record discussions. (CT 111, 155.) On June 5, 1991, there were three off-the-record discussions. (CT 166, 219.) On June 6, 1991, there were five off-the-record discussions and/or proceedings. (CT 282, 313, 334, 355, 364.) On June 7, 1991, there were five off-the-record discussions and/or proceedings. (CT 381, 414, 417, 438, 439.) On June 11, 1991, there was one off-the-record proceeding. (CT 571.) On June 12, 1991, the prosecutor played a tape-recorded police interview of one of his witnesses, but the

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[124]This is the relevant portion of § 190.9(a) as the statute existed during appellant's trial.

[125]There were several judges involved in this case because the preliminary examination occurred before a different judge than the trial judge.

court reporter did not record this tape or note which parts of the tape were played. (CT 668-671.) Also, on June 12, 1991, there were four off-the-record proceedings. (CT 672, 700, 701, 781.) On June 13, 1991, there were five off-the-record discussions and/or proceedings. (CT 803, 812-814, 816.) On June 17, 1991, there were two off-the-record proceedings. (RT 878, 911.)

2. The Guilt Phase

The record suggests that on December 16, 1994, there were several matters which were handled in the trial judge's chambers without a court reporter present. (RT 2-4.) On January 6, 1995, there was an off-the-record discussion about the jury selection process. (RT 29.) On February 7, 1995, there was an off-the-record bench conference. (RT 259; CT 1615-1616.) On February 23, 1995, there was an off-the-record bench conference. (RT 821.) On March 2, 1995, there was an off-the-record bench conference. (RT 1275.) On March 15, 1995, there was an off-the-record bench conference. (RT 2146.) On March 21, 1995, there was an off-the-record discussion about a stipulation. (RT 2385.) On March 29, 1995, there was an off-the-record discussion. (RT 2954.) On March 30, 1995, there was an off-the-record proceeding. (CT 1693.) On March 31, 1995, there was an off-the-record proceeding. (CT 1695.)

On April 13, 1995, the prosecutor played portions of a tape-recording of a conversation between the defendants. The court reporter did not record what was played nor does the record indicate which parts of the tape were played. (RT 3785-3786, 3816-3818; CT 1722-1723.) On April 17, 1995, there was an off-the-record bench conference. (RT 4013.) On April 26, 1995, there was an off-the-record proceeding. (RT 4520.) On May 1, 1995, there was an off-the-record proceeding. (RT 4945-4946.) On May 2, 1995, there was an off-the-record proceeding about a note from one of the jurors. (RT 5051.) On May 3, 1995, there was an off-the-record

proceeding. (RT 5110.)

On May 4, 1995, there was an off-the-record conference among counsel and the trial judge about the guilt phase jury instructions. (CT 1815.) On May 10, 1995, there was an off-the-record discussion about witnesses. (RT 5645.) On May 11, 1995, there was an off-the-record discussion among counsel and the trial judge about a jury request. (CT 1821.) On May 16, 1995, there was an off-the-record discussion among counsel and the trial judge about how to respond to a note from the jury. (CT 1826.) On May 17, 1995, there was another off-the-record discussion among counsel and the trial judge about responding to a note from the jury. (CT 1829-1830.) On May 18, 1995, there were two more off-the-record discussions among counsel and the trial judge about responding to notes from the jury. (CT 1831.)

3. The Penalty Phase

On May 25, 1995, there was an off-the-record conference among the counsel and the trial judge about the request by a juror to be released from the penalty phase. (RT 5698.) On June 7, 1995, there was an off-the-record discussion. (RT 5950.) On June 14, 1995, there was an off-the-record discussion among counsel and the trial judge about the penalty phase instructions. (CT 2614-2615.) On June 15, 1995, there was another off-the-record discussion among counsel and the trial judge about the penalty phase instructions. (CT 2617.)

On June 20, 1995, the prosecutor played portions of a tape-recording of a conversation between the two defendants. The court reporter did not record what was played nor does the record show which portions of the tape were played. (RT 6390-6391.) On June 22, 1995, there was an off-the-record discussion among counsel and the trial judge about a written request from the jury. (CT 2625.)

B. The Number of Unreported Proceedings in This Case as Well as the Crucial Nature of These Unreported Proceedings Require Reversal

The trial judge in this case did not comply with the clear dictates of section 190.9. As enumerated *ante*, the record in this case shows that there were at least thirty-one incidents of off-the-record proceedings during the preliminary examination. There were another twenty-seven during the guilt and penalty phases of the trial. More importantly, the latter involved some very crucial discussions. For example, neither of the conferences about jury instructions at both phases of the trial were reported. Similarly, there were six off-the-record conferences involving jury notes and requests.

In previous decisions, while this Court has refused to reverse judgments because the trial judge failed to comply with section 190.9, it also has acknowledged the mandatory nature of this statute. For example, in *People v. Freeman* (1995) 8 Cal.4th 450, the Court wrote:

> We emphasize the trial Court should meticulously comply with Penal Code section 190.9, and place all proceedings on the record. It can seem burdensome, as it apparently seemed to the Court and parties in this case, to discuss routine matters and conduct bench conferences on the record before a court reporter. But, in addition to assuring an adequate record for appellate review, . . . following that mandate can ultimately save much time and effort in preparing the appellate record. Here, two substantial record settlement proceedings in superior court were required, proceedings that would not have been necessary had Penal Code section 190.9 been followed. If the trial Court had taken the necessary care, and conducted everything on the record, substantial delay, expense, and squandering of judicial resources could have been avoided.

(*Id.* at p. 511)

This Court has refused, in effect, to enforce the provisions of Penal Code section 190.9. Instead of insisting that trial judges hew to the clear mandate of section 190.9, the Court has placed the burden on the criminal

defendant to establish on appeal that the trial court's failure to assure that all proceedings were recorded by a court reporter prejudiced the defendant. (See, e.g., *People v. Freeman, supra; People v. Scott* (1997) 15 Cal.4th 1188, 1203-1204.)

Appellant urges the Court to reconsider its position. Not only does it effectively eviscerate the statute, it also defies logic. In effect, this Court has ruled repeatedly that trial judges are free to violate the provisions of section 190.9 as long as the appellant is unable to identify specifically the prejudice caused by the failure to comply with the statute. In order to show prejudice, however, the appellant must be able to reconstruct what happened during each off-the-record proceeding. More often than not, such reconstruction -- at least *accurate and complete* reconstruction -- is impossible because memories fade with time, and capital trials are usually long and complicated. Indeed, these problems underlie the purpose of section 190.9. It is therefore both illogical and unfair to require appellant to show prejudice when it is the trial court which has made it virtually impossible to do so by failing to meet its obligations under section 190.9.

This case, where the record correction process did not begin until over five years after the conclusion of the trial, is not unusual. Despite many hours spent in informal discussion with trial counsel, appellant was not able to make any adequate reconstruction of off-the-record proceedings. This case is typical.

Appellant urges the Court to take a page from the jurisprudence of the Pennsylvania Supreme Court. That court has developed a reversible per se rule on the use of biblical references by prosecutors in jury arguments in death penalty. After many years of warning prosecutors not to use these references, the Pennsylvania Supreme Court finally instituted a per se rule:

> In the past we have narrowly tolerated references to the Bible and have characterized such references as on the limits

> of "oratorical flair" and have cautioned that such references are a dangerous practice which we strongly discourage. We now admonish all prosecutors that reliance in any manner upon the Bible or any other religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action.

(*Commonwealth v. Chambers* (Pa. 1992) 599 A.2d 630, 644 [citations omitted]; see also *Com. v. Brown* (Pa. 1998) 711 A.2d 444, 457.)

Appellant recognizes, of course, that the prosecutorial misconduct which was the focus of the rule articulated in the *Chambers* decision is very different from the issue of trial courts' routine failure to follow the requirements of section 190.9. Nevertheless, as long as this Court does not sanction the trial courts for not following the requirements of section 190.9, a cavalier disregard of the statute by trial judges likely will continue. If such an important proceeding as the conference on jury instructions, for example, need not be recorded and may simply be "summarized," then section 190.9 truly has no meaning.

Not only did the failure to conduct all proceedings in this capital case before a court reporter violate the mandate of section 190.9, it violated appellant's rights to due process and to a fair trial under the Fourteenth Amendment. It also violated his rights to a state-created liberty interest under *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346 and his Eighth Amendment right to a reliable death penalty adjudication. The U. S. Supreme Court has held that meaningful appellate review requires an adequate trial record. (See, e.g., *Rushen v. Spain* (1983) 464 U.S. 114, 118.) While it is true that this Court has held that the use of settled statements is a means of reconstructing missing trial records and meets the due process need for an adequate appellate record, the settled statements in this case do not meet this standard. First, there were many off-the-record proceeding. Second, there is no guarantee that the parties' memories of the unrecorded portions of the trial are accurate.

While appellant concedes that he cannot demonstrate specifically the prejudice he suffered as a result of the failure to comply with section 190.9, he asks this Court to take into account the resulting numerous gaps in the trial record when it assesses the cumulative effect of all of the errors that occurred at his trial. The cumulative error necessitates a reversal of appellant's convictions and judgment of death.

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XXV.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment right to be protected from the arbitrary and capricious imposition of capital punishment and also violates his Fourteenth Amendment right to equal protection of the law.

A. The Lack of Intercase Proportionality Review Violates the Eighth Amendment Protection Against the Arbitrary and Capricious Imposition of the Death Penalty

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* (1976) 428 U.S. 153, 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 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.).)[126] Comparative case review is the most rational – if not the only – effective means by which to ascertain

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[126]Appellant does not challenge the narrowing effect of California's special circumstances in this automatic appeal because that factual question depends on an empirical showing that must wait for a petition for writ of habeas corpus. (See Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1317-1318.)

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.[127]

The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Even assuming, for purpose 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.

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[127] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. (See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

(See *Tuilaepa v. California, supra*, 512 U.S. at pp. 986-988 (dis. opn. of Blackmun, J.) .)

California's death penalty scheme suffers from 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 in Arguments and through , which are incorporated here. 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 – including appellant – are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

B. The Lack of Intercase Proportionality Review Violates Appellant'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* (1998) 524 U.S. 721, 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 appellant's sentence, 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 undergirding *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 judge 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 p. 1287, italics 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. 41). "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 421 & 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 appellant, 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 violates appellant's Fourteenth Amendment right to equal protection and requires reversal of his death sentence.

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XXVI.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

The California death penalty statute, and the instructions given in this case, assign no burden of proof with regard to the jury's choice between the sentences of life without possibility of parole and death. They delineate no burden of proof with respect to either the preliminary findings that a jury must make before it may impose a death sentence or the ultimate sentencing decision. And neither the statute nor the instructions require jury unanimity as to the existence of aggravating factors. As shown below, these omissions in the California capital-sentencing scheme run afoul of the Sixth, Eighth, and Fourteenth Amendments.

A. The Statute and Instructions Unconstitutionally Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, That the Aggravating Factors Outweigh the Mitigating Factors, and That Death Is the Appropriate Penalty

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

jury's satisfaction pursuant to any delineated burden of proof.[128]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments. Although this Court has rejected similar claims (see, e.g. *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent* (1987) 43 Cal.3d 739, 773-774), the issue must be revisited in light of recent Supreme Court authority that creates significant doubt about the continuing vitality of California's current death penalty scheme.

With the issuance of three opinions within the past five years, *Jones v. United States* (1999) 526 U.S. 227, *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, the United States Supreme Court has dramatically altered the landscape of capital jurisprudence in this country in a manner that has profound implications for penalty phase instructions in California capital cases. As the Court has observed, "*in 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.'"" [Citations.]" (*Monge v. California, supra,* 524 U.S. at p. 732, italics added.)

Nevertheless, this Court has reasoned that, because the penalty phase determinations are "moral and ... not factual" functions, they are not "susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) As the above-quoted statement from *Monge* indicates, however, the Supreme Court contemplates the application of the

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[128]There are two exceptions to this lack of a burden of proof. The special circumstances (Pen. Code, § 190.2) and the aggravating factor of unadjudicated violent criminal activity (Pen. Code, § 190.3, subd. (b)) must be proved beyond a reasonable doubt. Appellant discusses the defects in Penal Code section 190.3, subdivision (b) in Argument .

reasonable doubt standard in the penalty phase of a capital case. It has made this point clear in the trilogy of cases that began with *Jones v. United States*, *supra*, 526 U.S. 227.

In *Jones*, the Court held that under the Due Process Clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment, any fact increasing the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. (*Jones v. United States*, *supra*, 526 U.S. at p. 243, fn. 6.) The *Jones* case involved a federal statute, but in *Apprendi v. New Jersey*, the Court extended to the states through the Fourteenth Amendment the holding of *Jones*, concluding:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range or penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

(*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490, quoting *Jones v. United States*, *supra*, 526 U.S. at pp. 252-253.)

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the

elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, where the jury determines guilt but has no participation in the sentencing proceedings, and concluded that the scheme violated the petitioner's Sixth Amendment right to a jury determination of the applicable aggravating circumstances. Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi*: "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense.

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.)[129] The Court observed: "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. We hold that the Sixth Amendment applies to both."(*Ibid.*)

Despite the holding in *Apprendi*, this Court stated that "*Apprendi* does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder." (*People v. Ochoa* (2001) 26 Cal.4th 398, 454.) The Court reasoned that "once a jury has determined the existence of a special circumstance, the defendant stands convicted of an offense whose maximum penalty is death." (*Ibid.*) After *Ring*, however, this holding is no longer tenable.

Read together, the *Jones-Apprendi-Ring* trilogy renders the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) As the Court stated, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Ibid.*) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the

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

court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (Pen. Code, § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense."(*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541 (dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494), and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia J.).) They thus trigger *Ring* and *Apprendi* and the requirement that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

The Court in *Ring* and *Apprendi* made an effort to remove the game of semantics from sentencing determinations. "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 v. Arizona*, *supra*, 536 U.S. at pp. 585-586.) Accordingly, whether California's weighing assessment is labeled an enhancement, eligibility determination, or balancing test, the reasoning in *Apprendi* and *Ring* require that this most critical "factual assessment" be

made beyond a reasonable doubt.[130]

In addition, California law requires the same result.[131] The reasonable doubt standard is routinely applied in this state in proceedings

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[130]It cannot be disputed that the jury's decision of whether aggravating circumstances are present, whether the aggravating circumstances outweigh mitigating circumstances, and whether death is the appropriate penalty are "assessment[s] of facts" for purposes of the constitutional rule announced in *Apprendi* and *Ring*. This Court has recognized that "penalty phase evidence may raise disputed factual issues." (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236.) The Court has also stated that the section 190.3 factors of California's death penalty law "direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on [the defendant's] moral culpability." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 595; see *Ford v. Strickland* (11th Cir. 1983) 696 F.2d 804, 818 ["the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard"].)

[131]The practice in other states also supports this conclusion. Twenty-six states require that any factors relied on to impose death in a penalty phase must be proved beyond a reasonable doubt, and three other states have related provisions. See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 18-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. 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); Mont. Code Ann., §§ 46-18-302(b)(B), 46-18-305; Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann. §, 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).

Moreover, in at least eight states in which the death penalty is permissible, capital juries are specifically instructed that a death verdict may not be returned unless the jury finds beyond a reasonable doubt that aggravation outweighs mitigation and/or that death is the appropriate penalty. (See Acker & Lanier, *Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes* (1995) 31 Crim. L. Bull. 19, 35-37, and fns. 71-76, and the citations therein regarding the pertinent statutes of Arkansas, Missouri, New Jersey, Ohio, Tennessee, and Washington.)

with less serious consequences than a capital penalty trial, including proceedings that deal only with a prison sentence. Indeed, even such comparatively minor matters as sentence enhancement allegations, e.g., that the defendant was armed during the commission of an offense, must be proved by the standard of beyond a reasonable doubt. (See CALJIC No. 17.15.)

The disparity of requiring a higher standard of proof for matters of less consequence while requiring no standard at all for aggravating circumstances that may result in a defendant's death violates equal protection and due process principles. (See, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421 ["A state should not be permitted to treat defendants differently ... unless it has 'some rational basis, announced with reasonable precision' for doing so."].) Accordingly, both the *Jones-Apprendi-Ring* trilogy and consistent application of California precedent require that the reasonable doubt standard be applied to all penalty phase determinations, including the ultimate determination of whether to impose a death sentence.

B. The Sixth, Eighth, and Fourteenth Amendments Require That the State Bear Some Burden of Persuasion at the Penalty Phase

In addition to failing impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues," (*People v. Superior Court (Mitchell)*, *supra*, 5 Cal.4th at p. 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant urges this Court to reconsider that ruling because it is

constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see Pen. Code, §190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan, supra*, 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code Section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[132]

A fact could not be established – i.e., a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 420, subd. (b) [existence of aggravating circumstances necessary for

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[132]Of course, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v. Washington* (1984) 466 U.S. 668, 686-87; *Bullington v. Missouri* (1981) 451 U.S. 430, 446.)

imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."].) As explained in the preceding argument, to provide greater protection to noncapital than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See e.g. *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst*, *supra*, 897 F.2d at p. 421.)

C. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution By Failing to Require Juror Unanimity on Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing Watkins's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v.*

Bacigalupo (1991) 1 Cal.4th 103, 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)[133]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[134]

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[133]The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

[134] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an

(continued...)

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1977) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra*, 524 U.S. at p. 732; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Gardner v. Florida* (1977) 430 U.S. 349, 359 (plur. opn. of White, J.); *Woodson v. North Carolina, supra*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating

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[134](...continued)
aggravating factor. (*People v. Prieto* (2003) 30 Cal.4th 226, 265.) Watkins, however, does not believe that the Court fully addressed the arguments raised therein. Further, appellant must raise this issue to preserve his rights to further review. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

factors true also stands in stark contrast to rules applicable in California to noncapital cases.[135] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158, subd. (a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), – and, since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions.

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[135]The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous."(21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann. § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).)

D. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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XXVII.

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The trial court's concluding instruction in this case, a modified version of CALJIC No. 8.88, read as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant.
>
> After having heard all the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.
>
> A mitigating circumstance is any fact, condition or event which, as such, does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever morale [*sic*] or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. . . .
>
> In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances

that it warrants death instead of life without parole.
(CT 2645-2646; RT 6379-6380.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles, and were misleading and vague in crucial respects. Whether considered singly or together, the flaws in these pivotal instructions violated appellant's fundamental rights to due process (U.S. Const., 14th Amend.), to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and to a reliable penalty determination (U.S. Const., 6th, 8th & 14th Amends.), and require reversal of his sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

A. The Instructions Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard That Failed to Provide Adequate Guidance and Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CT 2646; RT 6379.) The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright, supra,* 486 U.S. at pp. 361-362.) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless, and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held

invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.)

> In analyzing the word "substantial," the *Arnold* court concluded: Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.(224 S.E.2d at p. 392, fn. omitted.)[136]

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. Of course, *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant, and

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[136]The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 202.)

do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold, supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance which used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222.) Because the instruction rendered the penalty determination unreliable (U.S. Const., 8th & 14th Amends.), the death judgment must be reversed.

B. The Instructions Failed to Inform the Jurors That the Central Determination Is Whether the Death Penalty Is the Appropriate Punishment, Not Simply an Authorized Penalty, for Appellant

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, the instruction under CALJIC 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole," the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, inter alia, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]"

might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to a "justified and appropriate" penalty. (CT 2646; RT 6380 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is

justified and appropriate . . . ."].) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]."

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.) and denies due process (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346), and must be reversed.

C. The Instructions Failed to Inform the Jurors That if They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life Without the Possibility of Parole

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, § 190.3.) [137] The United States Supreme Court has held that this mandatory language is consistent with the individualized

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[137]The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17.)

consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language is not included in CALJIC No. 8.88, which only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

Reasonable jurors deliberating appellant's sentence might not have understood that if the mitigating circumstances outweighed the aggravating circumstances, they were required to return a verdict of life without possibility of parole. By failing to conform to the specific mandate of Penal Code section 190.3, the instructions given to appellant's jury violated the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281, emphasis in the original.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances

outweighed [the] mitigating." (*People v. Duncan, supra*, 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and Watkins respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955)133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[138]

People v. Moore (1954) 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

It is true that the ... instructions ... do not incorrectly state the

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[138]There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 (1963); *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

> law ..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id.* at pp. 526-527, internal quotation marks omitted.)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this

state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

D. The Instructions Failed to Inform the Jurors That Appellant Did Not Have to Persuade Them the Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643 ["Because the determination of penalty is essentially moral and normative ... there is no burden of proof or burden of persuasion."] That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, 727-728, rev'd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]

The state of Illinois, like California, does not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at p. 727.) Nonetheless, *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to apprise the jury that no such burden is imposed.

The instructions given in this case suffer from the same defect, with the result that capital juries in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

E. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88 failed to comply with the requirements of the due process clause of the Fourteenth Amendment and with the cruel and unusual punishment clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

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XXVIII.
THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3 AND THE APPLICATION OF THESE SENTENCING FACTORS RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

The jury was instructed on Penal Code section 190.3 pursuant to CALJIC No. 8.85, the standard instruction regarding the statutory factors that are to be considered in determining whether to impose a sentence of death or life without the possibility of parole (CT 2643-2644; RT 6378-6379) and pursuant to CALJIC No. 8.88, the standard instruction regarding the weighing of these aggravating and mitigating factors. (CT 2645-2646; RT 6379-6380.) These instructions, together with the application of these statutory sentencing factors, render appellant's death sentence unconstitutional.

First, the application of Penal Code section 190.3, subdivision (a) resulted in arbitrary and capricious imposition of the death penalty on appellant. Second, the failure to delete inapplicable sentencing factors violated appellant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. Third, the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty. Fourth, the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence. Fifth, the failure of the instruction to require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law. Finally, even

if the procedural safeguards addressed in this argument are not necessary to insure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. Because these essential safeguards were not applied to appellant's penalty trial, his death judgment must be reversed.

A. The Instruction on Penal Code Section 190.3, Subdivision (a) and Application of That Sentencing Factor Resulted in the Arbitrary and Capricious Imposition of the Death Penalty

Penal Code section 190.3, subdivision (a), permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." The jury in this case was instructed to consider and take into account "[t]he circumstances of the crimes of which the defendants were convicted in the present proceeding and the existence of any special circumstance found to be true." (CT 2643; RT 6378.) In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this section, concluding that – at least in the abstract – it had a "common sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.)

An analysis of how prosecutors actually use section 190.3, subdivision (a) shows that they have subverted the essence of the Court's judgment. In fact, the extraordinarily disparate use of the circumstances-of-the-crime factor shows beyond question that whatever "common sense core of meaning" it once may have had is long since gone. As applied, the California statute leads to the precise type of arbitrary and capricious decision making that the Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural

safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright, supra,* 486 U.S. at p. 362.)

As applied in California, however, section 190.3, subdivision (a), not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk. This can be seen upon examination of a cross-section of cases before this Court.

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 argued that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

- because the defendant struck many blows and inflicted multiple wounds,[139] or because the defendant killed with a single execution-style wound;[140]

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[139]See, e.g., *People v. Morales*, Cal. Sup. Ct. No. (hereinafter "No.") S004552, RT 3094-3095 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-2998 (same); *People v. Carrera*, No. S004569, RT 160-161 (same).

[140]See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-3027 (same).

- because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification),[141] or because the defendant killed the victim without any motive at all;[142]

- because the defendant killed the victim in cold blood,[143] or because the defendant killed the victim during a savage frenzy;[144]

- because the defendant engaged in a cover-up to conceal his crime,[145] or because the defendant did not engage in a cover-up and so must have been proud of it;[146]

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[141]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-969 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6760 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3543-3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[142]See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[143]See, e,g., *People v. Visciotti*, No. S004597, RT 3296-3297 (defendant killed in cold blood).

[144]See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy (trial court finding).

[145]See, e.g., *People v. Stewart*, No. S020803, RT 1741-1742 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[146]See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-3031 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

- because the defendant made the victim endure the terror of anticipating a violent death,[147] or because the defendant killed instantly without any warning;[148]

- because the victim had children,[149] or because the victim had not yet had a chance to have children;[150]

- because the victim struggled prior to death,[151] or because the victim did not struggle;[152]

- because the defendant had a prior relationship with the victim,[153] or because the victim was a complete stranger to the defendant.[154]

These examples show that although a plausible argument can be made that the circumstances-of-the-crime aggravating factor once may have had a "common sense core of meaning," that position can be maintained

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[147]See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11, 125; *People v. Hamilton*, No. S004363, RT 4623.

[148]See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[149]See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[150]See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

[151]See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[152]See, e.g., *People v. Fauber*, No. S005868, RT 5546-5547 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[153]See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-3067 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[154]See, e.g., *People v. Anderson*, No. S004385, RT 3168-3169 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

only by ignoring how the term actually is being used in California. In fact, prosecutors urge juries to find this aggravating factor and place it on death's side of 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 inevitably present in every homicide:

- **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;[155]

- **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;[156]
- **The motive for 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

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[155]See, e.g., *People v. Deere*, No. S004722, RT 155-156 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63 (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, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-4716 (victim was "elderly").

[156]See, e.g., *People v. Clair*, No. S004789, RT 2474-2475 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an axe); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-6787 (use of a club); *People v. Jackson*, No. S010723, RT 8075-8076 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all;[157]

- **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;[158]

- **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.[159]

The foregoing examples of how the factor (a) aggravating circumstance actually is being applied establish that it is used as an aggravating factor in every case, by every prosecutor, without any limitation whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors that they argue to the jury as factors weighing on

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[157]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-970 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-6761 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-2555 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[158]See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-2604 (late at night); *People v. Lucero*, No. S012568, RT 4125-4126 (middle of the day).

[159]See, e.g., *People v. Anderson*, No. S004385, RT 3167-3168 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-3711 (public bar); *People v. Ashmus*, No. S004723, RT 7340-7341 (city park); *People v. Carpenter*, No. S004654, RT 16,749-16,750 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

death's side of the scale.

In this case, the prosecutor emphasized the circumstances of the crime in his closing argument to the jury at penalty phase because he offered virtually no other aggravating evidence. He did call Ellen Wang to testify about the effect of her grandmother's murder on her family. The prosecutor argued that torture alone earned appellant and his co-defendant the death penalty. (RT 6387.) He further argued that since the defendants committed the murder because of a senseless argument, they deserved to be sentenced to death. (RT 6419.)

As this case illustrates, the 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*, *supra*, 486 U.S. at p. 363.) That this factor may have a "common sense core of meaning" in the abstract should not obscure what experience and reality both show. This factor is being used to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits. As a result, the California scheme is unconstitutional, and appellant's death sentence must be vacated.

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B. The Failure to Delete Inapplicable Sentencing Factors Violated Appellant's Constitutional Rights

Most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case.[160] However, the trial court did not delete those inapplicable factors from the instruction. Including these irrelevant factors in the statutory list introduced confusion, capriciousness, and unreliability into the capital decision-making process, in violation of appellant's rights under the Sixth, Eighth, and Fourteenth Amendments. Appellant recognizes that this Court has rejected similar contentions previously (see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), but he requests reconsideration for the reasons given below. In addition, appellant raises the issue to preserve it for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) However, the

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[160]Those inapplicable factors included: factor (b) ("the presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence"); factor (e) ("Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act"); factor (f) ("Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a morale [*sic*] justification or extenuation for his conduct"); factor (g) ("Whether or not the defendant acted under extreme duress or under the substantial domination of another person"); factor (h) ("Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect of the effects of intoxication"); and factor (j) ("Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor"). (See CT 797-798.)

"whether or not" formulation used in CALJIC No. 8.85 given in this case suggested that the jury could consider the inapplicable factors for or against appellant. Moreover, instructing the jury on irrelevant matters dilutes the jury's focus, distracts its attention from the task at hand, and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, failing to delete factors for which there was no evidence at all inevitably denigrated the mitigation evidence which was presented. The jury was effectively invited to sentence appellant to death because there was evidence in mitigation for "only" two or three factors, whereas there was either evidence in aggravation or no evidence at all with respect to all the rest.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an ad hoc determination on the legal question of relevancy and undermined the reliability of the sentencing process.

The inclusion of inapplicable factors also deprived appellant of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime. In addition, that error artificially inflated the weight of the aggravating factors and violated the Sixth, Eighth, and Fourteenth Amendment requirements of heightened reliability in the penalty determination. (*Ford v. Wainwright*, *supra*, 477 U.S. at pp. 411,

414; *Beck v. Alabama*, *supra*, 447 U.S. at p. 637.) Reversal of appellant's death judgment is required.

C. Failing to Instruct That Statutory Mitigating Factors Are Relevant Solely as Mitigators Precluded the Fair, Reliable, and Evenhanded Application of the Death Penalty

The trial judge in this case gave only one instruction which provided any guidance about which of the factors listed in CALJIC No. 8.88 should be treated either as mitigating or aggravating or as either. That instruction identified three factors that the jurors could consider either as mitigating or aggravating evidence:

> The following factors may be considered by you as either factors in aggravation or factors in mitigation:
>
> 1) The circumstances of the crime of which the defendant was convicted in the present proceeding, and the existence of any special circumstances found to be true;
>
> 2) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings;
>
> 3) The age of the defendant.
>
> It is for you to determine whether these factors exist, and if they do, whether they are aggravating or mitigating.
>
> The absence of a mitigating factor cannot be considered by you as an aggravating factor.

(CT 2648.)

Yet, as a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h) and (j) – was relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.)

Without guidance of which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating

circumstance, and was thus invited to aggravate appellant's sentence upon the basis of nonexistent and/or irrational aggravating factors, which precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.) Failing to provide appellant's jury with guidance on this point was reversible error.

D. Restrictive Adjectives Used in the List of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration of Mitigation

The inclusion in the list of potential mitigating factors read to the jury in this case of such adjectives as "extreme" (see factors (d) and (g); CT 2643; RT 6378), and "substantial" (see factor (g); CT 2643; RT 6378), acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

E. The Failure to Require The Jury to Base a Death Sentence on Written Findings Regarding the Aggravating Factors Violates Watkins's Constitutional Rights to Meaningful Appellate Review and Equal Protection of the Law.

The instructions given in this case under CALJIC No. 8.85 and No. 8.88 did not require the jury to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Because California juries

Gregg v. Georgia (1976) 428 U.S. 153, 195.) Because California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California, supra*, 512 U.S. at pp. 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 373 U.S. 293, 313-316.)

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland, supra*, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the state's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (See also *People v.*

Martin (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code, § 1170 swod. (c).) Under the Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan, supra*, 501 U.S. at p. 994.) Since providing more protection to noncapital than to capital defendants violates the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990)897 F.2d 417, 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes, supra*, 52 Cal.3d at p. 643), and "moral" (*People v. Hawthorne, supra*, 4 Cal.4th at p. 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to impose death.[161] California's failure to require such findings renders its

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[161]See Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; (continued...)

death penalty procedures unconstitutional.

F. Even if the Absence of the Previously Addressed Procedural Safeguards Does not Render California's Death Penalty Scheme Constitutionally inadequate to Ensure Reliable Capital Sentencing, Denying Them to Capital Defendants Like Watkins Violates Equal Protection.

As noted previously, the United States Supreme Court repeatedly has asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in fact finding. (See, e.g., *Monge v. California, supra*, 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. Chief Justice Wright wrote for a unanimous Court that "personal liberty is a fundamental interest, second only to life itself, as an interest

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[161](...continued)
Fla. Stat. Ann., § 921.141(3) (West 1985); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code art 27 § 413(i) (1992); Miss Code Ann., § 99-19-103 (1993); Mont. Code Ann., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann., § 630:5 (IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 41 Pa. Cons. Stat. Ann., § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "Aside from its prominent place in the Due Process Clause, the right to life is the basis of all other rights ... It encompasses, in a sense, 'the right to have rights' (*Trop v. Dulles*, 356 U.S. 86, 102 (1958) ...." (*Commonwealth v. O'Neal* (Mass. 1975.) 327 N.E.2d 662, 668.)

In the case of interests identified as "fundamental," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing that a compelling interest justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet that burden here. In the context of capital punishment, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification must be strict, and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not simply liberty, but life itself. The differences between capital defendants and noncapital felony defendants justify more, not fewer, procedural protections, in order to make death sentences more reliable.

In Argument XXV, section B, *supra*, appellant explained why the failure to provide intercase proportionality review violated his right to equal protection under the Fourteenth Amendment. He reasserts that argument here with regard to the denial of other safeguards such the requirement of written jury findings, and on other particular aggravating factors, and the

disparate treatment of capital defendants set forth in this Argument , and this argument. The procedural protections outlined in these arguments but denied capital defendants are especially important in insuring the need for reliable and accurate fact finding in death sentencing trials. (*Monge v. California* (1998) 524 U.S. 721, 731-732.) Withholding them on the basis that a death sentence is a reflection of community standards or any other ground is irrational and arbitrary and cannot withstand the close scrutiny that should apply when the most fundamental interest – life – is at stake.

G. Conclusion

For all the reasons set forth above, appellant's death sentence must be reversed.

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XXIX.

CALIFORNIA'S USE OF THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, THE EIGHTH AMENDMENT, AND LAGS BEHIND EVOLVING STANDARDS OF DECENCY

The Eighth Amendment "draw'[s] its meaning from evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) The "cruel and unusual punishment" prohibited under the Constitution is not limited to the "standards of decency" that existed at the time our Framers looked to the 18th century European nations as models. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn. of Stevens, J.).) Rather, just as the civilized nations of Europe have evolved, so must the "evolving standards of decency" set forth in the Eighth Amendment. With the exception of extraordinary crimes such as treason, the civilized nations of western Europe which served as models to our Framers have now abolished the death penalty.

In addition to the nations of Western Europe, Canada, Australia, and New Zealand have also abolished the death penalty. In 2004, five more nations (Bhutan, Greece, Samoa, Senegal, and Turkey) abandoned the death penalty. Indeed, since 1976 an average of three countries a year have abolished the death penalty. (Amnesty International, *The Death Penalty, Abolitionist and Retentionist Countries* (as of March 2005), Amnesty International webcite, [www.amnesty.org]; "Facts and Figures on the Death Penalty," Amnesty International, April 2005.) The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment, a blemish on a rapidly evolving standard of decency

moving to abolish capital punishment worldwide. (See *Ring v. Arizona* (2002) 536 U.S. 584, 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.) Indeed, in 2004, ninety-seven per cent of all known executions took place in China, Iran, Viet Nam and the United States. (*Ibid.*)

While most nations have abolished the death penalty in law or practice, this nation continues to be one of a handful of nations with the highest numbers of executions. The United States has executed more than 940 people since the death penalty was reinstated in 1976, and as of January 1, 2005, over 3,400 men and women were on death rows across the country. (Amnesty international, *About the Death Penalty,* Amnesty International webcite, *supra.*) As Dr. William F. Schulz, Executive Director of Amnesty International USA ("AIUSA") has said:

> Our report indicates that governments and citizens around the world have realized what the United States government refuses to admit - that the death penalty is an inhumane, antiquated form of punishment . . . Thomas Jefferson once wrote that 'laws and institutions must go hand in hand with the progress of the human mind;' it is past time for our government to live up to this Jeffersonian ideal and let go of the brutal practices of the past.

(April 5, 2005, AIUSA Press Release, "Amnesty International's Annual Death Penalty Report Finds Global Trend Toward Abolition.")[162]

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[162]Amnesty International has also called attention to instances in which U.S. citizens were sentenced to death for crimes they did not commit:

> The cases of Derrick Jamison and the other 118 individuals released from death row since 1973 demonstrate that no judicial system is infallible. However sophisticated the system, the death penalty will always carry with it the risk of lethal error . . .

(*Ibid*; in February 2005, Derrick Jamison became the 119th wrongfully

(continued...)

The continued use of capital punishment in California and the United States is therefore not in step with the evolving standards of decency which the Framers sought to emulate. As set forth above, nations in the Western world no longer accept the death penalty, and the Eighth Amendment prohibits jurisdictions in this nation from lagging so far behind our peer nations. (See, e.g., *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *see also Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) California's use of death as a regular punishment, as in this case, therefore violates the Eighth and Fourteenth Amendments. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky, supra*, 492 U.S. at pp. 389-390 [dis. opn. of Brennan, J.].)

Additionally, the California death penalty law violates specific provisions of international treaties. The Universal Declaration of Human Rights, adopted by this country via the United Nations General Assembly in December 1948, recognizes each person's right to life and categorically states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." According to Amnesty International, imposition of the death penalty violates the rights guaranteed by the UDHR. (Amnesty International, *International Law*, Amnesty International website, *supra*.)

Additional support for this position is also evident by the adoption of international and regional treaties providing for the abolition of the death

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[162](...continued)
convicted person to be released from death row on the grounds of innocence.)

penalty, including, inter alia, Article VII of the International Covenant of Civil and Political Rights ("ICCPR") which prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1990. Under Article VI of the federal Constitution, "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, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 439-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR.[163]

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes "cruel,

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[163] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. Some of these discussions include: Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate* (1993) 42 DePaul L. Rev. 1169; Posner & Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993* (1993) 42 DePaul L. Rev. 1209; Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights* (1993) 6 Harv. Hum. Rts. J. 59.

inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. For these same reasons, the death sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.

In the recent case of *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284, the Court of Appeals held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (But see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Once again, however, defendant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (*People v. Brown* (2004) 33 Cal.4th 382, 403; *People v. Ghent* (1987) 43 Cal.3d 739, 778-781; see also 43 Cal.3d at pp. 780-781 [conc. opn. of Mosk, J.]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero, supra,* 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 [dis. opn. of Norris, J.].)

Appellant requests that the Court reconsider and, in this context, find the death sentence violative of international law. (See *Smith v. Murray* (1986) 477 U.S. 527, 534 [holding that even issues settled under state law must be reraised to preserve the issue for federal habeas corpus review].) The death sentence in this case should be vacated.

XXX.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) [164] Reversal is required unless the State can prove beyond a doubt that the combined effect of all of the errors, constitutional and otherwise, was harmless. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

Aside from the insufficiency of the evidence, which requires a per se

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[164]Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.)

reversal, guilt phase errors in this case include, inter alia, the failure sever the trials of appellant and his co-defendant (Argument II), numerous evidentiary errors (Arguments IX through XII), and numerous instructional errors (Arguments XIII through XXI). The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting convictions a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant's convictions, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at p. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty

> trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137.)

See also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

The errors committed at the penalty phase of appellant's trial included, inter alia, the failure to give an important pinpoint instruction (Argument XXII), the failure to sever the penalty phase trial of appellant from that of his co-defendant (Argument II) and the admission of a highly unreliable and highly prejudicial tape-recording of a conversation between appellant and his co-defendant (Argument VIII). Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

XXXI.

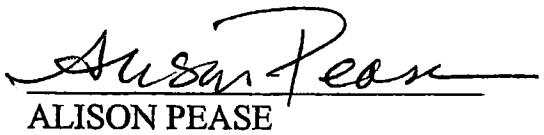
CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: June 20, 2005.

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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CERTIFICATION OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2)

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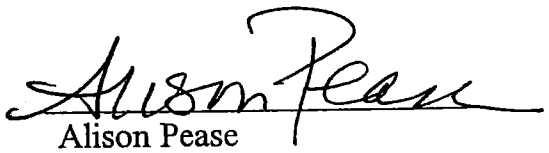

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Case Number: **Superior Court No. Crim. 148113**
Supreme Court No. S049626

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **June 20, 2005**, at Sacramento, California.

Saundra Alvarez

Saundra Alvarez