IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Appellee, vs. JOHN LEE CUNNINGHAM Defendant and Appellant.	No. S051342 SAN BERNARDINO COUNTY Sup. Ct. RCR 22225

Appeal from the Superior Court of San Bernardino County
The Honorable Michael A. Smith, Presiding

APPELLANT'S OPENING BRIEF

Brian A. Pori
California Bar No. 135920
INOCENTE, P.C.
204 Bryn Mawr NE
Albuquerque, New Mexico 87106
(505) 255-9088

Attorney for Appellant
John Lee Cunningham

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 6

STATEMENT OF APPEALABILITY 11

STATEMENT OF FACTS 11
GUILT PHASE EVIDENCE 11
A. The Killings of Wayne Sonke, David Smith and Jose Silva 12
B. The Investigation of John Lee Cunningham 13
C. The Arrest, Confessions and Re-Enactment 16
D. The Defense 21
E. The Verdict 22
PENALTY PHASE 22
A. The Prosecution Case 22
B. The Defense Case 24

ARGUMENT 33
THE GUILT PHASE 33
I. MR. CUNNINGHAM WAS PAINFULLY RESTRAINED AND IMPROPERLY SUBJECTED TO PRE-TRIAL PUNISHMENT WITHOUT AN ADEQUATE SHOWING OF MANIFEST NEED IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS. 38
A. Mr. Cunningham Was Unnecessarily Restrained In Violation of the State and Federal Constitutions. .. 40
1. There Was No Showing of a Manifest Need. 47
2. There Were Less Restrictive Alternatives to Shackling. 50
B. Mr. Cunningham Was Profoundly Prejudiced By the Improper Shackling. 49
1. The Improper Shackling Was Structural Error 56
2. The Error in Restraining Mr. Cunningham Was Not Harmless Beyond a Reasonable Doubt. 59
II. THE EXCESSIVE SHACKLING LED TO THE IMPROPER EXCLUSION OF MR. CUNNINGHAM FROM THE GUILT PHASE OF THE TRIAL. 62

A. Mr. Cunningham had a Constitutional and Statutory Right to Be Personally Present at the Guilt Phase of his Capital Murder Trial. 64
1. Mr. Cunningham Had a Constitutional Right to Be Personally Present at the Guilt Phase of his Capital Murder Trial. 66
2. Mr. Cunningham Was Obligated to Be Present At the Guilt Phase of His Capital Murder Trial Under Sections 977 and 1043. 70
B. Mr. Cunningham's Waiver of His Right to Be Present Was Involuntary and Ineffective. 73
1. The Waiver of Personal Presence Was Involuntarily Coerced by the Improper Shackling. 74
2. The Waiver of Mr. Cunningham's Personal Presence Did Not Comply With Section 977. 78
C. Mr. Cunningham Was Prejudiced By His Absence During the Guilt Phase. 81
1. Mr. Cunningham's Absence Was Structural Error. 82
2. Mr. Cunningham Was Prejudiced By His Absence. 85
III. THE WANTON INFLICTION OF PAIN LED TO AN INVOLUNTARY WAIVER OF MR. CUNNINGHAM'S RIGHT TO A JURY TRIAL DURING THE GUILT PHASE. 86
A. The Waiver of the Right to a Jury Trial Was Involuntary. 91
B. The Involuntary Waiver is Reversible. 95
IV. THE TRIAL COURT ERRED IN ACCEPTING THE FUNCTIONAL EQUIVALENT OF A GUILTY PLEA WITHOUT AN ADEQUATE ADVISEMENT OF THE CONSTITUTIONAL RIGHTS BEING WAIVED. 97
A. Mr. Cunningham was Convicted at a Bench Trial Which Was the Functional Equivalent of a Guilty Plea. 99
B. The Failure to Advise Mr. Cunningham of His Constitutional Rights Prior to the Submission of His Case Without any Defense is Reversible Because the Submission of the Case Was Not Voluntarily and

Intelligently Made. 108
V. THE COURT ERRED IN ADMITTING MR. CUNNINGHAM'S INVOLUNTARY CONFESSIONS WHICH WERE OBTAINED IN A DELIBERATE VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS. 111
A. Mr. Cunningham's Confessions Were Obtained After a Deliberate Violation of *Miranda v. Arizona*. 121
B. Mr. Cunningham's Custodial Statements Were Obtained After His Unambiguous Request for Counsel Was Ignored. 130
C. The Video taped Re-Enactment Was Obtained Only After Denying Mr. Cunningham Access to Counsel and Offering Improper Inducements. 137
1. The Video Tape Re-Enactment Was Obtained After Detectives Took Advantage of the Delay in the Appointment of Counsel. 138
2. The Video Taped Re-Enactment Was Obtained After Detectives Made Implied Promises of Leniency Which They Knew Would Coerce Mr. Cunningham's Agreement. 143
D. Mr. Cunningham's Custodial Statements Were Involuntary 147
1. Mr. Cunningham's Statements Were Obtained by Deception and the Implied Threat to Arrest a Close Friend. 152
2. During His Confession Mr. Cunningham Exhibited Bizarre and Irrational Behavior. 156
E. Mr. Cunningham was Prejudiced by the Erroneous Admission of His Confessions. 158
VI. THE CUMULATIVE EFFECT OF THE ASSERTED ERRORS AT THE GUILT PHASE OF THE TRIAL REQUIRES REVERSAL. 160
THE PENALTY PHASE 162
VII. THE TRIAL COURT ERRED IN DENYING THE MOTION TO QUASH THE JURY PANEL BASED ON THE SYSTEMATIC EXCLUSION OF HISPANICS. 163
A. The Jury Selection Procedures Systematically Excluded Jurors. 167

1. The Evidence Demonstrated the Systematic Exclusion of Hispanic-American Jurors. . . 173
2. The Trial Court Erred in Rejecting Population Estimates 184
B. The Systematic Exclusion of Hispanics is a Structural Error Which Requires Reversal. 189
VIII. THE TRIAL COURT ERRONEOUSLY EXCUSED A QUALIFIED JUROR FOR CAUSE WITHOUT VOIR DIRE BECAUSE THE JUROR EXPRESSED A SKEPTICISM OF THE DEATH PENALTY IN HIS JUROR QUESTIONNAIRE. 190
A. The Evidence Was Insufficient to Show that the Excused Juror's Views About the Death Penalty Would Have Impaired his Performance. 193
B. The Trial Court Erred in Excusing the Juror Without Conducting Any Voir Dire. 198
C. The Improper Removal of the Potential Juror Is Reversible *Per Se*. 202
IX. THE PROSECUTION IMPROPERLY EXERCISED ITS PEREMPTORY CHALLENGES TO STRIKE AFRICAN-AMERICANS FROM THE JURY PANEL. 204
A. The Trial Court Erred in Failing to Find a Prima Facie Case of Discrimination. 211
1. Standard of Review. 211
2. There Was a Strong Inference that the Prosecutor's Four Challenges to African-Americans Were Discriminatory. 213
i. An Inference of Discrimination Was Established by a Pattern of Disproportionate Peremptory Challenges Against Black Jurors215
ii. An Inference of Discrimination Was Present Because the Stricken Jurors Shared Only One Common Characteristic–Their Race. 218
B. The Trial Court Abdicated its Duty to Determine Whether the Prosecution Purposefully Discriminated Against Potential Jurors. 221
C. The Improper Removal of Potential Jurors Is Automatically Reversible. 227

X. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A CONTINUANCE TO AVOID CONDUCTING VOIR DIRE IN AN UNDULY PREJUDICIAL ATMOSPHERE. 228
A. The Trial Court Abused Its Discretion in Denying a Continuance. 231
B. Mr. Cunningham Was Entitled to a Continuance to Obtain a Fair and Impartial Jury. 233
XI. THE TRIAL COURT ERRED BY FAILING, *SUA SPONTE*, TO APPOINT A SECOND ATTORNEY FOR MR. CUNNINGHAM IN THIS CAPITAL CASE. 235
A. Mr. Cunningham Was Entitled to Two Attorneys. 235
B. Mr. Cunningham Was Prejudiced By the Failure to Appoint A Second Attorney *Sua Sponte*. 239
XII. THE TRIAL COURT ERRED IN FAILING TO EXCLUDE PHOTOGRAPHIC AND VIDEO TAPE EVIDENCE THAT WAS MORE PREJUDICIAL THAN PROBATIVE 241
A. The Challenged Photographs Should Have Been Excluded. 244
1. The Photographs and Crime Scene Video Tape Were Not Relevant. 245
2. The Photographs and Video Tape Were More Prejudicial than Probative. 247
B. Mr. Cunningham was Prejudiced by the Improper Admission of the Photographic Evidence. 249
XIII. THE TRIAL COURT ERRED IN FAILING TO DISCHARGE A JUROR WHO REPEATEDLY COMMITTED MISCONDUCT. 250
A. Mr. Cunningham Was Convicted by a Jury Which Included a Jury Member who Was Biased and Who Committed Misconduct. 256
B. Mr. Cunningham Was Prejudiced by the Juror Bias and Misconduct. 260
XIV. THE TRIAL COURT ERRED IN FAILING TO MODIFY THE DEATH SENTENCE BECAUSE THERE IS INSUFFICIENT EVIDENCE TO SHOW THAT AGGRAVATING FACTORS OUTWEIGHED MITIGATING FACTORS TO JUSTIFY A SENTENCE OF DEATH. 262

XV. A PENALTY OF DEATH IS DISPROPORTIONATE TO MR. CUNNINGHAM'S INDIVIDUAL CULPABILITY. 267
XVI. THE DEATH PENALTY STATUTE AS APPLIED IN MR. CUNNINGHAM'S TRIAL VIOLATES THE UNITED STATES CONSTITUTION 270
A. Mr. Cunningham's Death Sentence is Invalid because Penal Code section 190.2 is Impermissibly Broad. 273
B. Mr. Cunningham's Death Penalty is Invalid because Penal Code section 190.3(a), as applied, Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. . . 275
C. California's death penalty statute contains no safeguards to avoid arbitrary and capricious sentencing and deprived Mr. Cunningham of the right to a jury determination of each factual prerequisite to a sentence of death, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. 277
1. Mr. Cunningham's Death Verdict was not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury that One or More Aggravating Factors Existed and that These Factors Outweighed Mitigating Factors; his Constitutional Right to a Jury Determination Beyond a Reasonable Doubt of all Facts Essential to the Imposition of a death penalty was thereby Violated. 279
a. In the wake of *Ring* and *Cunningham*, Any Jury Finding Necessary to the Imposition of a Death Sentence Must be Found True Beyond a Reasonable Doubt. 285
b. The Requirements of Jury Agreement and Unanimity 291

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitutions Require that the Jury in a Capital Case be Instructed that they may Impose a Sentence of Death only if they are Persuaded Beyond a Reasonable Doubt that the Aggravating Factors Exist and Outweigh Mitigating Factors and that Death is the Appropriate Penalty. 295
a. Factual Determinations: 295
b. Imposition of Life or Death: 296
3. California law violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution by Failing to Require that the Jury base any Death Sentence on Written Findings Regarding Aggravating Evidence. 298
4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-Case Proportionality Review, thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Imposition of the Death Penalty. 301
5. The use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury. 303
6. The Failure to Instruct that Statutory Mitigating Factors were Relevant Solely as Potential mitigators Precluded a Fair, Reliable and Evenhanded Administration of the Capital Sanction. 303
D. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants which are Afforded to Non-Capital Defendants. . . 307

e. California's use of the Death Penalty as a Regular Form of Punishment falls short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty now Violates the Eighth and Fourteenth Amendments to the United States Constitution. . . 310

CONCLUSION 313

CERTIFICATE OF SERVICE 314

TABLE OF AUTHORITIES

State Cases

Bunnell v. Superior Court (1975) 13 Cal.3d 592 93-95

Clemens v. Regents of the University of California (1971) 20 Cal.App.3d 356 237

Conservatorship of Roulet (1979) 23 Cal.3d 219 273

Corona v. Superior Court (1972) 24 Cal.App.3d 872 215

Hovey v. Superior Court (1980) 28 Cal.3d 1 156

In re Hitchings (1993) 6 Cal.4th 97 183

In re Hamilton (1999) 20 Cal.4th 273 231

In re Rhymes (1985) 170 Cal.App.3d 1100 ..... 170, 172

In re Sturm (1974) 11 Cal.3d 258 275

In re Tahl (1969) 1 Cal.3d 122 ..... 92, 95

Lombardi v. California Street Railway Co. (1899) 124 Cal. 311 178

Martinez v. Superior Court (1981) 29 Cal.3d 574 217

People v. Adcox (1988) 47 Cal.3d 207 254

People v. Allen (1986) 42 Cal.3d 1222 264

People v. Allen (1999) 21 Cal.4th 424 102

People v. Allen (2004) 115 Cal.App.4th 542 210

People v. Alvarez (1996) 14 Cal.4th 155 228

People v. Anderson (1987) 43 Cal.3d 1104 230

State Cases (cont'd)

People v. Anderson (1992) 1 Cal.App.4th 318 87

People v. Anderson (2001) 25 Cal.4th 543 ..... 44, 157, 158, 166, 167, 264

People v. Ashmus (1991) 54 Cal.3d 932 ..... 179, 182, 183

People v. Ault (2004) 33 Cal.4th 1250 241

People v. Bacigalupo (1993) 6 Cal.4th 857 252

People v. Bell (1989) 49 Cal.3d 502 ..... 168, 196, 207

People v. Bernard (1994) 27 Cal.App.4th 458 197

People v. Bittaker (1989) 48 Cal.3d 1046 254

People v. Black (2005) 35 Cal.4th 1238 261

People v. Bolden (2002) 29 Cal.4th 515 258

People v. Bonilla (2007) 41 Cal.4th 313 ..... 193, 194, 196, 197, 207, 226

People v. Bonillas (1989) 48 Cal.3d 757 132

People v. Box (2000) 23 Cal.4th 1153 200

People v. Boyd (1985) 38 Cal.3d 765 281

People v. Boyer (2006) 38 Cal.4th 412 257

People v. Bradford (1997) 14 Cal.4th 1005 ..... 126, 139

People v. Bradford (1997) 15 Cal.4th 1229 ..... 62, 63

People v. Breaux (1991) 1 Cal.4th 281 172

People v. Brown (1988) 46 Cal.3d 432 150

State Cases (cont'd)

People v. Brown (Brown I) (1985) 40 Cal.3d 512 264

People v. Burgener (2003) 29 Cal.4th 833 ..... 169, 258

People v. Burnick (1975) 14 Cal.3d 306 273

People v. Cahill (1993) 5 Cal.4th 478 ..... 31, 77, 78, 148

People v. Cain (1995) 10 Cal.4th 1 181

People v. Carpenter (1997)15 Cal.4th 312 281

People v. Carter (2005) 36 Cal.4th 1114 ..... 226, 228, 230

People v. Clark (1993) 5 Cal.4th 950 ..... 181, 221

People v. Cleveland (2001) 25 Cal.4th 466 237

People v. Coffman (2004) 34 Cal.4th 1 125

People v. Coleman (1985) 38 Cal.3d 69 156

People v. Collins (2001) 26 Cal.4th 297 ..... 82, 86, 87, 89, 90

People v. Combs (2004) 34 Cal.4th 821 ..... 44, 45, 139, 257

People v. Cook (1982) 135 Cal.App.3d 785 131

People v. Cook (2006) 39 Cal.4th 566 95

People v. Cox (1991) 53 Cal.3d 618 95

People v. Crandell (1988) 46 Cal.3d 833 ..... 125, 214

People v. Crittenden (1994) 9 Cal.4th 83 ..... 225, 242

People v. Cummings (1993) 4 Cal.4th 1233 53

State Cases (cont'd)

People v. Currie (2001) 87 Cal.App.4th 225 157

People v. Daniels (1991) 52 Cal.3d 815 ..... 237, 238, 240

People v. Demetrulias (2006) 39 Cal.4th 1 ..... 119, 276

People v. DePriest (2007) 42 Cal.4th 1 ..... 132, 133, 138, 140, 242

People v. Dillon (1984) 34 Cal.3d 441 252

People v. Duran (1976) 16 Cal.3d 282 ..... 44, 47, 53

People v. Duran (1996) 50 Cal.App.4th 103 ..... 232, 240

People v. Dyer (1988) 45 Cal.3d 26 254

People v. Edelbacher (1989) 47 Cal.3d 983 ..... 251, 279

People v. Fairbank (1997) 16 Cal.4th 1223 ..... 263, 275

People v. Falsetta (1999) 21 Cal.4th 903 228

People v. Farnam (2002) 28 Cal.4th 107 ..... 143, 263

People v. Fauber (1992) 2 Cal.4th 792 275

People v. Feagley (1975) 14 Cal.3d 338 273

People v. Fields (1983) 35 Cal.3d 329 181

People v. Fierro (1991) 1 Cal.4th 173 279

People v. Fredericks (1895) 106 Cal. 554 179

People v. Garceau (1993) 6 Cal.4th 140 ..... 154, 228

People v. Ghent (1987) 43 Cal.3d 739 187

State Cases (cont'd)

People v. Gonzales (1990) 51 Cal.3d 1179 230

People v. Griffin (1988) 46 Cal.3d 1011 95

People v. Griffin (2004) 33 Cal.4th 536 132

People v. Guerra (2006) 37 Cal.4th 1067 ..... 118, 119, 127, 138, 143, 195

People v. Haley (2004) 34 Cal.4th 283 146

People v. Hall (1983) 35 Cal.3d 161 205

People v. Hamilton (1989) 48 Cal.3d 1142 279

People v. Hardy (1992) 2 Cal.4th 86 254

People v. Harrington (1871) 42 Cal.165 ..... 35, 37, 38

People v. Harris (1984) 36 Cal.3d 36 169

People v. Hawkins (1995) 10 Cal.4th 920 45

People v. Hawthorne (1992) 4 Cal.4th 43 ..... 263, 276

People v. Haydel (1974) 12 Cal.3d 190 142

People v. Heard (2003) 31 Cal.4th 946 230

People v. Hernandez (2003) 30 Cal.4th 835 266

People v. Hill (1998) 17 Cal.4th 800 ..... 150, 151

People v. Hillhouse (2002) 27 Cal.4th 469 252

People v. Hinton (2006) 38 Cal.4th 71 257

People v. Holt (1997) 15 Cal.4th 619 182

State Cases (cont'd)

People v. Horton (1995) 11 Cal.4th 1068 157

People v. Houston (2005) 130 Cal.App.4th 279 ..... 211, 215

People v. Howard (1992) 1 Cal.4th 1132 ..... 69, 157, 167, 195

People v. Huggins (2006) 38 Cal.4th 175 ..... 116, 133

People v. Huggins (2006) 38 Cal.4th 175 66

People v. Hughes (2002) 27 Cal.4th 287 133

People v. Jablonski (2006) 37 Cal.4th 774 ..... 119, 138, 225

People v. Jackson (1980) 28 Cal.3d 264 ..... 218, 220

People v. Jackson (1996) 13 Cal.4th 1164 ..... 66, 77, 209

People v. Jenkins (2000) 22 Cal.4th 900 ..... 53, 195

People v. Jenkins (2000) 29 Cal.4th 515 ..... 257, 258

People v. Jones (1998) 17 Cal.4th 279 237

People v. Kaurish (1990) 52 Cal.3d 648 180

People v. King (1969) 270 Cal.App.2d 817 132

People v. Lasko (2000) 23 Cal.4th 101 45

People v. Levy (1973) 8 Cal.3d 648 94

People v. Lewis (2001) 25 Cal.4th 610 179

People v. Lewis (2006) 39 Cal.4th 970 ..... 205, 206, 242

People v. Louis (1986) 42 Cal.3d 969 126

State Cases (cont'd)

People v. Majors (1998) 18 Cal.4th 385 66

People v. Mancheno (1982) 32 Cal.3d 855 104

People v. Marshall (1990) 50 Cal.3d 907 246

People v. Matlock (1959) 51 Cal.2d 682 143

People v. Medina (1995) 11 Cal.4th 694 271

People v. Memro (1995) 11 Cal.4th 786 243

People v. Mickey (1991) 54 Cal.3d 612 242

People v. Monterroso (2004) 34 Cal.4th 743 258

People v. Montiel (1994) 5 Cal.4th 877 281

People v. Montoya (2001) 86 Cal.App.4th 825 86

People v. Morrison (2004) 34 Cal.4th 698 ..... 280, 281

People v. Mosby (2004) 33 Cal.4th 353 92

People v. Motton (1985) 39 Cal.3d 596 200

People v. Neal (2003) 31 Cal.4th 63 .. 116, 119, 121, 126, 127, 136, 137, 139-142

People v. Nesler (1997) 16 Cal.4th 561 ..... 231, 232, 237, 240

People v. Nicolaus (1991) 54 Cal.3d 551 254

People v. Olivas (1976) 17 Cal.3d 236 283

People v. Ortiz (1990) 51 Cal.3d 975 217

People v. O'Bryan (1913) 165 Cal. 55 31

State Cases (cont'd)

People v. Panah (2005) 35 Cal.4th 395 ..... 213, 214

People v. Parker (1965) 235 Cal.App.2d 100 ..... 213, 214

People v. Perry (2006) 38 Cal.4th 302 ..... 75, 76

People v. Pollock (2004) 32 Cal.4th 1153 226

People v. Pompa-Ortiz (1980) 27 Cal.3d 519 214

People v. Prieto (2003) 30 Cal.4th 226 ..... 264, 284

People v. Ramirez (2006) 39 Cal.4th 398 ..... 154, 173, 238

People v. Reynoso (2003) 31 Cal.4th 903 205

People v. Riel (2000) 22 Cal.4th 1153 76

People v. Robinson (2005) 37 Cal.4th 592 254

People v. Rogers (2006) 39 Cal.4th 826 275

People v. San Nicolas (2004) 34 Cal.4th 614 126

People v. Sanchez (1995) 12 Cal.4th 1 ..... 93, 94

People v. Sanders (1990) 51 Cal.3d 471 154

People v. Sandoval (1987) 188 Cal.App.3d 1428 81

People v. Sapp (2003) 31 Cal.4th 240 ..... 116, 125, 258

People v. Scheid (1997) 16 Cal.4th 1 ..... 226, 228, 229

People v. Shelton (1957) 151 Cal.App.2d 587 143

People v. Silva (2001) 25 Cal.4th 345 ..... 206, 210

State Cases (cont'd)

People v. Smith (2003) 110 Cal.App.4th 492 86-88

People v. Snow (1987) 44 Cal.3d 216 200

People v. Snow (2003) 30 Cal.4th 43 ..... 264, 284

People v. Stanley (2006) 39 Cal.4th 913 268

People v. Steele (2002) 27 Cal.4th 1230 246

People v. Stewart (2004) 33 Cal.4th 425 ..... 176, 179-181, 184

People v. Stitely, (2005) 35 Cal.4th 514 257

People v. Superior Court (Engert) (1982) 31 Cal.3d 797 252

People v. Taylor (1990) 52 Cal.3d 719 268

People v. Thomas (1977) 19 Cal.3d 630 273

People v. Thompson (1980) 27 Cal.3d 303 ..... 131, 132

People v. Thompson (1990) 50 Cal.3d 134 143

People v. Turner (1984) 37 Cal. 3d. 302 226

People v. Turner (1986) 42 Cal.3d 711 ..... 201, 204, 205, 210

People v. Turner (1994) 8 Cal.4th 137 132

People v. Vargas (1993) 13 Cal.App.4th 1653 86

People v. Vasquez (2006) 39 Cal.4th 47 77

People v. Vera (1997) 15 Cal.4th 269 81

People v. Walker (1988) 47 Cal.3d 605 254

State Cases (cont'd)

People v. Watson (1956) 46 Cal.2d 818 ..... 77, 78, 221, 230

People v. Weaver (2001) 26 Cal.4th 876 73

People v. Wheeler (1978) 22 Cal.3d 258 .. 154, 156, 178, 193, 198, 199, 210, 271

People v. Wheeler (1978) 22 Cal.3d 258 271

People v. Will (1992) 3 Cal.App.4th 16 232

People v. Williams (1997) 16 Cal.4th 635 ..... 140, 146

People v. Williams (2000) 78 Cal.App.4th 1118 210

People v. Williams (2006) 40 Cal.4th 287 ..... 219, 221

People v. Wrest (1992) 3 Cal.4th 1088 82

People v. Wright (1987) 43 Cal.3d 487 94

People v. Yeoman (2003) 31 Cal.4th 93 249

People v. Zambrano (2007) 41 Cal.4th 1082 196

Rubio v. Superior Court (1979) 24 Cal.3d 93 166

Federal Cases

Adams v. Texas (1980) 448 U.S. 38 ..... 179, 187

Adams v. United States ex rel. McCann (1942) 317 U.S. 269 69

Addington v. Texas (1979) 441 U.S. 418 ..... 272, 274

Aldridge v. United States (1931) 283 U.S. 308 183

Alexander v. Louisiana (1972) 405 U.S. 625 157

Federal Cases (cont'd)

Apodaca v. Oregon (1972) 406 U.S. 404 270

Apprendi v. New Jersey (2000) 530 U.S. 466 258

Arizona v. Fulminante (1991) 499 U.S. 279 .. 53, 54, 78, 100, 118, 136, 148, 149

Atkins v. Virginia (2002) 536 U.S. 304 ..... 287, 288

Batson v. Kentucky (1986) 476 U.S. 79 ..... 81, 193, 197, 198

Blackburn v. Alabama (1960) 361 U.S. 199 136

Blakely v. Washington (2004) 542 U.S. 296 ..... 259, 260, 266, 269

Boykin v. Alabama (1969) 395 U.S.238 ..... 91, 92, 95

Brady v. United States (1970) 397 U.S. 742 69

Bram v. United States (1897) 168 U.S. 532 142

Brown v. Louisiana (1980) 447 U.S. 323 269

Brown v. Mississippi (1936) 297 U.S. 278 ..... 31, 32

Bullington v. Missouri (1981) 451 U.S. 430 274

Burch v. Louisiana (1979) 441 U.S. 130 270

Bush v. Gore (2000) 531 U.S. 98 285

Caldwell v. Mississippi (1985) 472 U.S. 320 ..... 33, 288

California v. Brown (1987) 479 U.S. 538 275

California v. Ramos, 463 U.S. 992 (1983) 33

Campbell v. Blodgett (9th Cir. 1993) 997 F.2d 512 281

Federal Cases (cont'd)

Castaneda v. Partida (1977) 430 U.S. 482 ..... 157, 158

Chapman v. California (1967) 386 U.S. 18 ..... 53, 147, 148, 151

Colorado v. Connelly (1986) 479 U.S. 157 ..... 120, 139, 146

Colorado v. Spring (1987) 479 U.S. 564 86

Comer v. Schirro (9th Cir. 2006) 463 F.3d 934 49

Cooper v. Cambra (9th Cir. 2001) 245 F.3d 1042 200

County of Riverside v. McLaughlin (1991) 500 U.S. 44 ..... 130, 131

Cunningham v. California (2007) — U.S. —; 127 S.Ct. 856 260-262

Davis v. Georgia (1976) 429 U.S. 122 187

Davis v. United States (1994) 512 U.S. 452 126

Deck v. Missouri (2005) 544 U.S. 622 ..... 37, 49, 50

Delaware v. VanArsdall (1986) 475 U.S. 673 101

Dickerson v. United States (2000) 530 U.S. 428 ..... 116, 120

Dickerson v. United States (2000) 530 U.S. 428 ..... 138, 140, 141

Duckworth v. Eagan (1989) 492 U.S. 195 120

Duncan v. Louisiana (1968) 391 U.S. 145 81

Duren v. Missouri (1979) 439 U.S. 357 ..... 153, 157, 166, 173

Dyer v. Calderon (9th Cir. 1998) 151 F.3d 970 237

Eddings v. Oklahoma (1982) 455 U.S. 104 ..... 33, 282

Federal Cases (cont'd)

Edwards v. Arizona (1981) 451 U.S. 477 ..... 105, 125

Enmund v. Florida (1982) 458 U.S. 782 247

Escobedo v. Illinois (1964) 378 U.S. 478 133

Estelle v. McGuire (1991) 502 U.S. 62 150

Fernandez v. Roe (9th Cir. 2002) 286 F.3d 1073 198

Fetterly v. Paskett (9th Circ. 1993) 997 F.2d 1295 281

Florida v. Nixon (2004) 543 U.S. 175 95

Ford v. Wainwright (1986) 477 U.S. 399 288

Furman v. Georgia (1972) 408 U.S. 238 ..... 253, 278

Gall v. Parker (6th Cir. 2000) 231 F.3d 265 182

Gardner v. Florida (1977), 430 U.S. 349 ..... 62, 272

Gideon v. Wainwright (1963) 372 U.S. 335 ..... 53, 218

Glasser v. United States (1942) 315 U.S. 60 154

Godfrey v. Georgia (1980) 446 U.S. 420 255

Gray v. Mississippi (1987) 481 U.S. 648 ..... 179, 180, 187

Gregg v. Georgia (1976) 428 U.S. 153 ..... 33, 275, 288

Griffin v. United States (1991) 502 U.S. 46 269

Groseclose ex rel. Harries v. Dutton (M.D. Tenn. 1984) 594 F.Supp. 949 70

Hamilton v. Alabama (1961) 368 U.S. 52 129

Federal Cases (cont'd)

Hardy v. United States (1964) 375 U.S. 277 183

Harmelin v. Michigan (1991) 501 U.S. 957 ..... 270, 276

Hicks v. Oklahoma (1980) 477 U.S. 343 ..... 66, 281

Hilton v. Guyot (1895) 159 U.S. 113 287

Holbrook v. Flynn (1986) 475 U.S. 560 50

Holloway v. Arkansas (1978) 435 U.S. 247 78

Hope v. Pelzer (2002) 536 U.S. 730 51

Hutto v. Ross (1976) 429 U.S. 28 ..... 136, 140

Illinois v. Allen (1970) 397 U.S. 337 35

In re Murchison (1955) 349 U.S. 133 178

In re Winship (1970) 397 U.S. 358 ..... 272, 273

International Board of Teamsters v. United States (1977) 431 U.S. 324 173

Irwin v. Dowd (1961) 366 U.S. 717 178

Jecker, Torre & Co. v. Montgomery (1855) 59 U.S. [18 How.] 110 287

Johnson v. California (2005) 545 U.S. 162 195-197

Johnson v. Louisiana (1972) 406 U.S. 356 270

Johnson v. Mississippi (1988) 486 U.S. 578 270

Johnson v. United States (1997) 520 U.S. 461 101

Johnson v. Zerbst (1938) 304 U.S. 458 ..... 69, 87

Federal Cases (cont'd)

Kansas v. Marsh (2006) — U.S. —; 126 S.Ct.2516 ..... 249, 277, 279

Keenan v. Superior Court (1982) 31 Cal.3d 424 217-219

Kentucky v. Stincer (1987) 482 U.S. 730 ..... 62, 63

Kumho Tire v. Carmichael (1999) 526 U.S. 137 173

Lockett v. Ohio (1978) 438 U.S. 586 279

Martin v. Waddell's Lessee (1842) 41 U.S. [16 Pet.] 367 287

Maynard v. Cartwright (1988) 486 U.S. 356 255

McCarver v. North Carolina, O.T. 2001, No. 00-8727 287

McDonough Power Equipment, Inc. v. Greenwood (1984) 464 U.S. 548 183

McNeil v. Wisconsin (1991) 501 U.S. 171 125

Michigan v. Harvey (1990) 494 U.S. 344 125

Mickens v. Taylor (2002) 535 U.S. 162 78

Miller v. United States (1871) 78 U.S. [11 Wall.] 268 287

Miller-El v. Cockrell (2003) 537 U.S. 332 ..... 198, 200

Miller-El v. Dretke (2005) 545 U.S. 231 206

Mills v. Maryland (1988) 486 U.S. 367 ..... 276, 279, 285

Mills v. Municipal Court (1973) 10 Cal.3d 288 92

Minnesota v. Murphy (1984) 465 U.S. 420 116

Minnick v. Mississippi (1990) 498 U.S. 146 70

Federal Cases (cont'd)

Miranda v. Arizona (1966) 384 U.S. 436 ..... 105, 115, 116, 119, 121

Missouri v. Seibert (2004) 542 U.S. 600 115

Monge v. California (1998) 524 U.S. 721 ..... 267, 270, 274, 283

Morgan v. Illinois (1992) 504 U.S. 719 183

Murphy v Florida (1975) 421 U.S. 794 216

Murray's Lessee v. Hoboken Land and Improvement Co. (1855) 59 U.S. (18 How.) 272
..... 269

Myers v. Ylst (9th Cir. 1990) 897 F.2d 417 ..... 276, 285

Norris v. Risley (9th Cir. 1989) 878 F.2d 1178 215

New York v. Hill (2000) 528 U.S. 110 86

North Carolina v. Alford (1970) 400 U.S. 25 92

Payne v. Arkansas (1958) 356 U.S. 560 136

Peters v. Kiff (1972) 407 U.S. 493 167

Powell v. Alabama (1932) 287 U.S. 45 217

Powers v. Ohio (1991) 499 U.S. 400 ..... 156, 195

Presnell v. Georgia (1978) 439 U.S. 14 272

Puckett v. Elem (1995) 514 U.S. 765 205

Pulley v. Harris (1984) 465 U.S. 37 ..... 249, 278

Pullman-Standard v. Swint (1982) 456 U.S. 273 173

Ramseur v. Beyer (3d Cir. 1992) 983 F.2d 1215 168

Federal Cases (cont'd)

Randolph v. California (9th Cir. 2004) 380 F.3d 1133 ..... 168, 169

Rhode Island v. Innis (1980) 446 U.S. 291 116

Richardson v. United States (1999) 526 U.S. 813 271

Ring v. Arizona (2002) 536 U.S. 584 ..... 258, 259, 265-267, 269, 270, 276, 285

Rochin v. California (1952) 342 U.S. 165 37

Rosales-Lopez v. United States (1981) 451 U.S. 182 183

Rose v. Mitchell (1979) 443 U.S. 545 ..... 157, 175

Ross v. Oklahoma (1988) 487 U.S. 81 180

Rushen v. Spain (1983) 464 U.S. 114 ..... 53, 76

Santosky v. Kramer (1982) 455 U.S. 743 ..... 272, 273

Satterwhite v. Texas (1988) 486 U.S. 249 ..... 150, 288

Schneckloth v. Bustamonte (1973) 412 U.S. 218 ..... 69, 137

Skinner v. Oklahoma (1942) 316 U.S. 535 283

Smith v. Armontrout (8th Cir. 1987) 812 F.2d 1050 70

Smith v. Illinois (1984) 469 U.S. 91 ..... 125, 126

Smith v. Phillips (1982) 455 U.S. 209 ..... 231, 236

Smith v. Texas (1940) 311 U.S. 128 175

Smith v. United States (D.C.Cir. 1965) 353 F.2d 838 220

Spain v. Rushen (1989) 883 F.2d 712 ..... 35, 47, 56

Federal Cases (cont'd)

Speiser v. Randall (1958) 357 U.S. 513 272

Stanford v. Kentucky (1989) 492 U.S. 361 286

Strauder v. West Virginia (1880) 100 U.S. 303 193

Stringer v. Black (1992) 503 U.S. 222 282

Sullivan v. Louisiana (1993) 508 U.S. 275 ..... 54, 90, 148

Szuchon v. Lehman (3d Cir. 2001) 273 F.3d 299 182

Taylor v. Louisiana (1975) 419 U.S. 522 ..... 153, 154, 167, 174

Thiel v. Southern Pacific Co. (1946) 328 U.S. 217 156

Thompson v. Oklahoma (1988) 487 U.S. 815 286

Tison v. Arizona (1987) 481 U.S. 137 247

Townsend v. Sain (1963) 372 U.S. 293 275

Tuilaepa v. California (1994) 512 U.S. 967 255

Tumey v. Ohio (1927) 273 U.S. 510 53

Ungar v. Sarafite (1964) 376 U.S. 575 214

United States v. Battle (8th Cir. 1987) 836 F.2d 1084 201

United States v. Booker (2005) 543 U.S. 220 260

United States v. Cazares (9th Cir. 1997) 121 F.3d 1241 120

United States v. Chanthadara (10th Cir. 2000) 230 F.3d 1237 182

United States v. Doe (9th Cir. 1998) 155 F.3d 1070 69

Federal Cases (cont'd)

United States v. Feliciano (2d Cir. 2000) 223 F.3d 102 76

United States v. Gagon (1985) 470 U.S. 522 ..... 62, 63

United States v. Garibay (9th Cir. 1998) 143 F.3d 534 120

United States v. Gonzales-Lopez (2006) - U:S. -, 126 S.Ct. 2557 ..... 53, 54

United States v. Howard (9th Cir. 2005) 429 F.3d 843 ..... 45, 50

United States v. Jackson (1968) 390 U.S. 570 70

United States v. Lovasco (1977) 431 U.S. 783 132

United States v. Ocoha-Vasquez (11th Cir. 2005) 428 F.3d 1015 200

United States v. Sanchez-Lopez (9th Cir. 1989) 879 F.2d 541 173

United States v. Scott (9th Cir. 2006) 450 F.3d 863 ..... 70, 71

United States v. Stephens (7th Cir. 2005) 421 F.3d 503 ..... 200, 207

Vasquez v. Hillery (1986) 474 U.S. 254 ..... 53, 175

Wainwright v. Witt (1985) 469 U.S. 412 ..... 179, 180, 183

Waller v. Georgia (1984) 467 U.S. 39 ..... 53, 63, 78

Walton v. Arizona (1990) 497 U.S. 639 259

Westbrook v. Milahy (1970) 2 Cal.3d 765 283

Wheat v. United States (1988) 486 U.S. 153 217

Whitmore v. Arkansas (1990) 495 U.S. 149 69

Wiggins v. Smith (2003) 539 U.S. 510 218

Federal Cases (cont'd)

Williams v. Runnels (9th Cir. 2006) 432 F.3d 1102 200

Witherspoon v. Illinois (1968) 391 U.S. 510 ..... 176, 180, 181, 187

Withrow v. Williams (1993) 507 U.S. 680 ..... 138, 141

Woodson v. North Carolina (1976) 428 U.S. 280 ..... 32, 33. 274, 280

Yarborough v. Keane (2d Cir. 1996) 101 F.3d 894 77

Yates v. Evatt (1991) 500 U.S. 391 148

Zant v. Stephens (1983) 462 U.S. 862 280

Constitutional Provisions

UNITED STATES CONSTITUTION

Fifth Amendment 105, 140, 178, 253

Eighth Amendment 149, 193, 246, 253, 277

Fourteenth Amendment 105, 138, 140, 153, 178, 193, 253, 258

Sixth Amendment 81, 105, 153, 154, 178, 217, 253, 258

CALIFORNIA CONSTITUTION

Article I, Section 7 105

Article I, Section 15 ..... 105, 217

Article I, Section 16 ..... 81, 153

Article I, Section 17 ..... 149, 193, 246

Article II, section 7 138

State Statutes

Code of Criminal Procedure § 197 153

Code of Criminal Procedure § 203 153

Penal Code

Section 190 ..... 242, 253-256, 262, 264, 265

Section 825 130

Section 977 ..... 65, 66, 73

Section 987 218

Section 1043 65

Section 1066 215

Section 1122 237

Section 1181 231

Other State Cases

Johnson v. State (Nev. 2002) 59 P.3d 450 ..... 263, 267

Parker v. Territory of Arizona (1898) 5 Ariz. 283, 52 P. 361 38

People v. Clark (1977) 45 Ill.App.3d 24; 358 N.E.2d 1362 38

Pierce v. United States (D.C.App. 1979) 402 A.2d 1237 220

State v. Allen, 2000-NMSC-002, 128 N.M. 482, 994 P.2d 728 33

State v. Hucks (N.C. 1988) 323 N.C. 574, 374 S.E.2d 240 219

State v. Ring (Az. 2003) 65 P.3d 915 267

Other State Cases (cont'd)

State v. Whitfield (Mo. 2003) 107 S.W.3d 253 267

Woldt v. People (Colo. 2003) 64 P.3d 256 267

Other Authorities

1 Kent's Commentaries 1 286

ABA Guidelines, Guideline 10.4 ..... 218, 219

Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006) 286

Donnelly, R., *Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 New. Eng. J. on Crim. & Civ. Confinement 339 286

International Covenant on Civil and Political Rights, Article VI, Section 2 ... 288

Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res.L.Rev. 1 288

Kathleen M. Sullivan, "Unconstitutional Conditions," 102 Harv.L.Rev. 1413 (1989) 70

Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091 267

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	]	
	]	**No. S051342**
Plaintiff and Appellee,	]	
	]	**San**
vs.	]	**Bernardino County**
	]	**No. RCR 22225**
JOHN LEE CUNNINGHAM,	]	
	]	
Defendant and Appellant	]	
	]	

APPELLANT'S OPENING BRIEF

INTRODUCTION

Appellant, John Lee Cunningham was convicted in a bench trial of three counts of first degree murder for the deaths of Wayne Sonke, David Smith and Jose Silva during a robbery, burglary and arson at the Surplus Office Sales store in Ontario, California on June 27, 1992. The trial court found that the special circumstances of murder during a robbery and a burglary and multiple murder were present. A jury selected for the penalty phase sentenced Mr. Cunningham to death.

The paroxysm of violence had its beginning at least forty years earlier in the union of an alcoholic prostitute, Vivian Johns, and an abusive Merchant Marine, Maurice Cunningham, in Miami, Florida and the birth of their abused and neglected sons. Vivian and Maurice had three boy–Sam, Wes and John Cunningham. (RT Vol.

13, pp. 4352-4358, 4380; Vol. 16, p. 5034.)[1]

When Mr. Cunningham was two years old, his father left the family and he and his brothers were left with their mother, who exposed them to sexual assault, violence and chaos until one day she also abandoned them. Mr. Cunningham and his brothers lived on their own until they were made wards of the state of Florida and placed in a locked orphanage. A year later, Mr. Cunningham and his brothers were re-united with their father in California, where they were once again subject to a life of physical abuse, sexual assault and chaos. (RT Vol. 13, pp. 4312-4317, 4368-4369; Vol. 15, pp. 4750-4751; Vol. 16, pp. 5220-5221, 5035-5039, 5047-5053.)

After graduating from high school, Mr. Cunningham entered the United States Army and served in a recognizance patrol of the 101st Airborne during the Vietnam War. The trauma of that experience rivaled the horror of Mr. Cunningham's childhood, leaving a broken man who returned to the United States as a lost, hyper-vigilant, psychologically troubled man. (RT, Vol. 15, pp. 4764-4765, 4818; Vol. 16, pp. 5082-5085, 5118-5120; Vol. 17, pp. 5193, 5198, 5215.)

At about 3:00 p.m. on June 27, 1992, Mr. Cunningham–acting in desperation–went to the Surplus Office Sales store in Ontario, California (where he used to work as a clerk and warehouseman), and confronted Wayne Sonke, David

---

1. The record in this case consists of nineteen volumes of the Reporter's Transcript [hereafter "RT Vol. -, p. -"] and eight volumes of the Clerk's Transcript [hereafter "CT Vol. -, p. -"].

Smith and Jose Silva with a rifle. Mr. Cunningham ordered the three men into a bathroom, bound them with duct tape, and then stole approximately $800 from the company (while leaving behind $2000 which was readily available.) Mr. Cunningham then shot the three men, tried to set the building on fire, and fled. (RT Vol., 3, pp. 716-738, 786-787; Vol. 4, pp. 887-899.)

The day after the murders, Mr. Cunningham began a bizarre cross-country odyssey with a companion, Alana Costello. The couple traveled from Las Vegas, Nevada to Atlantic City, New Jersey and then returned west, traveling through the Badlands of South Dakota. During this journey Alana regularly spoke with family members by telephone and even told her mother (who was married to a retired San Bernardino County Sheriff's Deputy) where she was staying. As a result, Mr. Cunningham and Alana were arrested in Deadwood, South Dakota on July 23, 1992. (RT Vol. 1, pp. 198-201; Vol. 4, pp. 985-991.)

After Mr. Cunningham's arrest, detectives from the Ontario Police Department flew to South Dakota and interrogated Mr. Cunningham after intentionally obtaining an incomplete waiver of Mr. Cunningham's *Miranda* rights and ignoring his request for counsel. In three custodial interviews spanning three days, Mr. Cunningham confessed that he killed Messrs. Sonke, Smith and Silva during a burglary and robbery at the Surplus Office Sales store and expressed remorse for his acts. During these interviews, Mr. Cunningham also admitted that he feared being assaulted by prison

gang members from the Mexican Mafia if he was returned to prison in California and asked the detectives for help in protecting him. (RT Vol. 1, pp. 252-253, 262-265; Vol. 2, pp. 330-349, 379-381; Vol. 3, p. 555.)

When Mr. Cunningham returned to California he was not immediately arraigned on the charges arising out of the triple homicide at the Surplus Office Sales store; instead, as a parole violator, Mr. Cunningham was confined in the Administrative Segregation Unit of Folsom State Prison. While Mr. Cunningham was confined in Folsom Prison, Ontario Police Department detectives delayed a request for an arrest warrant and asked Sergeant Wesley Lewis, a correctional officer at the prison, to approach Mr. Cunningham and seek his consent to a video taped re-enactment of the triple homicide. In response, Mr. Cunningham told Sergeant Lewis that he would do anything to leave Folsom Prison. Consequently, on August 2, 1992, Mr. Cunningham was transported from Folsom State Prison to the Surplus Office Sales store where he haltingly re-enacted the events of June 27, 1992. (RT Vol. 2, pp. 290-292; 338-352; 403-406, 429-431.)

Mr. Cunningham was subsequently arraigned on the charges of murder with special circumstances contained in a criminal complaint. (CT Vol. 1, pp. 9-10.) David Negus of the San Bernardino County Public Defender's Office were appointed as defense counsel and Mr. Cunningham was confined pending trial in the West Valley Detention Center in Rancho Cucamonga, California. (CT Vol. 1, pp. 11-12;

Vol. 4, p. 1050.) Following a preliminary hearing, Mr. Cunningham was held to answer on the charges contained in the criminal complaint, the District Attorney filed an Information listing the same charges, and the case was ultimately assigned to the Honorable Michael A. Smith, who presided in the San Bernardino Courthouse. (CT Vol. 4, pp. 858; 985-992; RT Vol. 1, p. 1-3).

Prior to trial, counsel for Mr. Cunningham filed a motion to suppress evidence which was seized from the vehicle driven by Mr. Cunningham on the date of his arrest and a motion to suppress his custodial statements. (CT Vol. 4, pp. 995; 1004-1021; Vol. 5, pp. 1215-1230.) The prosecution opposed each motion. (CT Vol. 4, pp. 1027-1032; Vol. 5, pp. 1231-1237.) Unfortunately, in order to be transported to the San Bernardino County Courthouse for hearings on these motions, Mr. Cunningham was forced to be shackled at his legs, waist and hands for prolonged periods of time, often exceeding eight hours a day, without relief. (CT Vol. 4, pp. 1039-1050.)

The shackling proved to be physically painful and emotionally demeaning, and when the trial court refused to transfer the trial from the San Bernardino County Courthouse, Mr. Cunningham's will was overborne and he lost the desire to attend court or to meaningfully challenge the criminal charges. Rather than endure the continued shackling which was a condition of Mr. Cunningham's continued appearance in the San Bernardino Courthouse, Mr. Cunningham instead waived his right to be personally present at any proceedings held in San Bernardino and waived

his right to a jury trial. (CT Vol. 4, pp. 1050, 1059-1060; RT Vol. 1, pp. 68-79.)

Mr. Cunningham was convicted after a bench trial of, *inter alia*, murder, robbery burglary and arson. (RT Vol. 4, pp. 1088-1092.) However, the trial was the functional equivalent of a plea of guilty because counsel presented no defense and conceded Mr. Cunningham's guilt on all charges. (RT, Vol. 14, pp. 1079-1086.) Although Mr. Cunningham also wanted to waive his presence for the penalty phase, the trial court would not accept the waiver. (RT Vol. 1, pp. 206-208.)

The penalty phase lasted for thirty-four court days over five months. (CT Vol. 7, pp. 1644-1830.) During the penalty phase, the prosecution presented evidence of the circumstances surrounding the crime and facts relating to Mr. Cunningham's prior felony convictions. (RT Vol. 11, p. 2731 to Vol. 13, p. 4244.) In mitigation, Mr. Cunningham presented extensive testimony to document his abusive childhood and the effects of post- traumatic stress disorder on Vietnam-era veterans. (RT Vol. 13, p. 4329 to Vol. 17, p. 5384.)

The jury deliberated for three days before returning a judgment of death. (RT Vol. 19, pp. 5727-5734.)

STATEMENT OF THE CASE

On August 3, 1992, the District Attorney of San Bernardino County filed a felony complaint in the Rancho Cucamonga Municipal Court, in and for the Superior Court of San Bernardino County, California, charging Appellant John Lee

Cunningham in Counts I, II and III with three counts of first degree, premeditated murder, allegedly committed on June 27, 1992, against Wayne Sonke, David Smith, and Jose Silva in violation of Penal Code section 187.[2] With respect to each count, the District Attorney alleged that the murders were committed during the commission of a robbery and a burglary, and that, within the meaning of section 190.2(a)(2), Mr. Cunningham committed multiple murder. The complaint further alleged that Mr. Cunningham personally used a firearm, to wit, a .22 caliber rifle, during the offense, in violation of section 12022.5. (CT Vol. 1, pp. 1-8.)

In Count IV of the complaint, Mr. Cunningham was charged with one count of burglary, in violation of section 459, and with personally using a .22 caliber rifle during the charged offense, in violation of section 12022.5. Counts V through VII further alleged that Mr. Cunningham robbed Messrs. Sonke, Smith and Silva and that he used a .22 caliber rifle during the alleged crime, in violation of sections 211 and 12022.5. Finally, Count VIII alleged that Mr. Cunningham committed arson in setting the Surplus Office Sales store on fire, in violation of section 451(d). (CT Vol. 1, pp. 1-8.)

The complaint contained allegations under section 667.5(5) that Mr. Cunningham had previously been convicted of the felony offenses of robbery (§ 211), in Los Angeles County Superior Court case number A520635, the offense of oral

---

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

copulation with force (§ 288(b)) in Los Angeles County Superior Court case number A454521, and the offense of oral copulation with force (§ 288(b)) in Los Angeles County Superior Court case number A644844. The complaint also alleged that Mr. Cunningham had served a prior prison term for each of these prior felony convictions. (CT Vol. 1, pp. 1-8.)

On November 9, 1992, a preliminary hearing began before the Honorable Ellen E. Brodie. (CT Vol. 1, p. 11.) Following many days of continued hearings, the preliminary hearing ended on December 17, 1992. (CT Vol. 4, pp. 852-58). Mr. Cunningham was ultimately held to answer on all charged counts, special allegations and enhancements. (CT Vol. 4, p. 858.)

The District Attorney filed an Information in the Superior Court of the State of California in and for the County of San Bernardino, charging Mr. Cunningham with three counts of first degree murder (§ 187) with robbery, burglary and multiple murder special circumstance allegations (§ 190.2(a)(3)), one count of burglary (§ 459), three counts of robbery (§ 211) with firearm use enhancements for each count (§ 12022.5(a)), one count of arson (§ 451), and three prior prison term enhancements (§ 667.5(b)). (CT Vol. 4, pp. 985-92.) At his arraignment on January 20, 1993, Mr. Cunningham entered a plea of not guilty, and denied the special circumstances allegations and enhancements. (CT Vol. 4, p. 997.)

Prior to trial, Mr. Cunningham filed motions to suppress evidence seized

during his arrest and the custodial statements he made to law enforcement officers in the days following his apprehension. (CT Vol. 4, pp. 981-983; 995; 1004-1021; Vol 5, pp. 1215-1230; 1243-1283.) The prosecution opposed each motion. (CT Vol 4, pp. 1027-1033; Vol. 5, pp. 1231-1237.)

The pre-trial proceedings on the defense motions which were held in Superior Court in San Bernardino exposed Mr. Cunningham to severe pain, fear and humiliation because for every court appearance Mr. Cunningham was shackled at his hands, feet and waist for the entire day, even while he was confined in the locked holding cells of the court. (CT Vol. 4, pp. 1039-50.) In a declaration in support of his motion to prevent the continued shackling or else waive his personal presence at all further proceedings in San Bernardino County Superior Court, Mr. Cunningham averred that "for so long as my case is to be heard in San Bernardino, and I am forced to remain in restraints and be exposed to the general public, I wish to waive my personal presence and remain in the West End Detention Center." (CT Vol. 4, pp. 1057-58.)

After his objection to the pre-trial shackling was overruled, Mr. Cunningham repeatedly waived his personal presence at the pre-trial and trial proceedings in this case and consistently waived his right to a speedy trial. (CT Vol. 5, pp. 1089-90; 1145-46; 1167-68; 1186-88 [waivers of personal presence]; CT Vol. 5, pp. 1147-48; 1169-70; 1183-85 [time waivers].) In addition, rather than be tried by a jury *in*

absentia, Mr. Cunningham sought to withdraw from any further participation in the proceedings by also waiving his right to a jury trial. (CT Vol 5, pp. 1189-90; 1202-03.)

The trial of this case began on February 27, 1995, before the Honorable Michael A. Smith, sitting without a jury. (CT Vol. 5, pp. 1204-06.) Mr. Cunningham was not present for any portion of the trial. (CT Vol. 5, pp. 1202-03.) The trial extended over ten non-contiguous court days until March 20, 1995, when defense counsel rested without presenting any evidence and after conceding Mr. Cunningham's guilt in closing argument. (CT Vol. 5, pp. 1202-14; 1238-39; 1284-87; 1289-95; RT Vol. 4, pp. 1061, 1079-86.) Judge Smith found Mr. Cunningham guilty as charged on all counts, and found that the special circumstances alleged were true and that the firearm use enhancement and prison priors were also true. (RT Vol. 4, pp. 1088-92.)

Prior to the commencement of jury selection for the penalty phase, Mr. Cunningham again waived his right to be personally present at all pre-penalty phase proceedings and he again tried to waive his personal presence for the penalty phase of the trial. Ultimately Mr. Cunningham's request to absent himself from the penalty phase was denied. (CT Vol. 6, pp. 1446-47; 1510-11; 1570-72; 1633-35.)

The penalty phase of the trial began with jury selection on June 15, 1995. (CT Vol. 6, pp. 1637-38.) The jury began hearing evidence on August 1, 1995, and the

penalty phase lasted for thirty-four court days. (CT Vol. 7, pp. 1699-1700; 1888-89.) The jury retired to deliberate on October 15, 1995, and on October 18 they returned their verdicts, and selected the punishment of death for each of the three counts of first degree murder. (CT Vol. 7, p. 1890.)

On January 12, 1996, the Superior Court convened a hearing on Mr. Cunningham's automatic motion for modification of the death judgment, pursuant to section 190.4, subdivision (e). Judge Smith ultimately denied the motion for modification, finding that the jury's verdicts were supported by the weight of the aggravating evidence and were not outweighed by the mitigating evidence; and therefore, Judge Smith concluded that the judgement in this case should be death. (CT Vol. 7, pp. 1912-34; Vol. 8, pp. 1943-67.) Consequently, the court imposed judgments of death for Counts I, II, and III, and a determinate term of sixteen years for the remainder of the counts. A commitment and judgment of death were filed the same day. (CT Vol. 7, pp. 1939-41.)

STATEMENT OF APPEALABILITY

This is an automatic appeal from a death judgment, taken pursuant to the provisions of section 1239.

STATEMENT OF FACTS

GUILT PHASE EVIDENCE

The guilt phase of this case was tried before the Superior Court of San

Bernardino County, the Honorable Michael A. Smith presiding, without a jury. (CT, Vol. 5, pp. 1189-1190.) In considering the evidence at the guilt phase, Judge Smith also relied on the evidence presented at the preliminary hearing and at pre-trial proceedings on a Motion to Suppress Mr. Cunningham's multiple confessions. (RT Vol. 4, pp. 1064-67.)

A. The Killings of Wayne Sonke, David Smith and Jose Silva

On June 27, 1992, at 3:52 p.m. Officer Susan Quesada was dispatched to the Surplus Office Sales store at 2313 South Baker in Ontario, California. (RT Vol. 3, p. 715; Vol. 10, p. 2726.) When she arrived, she learned that members of the Ontario Fire Department were on the scene responding to a fire when they discovered the bodies of Wayne Sonke, David Smith and Jose Silva. (RT Vol. 3, pp. 716-17, 723, 738; Vol. 10, p. 2737.)

Wayne Sonke was killed by a single shot from a .22 caliber rifle to the back of his head near his left ear. The bullet perforated his brain tissue, lodged under the scalp on the right side and likely caused death within five minutes. (RT Vol. 4, pp. 887-88.) Jose Silva was killed by a two shots from a .22 rifle to the back of the head. The first bullet went through the skull and lodged in the brain, while the second bullet traveled through the brain and lodged in the scalp. Either bullet could have caused death within five to fifteen minutes. (RT Vol. 4, pp. 892-93.)

Unlike Wayne Sonke and Jose Silva, David Smith (the on-duty manager at the

time) was shot six times; and he too was ultimately mortally wounded by gunshot injuries to the back of his head. (RT Vol. 4, pp. 895-99.) However, it was uncertain whether Mr. Smith may have struggled prior to his death or whether any of his injuries were defensive. (RT Vol. 4, pp. 956-64.)

B. The Investigation of John Lee Cunningham

Betty Flodter, who was an office manager at the Surplus Office Sales store in June 1992, explained that she found out about the murders of her co-workers on the night of June 27, 1992, at about 10:00 p.m. When she responded to the store that evening she told the police that about $1000 in cash was stolen from the business, but almost $2000 was left behind. (RT Vol. 3, pp. 786-87.) Ms. Flodter also told the Ontario Police about a visit from a former employee, John Cunningham, on June 24, 1992. (RT Vol. 3, pp. 778-781.)

Evelyn Eriksen also testified that June 20, 1992, John Cunningham came into the Surplus Office Sales store in Ontario and inquired about her family. (CT Vol 2, p. 331.) According to Ms. Eriksen, Mr. Cunningham remained at the store for about two hours helping out, and then asked if Ms. Eriksen was working the next Saturday. (CT Vol. 2, pp. 331-32.) The following Thursday, Mr. Cunningham called Ms. Eriksen on the telephone and he came to the store for a game of cribbage. (CT Vol. 2, p. 340.) Finally, Ms. Eriksen recalled that at about 8:30 p.m. on the evening of June 27, 1992, Mr. Cunningham called her once again to ask how she was doing

following an earthquake. (CT Vol. 2, p. 341.)

At the time of the murders, Mr. Cunningham was on parole, reporting to Parole Officer Nina Milam, and he was involved in a committed relationship with Diana Jamison. (CT Vol. 2, pp. 350-53.) In her testimony before the court, Diana reported that while she lived with Mr. Cunningham he often cared for her disabled son, but that in the month before the slaying, the two had separated because Mr. Cunningham was acting strangely. According to Diana, Mr. Cunningham tried to seek treatment at a Veteran's Center for counseling because he was having trouble sleeping, he was waking in the middle of the night in a cold sweat, and he was having dreams of being tortured by women and children he saw in Vietnam. (RT Vol. 4, pp. 834-36.)

Diana testified that on June 26, 1992, Mr. Cunningham came by her house during the day and he was acting particularly strange. (RT Vol. 4, pp. 807-08.) However, later that evening Diana again saw Mr. Cunningham, and by that time he was acting fine. He gave her $50 to repay some of the money he owed her, and the two engaged in sexual intercourse. (RT Vol. 4, pp. 812-13.) The next day she and Mr. Cunningham met for breakfast, and then Mr. Cunningham left. (RT Vol. 4, p. 820.)

Alana Costello also testified that she was involved in a sexual relationship with Mr. Cunningham at the time of the murders. According to Alana, she and Mr. Cunningham were living together on Highland Avenue in San Bernardino, but they had decided to move into a bigger apartment. (RT Vol. 4, pp. 967-68.) Alana

recalled that the need to find enough money to move into a new apartment created a great deal of stress for Mr. Cunningham and he began to act very tense and very "wrapped up in himself." (RT Vol. 4, p. 976.) At that time, Alana described Mr. Cunningham as someone who was distant and removed, who would wake in the middle of the night in terror, and who would sometimes stare off into space for hours. (RT Vol. 4, pp. 1005, 1010-11.) Alana also recalled that, when they were living together, Mr. Cunningham borrowed a rifle that had been given to her by her mother, and modified the rifle by cutting down the stock. (CT Vol. 1, pp. 119-20.)

Alana testified further that on the night of June 26, 1992, she met Mr. Cunningham after he left Diana Jamison's house and together the two went to a movie and then they checked into a Motel 6 rather than return to their own apartment. (RT Vol. 4, pp. 977-78.) That night Ms. Costello noticed that Mr. Cunningham was much more closed-mouth than usual and he was acting abnormally, and the following morning she was anxious to leave the motel room and return home. (RT Vol. 4, pp. 980-81.)

On June 30, 1992, Parole Officer Nina Milam and Ontario Police Department Detective Donald McGready went to Diana Jamison's home, looking for Mr. Cunningham. (CT Vol. 2, p. 361.) During a search of the residence, Officer Milam found a belt buckle with a knife and then issued a warrant for Mr. Cunningham's arrest based on the violation of his parole. (CT Vol. 2, pp. 356-57.)

On July 1, 1992, Alana received a telephone call from Mr. Cunningham and he asked her to join him in Las Vegas, Nevada. (RT Vol. 4, p. 985.) As a result, Alana flew to Las Vegas and met Mr. Cunningham at the airport, and then the two traveled across the country, through Utah and Ohio to Atlantic City, New Jersey. (RT Vol. 4, p. 987.) Mr. Cunningham never discussed why he was leaving California and Alana never asked him; instead, after a few days in Atlantic City, the two drove idly south through Virginia and Arkansas, before heading north again to Deadwood, South Dakota. (RT Vol. 4, pp. 987-88, 991.)

While she was traveling with Mr. Cunningham, Alana regularly maintained telephone contact with her friend, her sister and her mother. (RT Vol. 4, p. 1018.) According to Alana, during this time, Mr. Cunningham was acting as if he had no concern for being apprehended. (RT Vol. 4, p. 1021.) As a result of Alana's telephone conversations with her mother, Doris Behr (who was married to a retired detective from the San Bernardino County Sheriff's Department), Ontario Police Department Detective Donald McGready ultimately learned that Alana and Mr. Cunningham were in Deadwood, South Dakota and advised law enforcement officers in the region that Mr. Cunningham was wanted for murder. (CT Vol. 1, pp. 198-201; RT Vol. 11, p. 2773.)

C. The Arrest, Confessions and Re-Enactment

On July 23, 1992, Special Agent Douglas Grell, of the Federal Bureau of

Investigation, saw a gray Nissan Altima which matched the description of the vehicle which Mr. Cunningham was driving. (CT Vol. 3, p. 637-39.) Agent Grell, acting in concert with Lawrence County Sheriff's Investigator Jim Charles and Chief Deputy Dwayne Russell, stopped the vehicle and ordered Mr. Cunningham and Alana Costello out of the vehicle at gunpoint. (CT Vol. 3, pp. 641-42.) Mr. Cunningham complied with all of the officer's demands and surrendered without incident. (CT Vol. 2, pp. 643, 653, 676.)

Upon learning of Mr. Cunningham's arrest, Ontario Police Department Detective Greg Nottingham and Sergeant Patrick Ortiz traveled to South Dakota on July 23, 1992, to try to obtain a confession from Mr. Cunningham and seek his extradition to California. (RT Vol. 1, p. 236; 2 RT 330.) The next day, Detective Nottingham and Sergeant Ortiz questioned Mr. Cunningham about the Surplus Office Sales robbery. (RT Vol. 1, pp. 237-42; CT Vol. 3, p. 746.)

Prior to their custodial interrogation of Mr. Cunningham, Detective Nottingham and Sergeant Ortiz did not obtain a complete waiver of the rights required by *Miranda v. Arizona,* 384 U.S. 436 (1966). In particular, the officers never gave Mr. Cunningham any opportunity to invoke his right to remain silent, and ignored his initial request for the assistance of counsel. (RT Vol. 1, pp. 252-53; Vol. 2, pp. 330, 336.) Instead, the detectives read Mr. Cunningham his rights, asked him if he understood them, and then proceeded to interrogate him. (RT Vol. 2, pp. 300, 320-

321.)

During the initial portions of the interrogation the detectives spoke with Mr. Cunningham about his work history and his experiences in Vietnam. However, when Mr. Cunningham began to incriminate himself by admitting he took part in the robbery of the Surplus Office Sales store in Ontario, he specifically asked, "I am charged with robbery, should I have someone here talking for me, is this the way it's supposed to be done?" (RT Vol. 2, p. 301.) Sergeant Ortiz ignored the request and instead simply re-read Mr. Cunningham's *Miranda* rights and asked him if he understood them. (RT Vol. 2, pp. 332-333.) In later interviews, Sergeant Ortiz repeated this pattern and consistently told Mr. Cunningham that involving any lawyers "would cause more pain" because once the lawyers were involved everything was "more complicated." (RT Vol. 2, pp. 341; 350.)

Ultimately, after his attempts to assert his constitutional rights were ignored, Mr. Cunningham admitted that he entered the Surplus Office Sales store, bound the hands of the three male employees with duct tape, shot them, stole money, and then tried to set the building on fire. However, during his multiple confessions, Mr. Cunningham would often pause for considerable periods of time before answering the officers' questions, he regularly became extremely emotional, and he consistently answered questions with *non sequitur* responses regarding his experiences in Vietnam or thoughts from his dreams. (RT Vol. 1, pp. 262-65; CT Vol. 3, p. 760.)

In addition, during a custodial interrogation on July 26, 1992, Mr. Cunningham told Detective Nottingham and Sergeant Ortiz that he had enemies in the Mexican Mafia prison gang and he asked the detectives to assist him in securing a protective custody placement which would protect him from these gang members. (RT Vol. 2, p. 277.) Mr. Cunningham explained that if he went into the general population section of any California prison, he would not be safe. (RT Vo. 2, pp. 276-278.) In response, Detective Nottingham assured Mr. Cunningham that he would assist him by ensuring that he would be placed in the Protective Custody Unit of the California Institution for Men in Chino, California. (RT Vol. 2, p. 284.)

Contrary to these assurances, upon his return to California, Mr. Cunningham was placed in the Administrative Segregation Unit of the California State Prison at Folsom. (RT Vol. 2, pp. 403-04.) Although Mr. Cunningham's classification should have placed him in an orientation unit where he would have more freedom and less threats of harm, he was nevertheless placed in the less-desirable administrative segregation unit because of his military background and a concern for escape. (RT Vol. 2, pp. 404, 429-31.)

While Mr. Cunningham was confined in the Administrative Segregation Unit of Folsom State Prison, detectives from the Ontario Police Department contacted Mr. Cunningham's parole officer to request her help in soliciting Mr. Cunningham to participate in a video tape re-enactment of the crime at the Surplus Office Sales store.

As a result of these efforts, the Sergeant in charge of the Administrative Segregation Unit, Sgt. Wesley Lewis, approached Mr. Cunningham and asked him if he would be willing to participate in a videotaped re-enactment at the Surplus Office Sales store with members of the Ontario Police Department. (RT Vol. 2, p. 406.) Mr. Cunningham agreed because, as he explained to Sergeant Lewis, he was willing to do anything to leave Folsom State Prison. (CT Vol. 3, pp. 597, 766.)

After learning that Mr. Cunningham was willing to participate in the re-enactment, officials from the Ontario Police Department deliberately delayed a formal request for an arrest warrant until the completion of the re-enactment. (RT Vol. 2, pp. 290-92.) The officers were concerned that, if formal charges were pursued against Mr. Cunningham, he would be prevented from participating in any re-enactment because once a lawyer was appointed for Mr. Cunningham, he or she would not permit Mr. Cunningham to make any further confessions or admissions. (RT Vol. 2, pp. 289-92; 338.)

On August 2, 1992, following a full advisement of rights, Ontario Police Detective McGready led Mr. Cunningham through a video taped re-enactment of the crime at the Surplus Office Sales store in Ontario. During the re-enactment, Mr. Cunningham admitted that he entered the Surplus Office Sales store in Ontario near closing time on June 26, 1992 armed with a rifle, stole money, bound the hands of the three employees with duct tape, and then shot all three men. However, once again,

during the re-enactment, Mr. Cunningham would often pause for long periods, he had difficulty standing and speaking, the detectives repeatedly asked him if he was feeling well, and he once again professed that he was having difficulty remembering things. (RT Vol. 1, pp. 239; 262-265; Vol. 2, pp. 288; 352.)

D. The Defense

In his opening argument during the guilt phase, defense counsel described Mr. Cunningham's experiences in Vietnam and explained to the Court that, because of post-traumatic stress disorder, there were periods in Mr. Cunningham's life when he "lost time." (RT Vol. 3, p. 708.) Counsel explained that this was not a crime which Mr. Cunningham wanted to commit, and that the only way the police were able to connect John Cunningham to the crime was by his own confessions. (RT Vol. 3, pp. 709-14.)

During the guilt phase of the trial, defense counsel presented no evidence in support of his chosen defense of "lost time." Instead, by the end of the case defense counsel conceded that Mr. Cunningham always sought to accept responsibility for what he did on June 27, 1992, and that he committed the charged offenses because he was experiencing a buildup of pressure caused by a mix of helplessness and fear. (RT Vol. 4, pp. 1083-84.) In conclusion, counsel argued "from everything we know, John Cunningham wished to take responsibility for his crime, and he did." (RT Vol. 4, p. 1086.)

E. The Verdict

At the conclusion of the guilt phase, the Superior Court judge found Mr. Cunningham guilty of the first degree murders of Wayne Sonke, David Smith and Jose Silva. (RT Vol. 4, p. 1088.) The Court also found Mr. Cunningham guilty of the burglary and arson of the Surplus Office Sales store, three counts of robbery, and being a felon in possession of a firearm. (RT Vol. 4, p. 1089.) The Court found true the special allegations of use of a firearm during the murders charged in Counts I through III, and also found true the special circumstances allegations that the murders of Wayne Sonke, David Smith and Jose Silva were committed during the commission of a robbery, and that Mr. Cunningham had been convicted of multiple murder. The Court concluded that the evidence was sufficient to demonstrate the proof of the three prior felony convictions alleged against Mr. Cunningham pursuant to section 667.5(b), and that the prior robbery conviction qualified as a prior conviction within the meaning of section 667(a). (RT Vol. 4, pp. 1091-1092.)

PENALTY PHASE

The penalty phase of this case was tried before a jury in the Superior Court of San Bernardino County.

A. The Prosecution Case

During the penalty phase, the prosecution presented the testimony of many of the same witnesses who testified during the preliminary hearing and the bench trial

in an effort to demonstrate the circumstances surrounding the crime. (See, e.g., RT Vol. 11, pp. 2731-4123.) The prosecution also presented additional testimony in aggravation regarding Mr. Cunningham's prior felony convictions and prior convictions for alleged crimes of violence.

Herta Gill testified that she was a cashier at the Vineland Drive-In, located in the City of Industry, California, and that on April 24, 1976, at about 9:00 p.m., she was robbed at gun point. (RT Vol. 13, p. 4135.) Defense counsel did not cross-examine Ms. Gill and stipulated that Mr. Cunningham had previously been convicted of robbery for this offense. (RT Vol. 13, p. 4139.)

Michelle Aneris Ramirez testified that her maiden name was Michelle Irrazary and that on April 5, 1982, she was fourteen years old and lived in La Mirada. On that date Mr. Cunningham, who was a friend of the family, knocked on the door and explained that his car had broken down. Ms. Irrazary opened the door and admitted Mr. Cunningham, but after a few minutes in her home Mr. Cunningham came around a counter, asked her to perform fellatio, forced her down on her knees, struck her, and then forced her to perform oral sex. (RT Vol. 13, pp. 4141-44.) The jury learned that, as a result of this offense, Mr. Cunningham was convicted of a violation of Penal Code section 288, subdivision (a).

Samira Sepulveda Nicholson then testified and told the jury that in the period from April to September 1987, she was fifteen years old and regularly engaged in

sexual contact with Mr. Cunningham. (RT Vol. 13, pp. 4152-59.) The jury learned that, as a result of this offense, Mr. Cunningham was convicted of a violation of Penal Code section 288, subdivision (b), but the Superior Court specifically found that this prior felony conviction could not be considered as a crime of violence under section 190.2[c]. (RT Vol. 13, pp. 5581-82.)

Finally, the prosecution introduced the testimony of Jose Silva's brother and sister, Jesus Silva and Josefina Gomez, David Smith's half brother, Edward Smith, and his wife, Mimi Smith, and Wayne Sonke's daughter, Lois Backe, and wife, Betsy Sonke, who each testified about the death of their loved one and how each learned about the murders. (RT Vol. 13, pp. 4191-4203; 4235-40.)

B. The Defense Case

In mitigation, defense counsel tried to present evidence of Mr. Cunningham's abusive childhood and his traumatic combat experiences in Vietnam. Defense counsel argued that Mr. Cunningham suffered from an extreme case of post-traumatic stress disorder at the time of the offense.

Evidence presented during the penalty phase showed that John Cunningham was born during the marriage of Vivian Lucille Johns to Maurice Cunningham. At the time they married Vivian had been married once previously (when she was fourteen), and Maurice had been forced out of his home and placed on a Merchant Marine ship on the docks of Hawaii when he was a teenager. Maurice and Vivian had

been married for four years and had two sons, Sam (the oldest) and Wes (the middle child), by the time John was born. (RT Vol. 13, p. 4352.)

Vivian Johns was born in Osceola, Florida and told her children and family members that she was a full-blooded Seminole Indian. (RT Vol. 13, p. 4358; Vol. 16 p. 5034.) Throughout her life, Vivian Johns regularly worked as a prostitute. (RT Vol. 13, p. 4355; Vol. 14, pp. 4678-79.) At the age of fourteen, Vivian married Raiford Mooney and had two children. (RT Vol. 14, p. 4684.) Vivian repeatedly deserted her family; and when her first husband tired of retrieving her, Vivian had no further contact with her two young children. (RT Vol. 14, pp. 4716, 4736.) By the time she was eighteen, Vivian had separated permanently from Raiford Mooney and began living with Maurice Cunningham. (RT Vol. 14, p. 4685.)

Maurice Cunningham was adopted as a child by a prominent family in Hilo, Hawaii. Maurice's father was a stern disciplinarian who never fully accepted his adopted son, and when his father no longer wanted to care for him, Maurice was forced into the Merchant Marines and his adopted father severed all further ties with him. (RT Vol. 13, p. 4380.) As a grown man Maurice developed a reputation as a violent and abusive person who had serious problems with alcohol and who often tried to sexually molest his family members. (RT Vol. 15, p. 4744 [Maurice tried to molest his sister-in-law].)

Maurice and Vivian lived in Florida for four years before Mr. Cunningham was

born, but they divorced when Mr. Cunningham was only two years old. (RT Vol. 13, p. 4349.) Following the divorce, Mr. Cunningham lived with his mother, who continued her promiscuous ways.

As Mr. Cunningham ultimately confided to those closest to him, when he was a young boy his mother had many different men coming in and out of her life, and it appears that some of these men may have been allowed to abuse the Cunningham children. (RT Vol. 13, p. 4317.) Mr. Cunningham reported being molested at least once during this period. (RT Vol. 13, p. 4312.)

Mr. Cunningham's brother Wesley reluctantly testified during the penalty phase and told the jury that he was trying to forget the horrific memories of his childhood because after his father left their family, his mother became a hopeless drunk. (RT Vol. 16, p. 5035.) Wesley explained that his mother quickly remarried and her new husband (who was also an alcoholic) would often strip the boys naked and beat them with a belt. (RT Vol. 16, p. 5036.) Wesley also recalled one day when he woke up because the house was on fire and his mother and his step-father were passed out in a room full of drunks and could not be roused. (RT Vol. 16, pp. 5036-37.) Finally, Wesley specifically recalled one incident when his mother fought with his step-father and stabbed him in the hand with a fork. (RT Vol. 16, p. 5038.)

Wesley also told the jury that Vivian repeatedly exposed her sons to sexual abuse and acts of molestation by strangers. Wes recalled at least one incident in

which his mother fondled him when she was drunk. (RT Vol. 16, p. 5035.) As Wesley explained, during this time of chaos and sexual abuse, it was common for the boys to go into the kitchen and see a person nude or draped in a towel. (RT Vol. 17, p. 5222.)

Despite these awful experiences, Wesley Cunningham's most vivid memory of living with his mother was that she would often leave her sons for days at a time. (RT Vol. 16, p. 5037.) One day, Vivian left and never came back–abandoning her three boys (ages five, seven and nine) to fend for themselves. (RT Vol. 16, pp. 5037-38.)

For a few months after their mother left, the three Cunningham boys lived on their own in the family home. Wesley recalled that during this time he and his brothers would play cowboys and Indians and shoot each other with real BB guns. (RT Vol. 16, p. 5047.) Wesley also explained that the boys survived by stealing milk left on the neighbor's porch and food from the corner store and by bathing in a neighborhood swimming pool. (RT Vol. 17, p. 5220, 5039.)

Ultimately, the Florida Department of Social Services took the three boys into protective child custody. Just before Christmas 1955, Mr. Cunningham and his brothers, Sam and Wes, were placed in the Kendall Boys' Home, an orphanage which at that time was located in North Miami, Florida. (RT Vol. 13, pp. 4368-4369.)

The Kendall Boys' Home was a segregated orphanage where boys were locked

in their rooms at night and only allowed out during the day if they demonstrated good behavior. (RT Vol. 16, p. 5048.) The entire time Mr. Cunningham lived in the Kendall Boy's Home he was separated from his brothers and was housed in a room alone on the bottom floor. (RT Vol. 16, p. 5040.) Wes recalls that the boys were in the orphanage for more than two years before Florida welfare officials were finally able to locate Maurice Cunningham in California and reunite the boys with their father. (RT Vol. 16, p. 5041.)

Unfortunately, life with Maurice proved to be far worse than any segregated, locked orphanage and, if possible, was more abusive and assaultive than life with Vivian. When the boys went to live with Maurice, they quickly discovered that he was a chronic alcoholic who became violent and sexually abusive whenever he was drunk. (RT Vol. 15, p. 4751.)

By the time Mr. Cunningham, Sam and Wes went to live with their father, Maurice had already married Betty Cunningham, who had three children of her own from a previous marriage (Jerry, William and Carolyn Crawford). (RT Vol. 15, pp. 4750-51.) According to Wesley Cunningham and Jerry Crawford, Maurice Cunningham would regularly beat Betty and each of the children with a closed fist. Jerry Crawford also told the jury that any time Maurice Cunningham had a bad day, any of his children or step-children could become a target for his abuse. (RT Vol. 16, p. 5051.)

More ominously, Jerry Crawford also recalled that Maurice regularly sexually abused his children. Mr. Crawford told the jury that Maurice Cunningham sodomized him so often that he "could not count the times." (RT Vol. 15, p. 4751.) Wesley Cunningham also testified that, although he cannot recall being abused by his father, he knew that Maurice would often sexually abuse his step-daughter, Carolyn. (RT Vol. 16, p. 5053.)

For his part, John Cunningham admitted to close friends in confidence that as a child his father sexually molested him. (RT Vol. 17, pp. 5223, 5321.) Finally, everyone who testified recalled that when he or she lived with Maurice Cunningham they regularly heard the screams of their siblings who were being sodomized by Maurice. (RT Vol. 17, pp. 5221, 5322.)

After Mr. Cunningham graduated from high school, he enlisted in the United States Army and was sent to Vietnam. Mr. Cunningham arrived in Vietnam in May 1970 and was assigned to the 199th Light Infantry Brigade in a reconnaissance unit. (RT Vol. 13, pp. 4494-4542.) This reconnaissance unit would travel through the jungles of Vietnam for a period of five to fourteen days in an effort to locate the suspected enemy. The unit would secure unstable areas, set up ambushes with claymore mines, and reconnoiter areas which were believed to be infiltrated by the Viet Cong. (RT Vol. 15, pp. 4764-65, 4779-80; Vol. 16, pp. 5082-85.) When the 199th Light Infantry Brigade was disbanded, Mr. Cunningham and members of his

unit were re-assigned to the 101st Airborne's "No Slack" battalion, where they continued as members of a reconnaissance platoon. (RT Vol. 15, p. 4818; Vol. 16, p. 5025.)

As a result of his service in Vietnam, Mr. Cunningham was promoted three times in eleven months and received the National Defense Service Medal, the Vietnam Service Medal, a Bronze Star, a commendation, and the Combat Infantryman's Badge. (RT Vol. 17, pp. 5229, 5340.) Mr. Cunningham also received a Republic of Vietnam Gallantry Cross with a Palm Unit Citation. (RT Vol. 17, p. 5375.)

During his tour of duty in Vietnam, Mr. Cunningham–like many other Vietnam combat veterans–experienced a variety of traumatic events. For example, at times, Mr. Cunningham's unit would encounter signs of the enemy which included mass graves. (RT Vol. 16, p. 5118.) There were other times when the reconnaissance unit encountered potential enemies living in an unauthorized area and the people in the illegal settlement were evacuated and the buildings of the village were destroyed by fire. (RT Vol. 16, p. 4919.) Most memorably, members of Mr. Cunningham's reconnaissance units recalled that there were times when they would witness civilians being killed by members of the Vietnamese special forces. During those times when Mr. Cunningham's reconnaissance unit would travel with members of the South Vietnamese PRU (a special unit led by an agent of the Central Intelligence Agency

and composed of elite members of the South Vietnamese Army and the armed forces of South Korea and Cambodia) they witnessed atrocities such as the summary execution of prisoners of war and the random killing, capturing, or mistreatment of Vietnamese civilians. (RT Vol. 16, pp. 4976-78, 5089, 5161-62; Vol. 17, pp. 5233-5234.) For example, many of the platoon members particularly remembered that, after a raid in the Ashau Valley, a sniper with the South Vietnamese Army went through a village and shot each of the captured North Vietnamese fighters in the head, insisting that he had orders to take no prisoners. (RT Vol. 16, p. 5066.) Other platoon members vividly recall one incident in which a South Vietnamese soldier deliberately killed a five year-old girl. (RT Vol. 16, p. 4923-24, 4935-36.)

Many members of Mr. Cunningham's reconnaissance unit testified during the penalty phase that after they returned from Vietnam they regularly experienced signs and symptoms of post-traumatic stress disorder. These veterans explained that they often had problems adjusting to life after Vietnam, and that many of those adjustment problems remained with them throughout their life. (RT Vol. 16, p. 5120.) Almost all the platoon members reported that they had trouble sleeping, that they were regularly afflicted by nightmares, and that they experienced problems with anxiety, hyper-vigilance, and being easily startled by innocuous sounds (like a car backfire or a motorcycle) or simple sights (like a tree stump). (RT Vol. 15, p. 4785; RT Vol. 16, pp. 4939, 4958, 5016.) One of the platoon members best described the experience of

suffering from PTSD as "like carrying a demon around inside of you." (RT Vol. 16, p. 4943.)

The defense concluded the presentation of evidence in the penalty phase with the testimony of Dr. Thomas Williams, a Naval Academy graduate with a doctorate in psychology who specialized in the treatment of post-traumatic stress disorder ("PTSD"). (RT Vol. 17, pp. 5184-88.) Dr. Williams opined that, based on his evaluation, Mr. Cunningham had a severe case of post traumatic stress disorder caused by the combination of the multiple traumas he experienced during his abusive childhood and the overwhelming events in Vietnam. (RT Vol. 17, pp. 5193, 5198, 5215.)

Dr. Williams explained that a person who suffers from PTSD can be depressed, socially isolated, have memory problems and–in extreme cases–experience a form of disassociation in which the individual literally loses control of his behavior (RT Vol. 17, pp. 5197, 5210-11.) In addition, Dr. Williams explained that the earlier a person develops PTSD the more debilitating its effects because "the earlier in life one is traumatized, the fewer coping skills one has to deal with" and that, in his opinion, John had probably developed a full-blown case of post-traumatic stress disorder by the age of nine. (RT Vol. 17, pp. 5225-26.) Finally, Dr. Williams concluded his testimony with his opinion that John Cunningham showed a high level of dissociative experiences related to post-traumatic stress disorder and that it was common for Mr.

Cunningham to often feel as if he was standing outside of himself, watching himself commit a particular act. Dr. Williams believed that it was likely that John experienced such a dissociative state at the time of the murders. (RT Vol. 17, pp. 5317-20, 5327.)

ARGUMENT

THE GUILT PHASE

Mr. Cunningham respectfully submits that he was denied his state and federal constitutional rights to due process and a fair trial when he was convicted in a bench trial in which he was absent. Mr. Cunningham insists that his trial was fundamentally unfair because the abusive conditions imposed by shackling him at each appearance in the San Bernardino Superior Court coerced a waiver of his right to be personally present during the guilt phase and led him to involuntarily waive his right to a jury trial. In addition, the trial court erred in convicting Mr. Cunningham without an adequate advisement of rights in a bench trial which was the functional equivalent of a slow plea of guilty. Finally, Mr. Cunningham contends that the trial court erred in admitting his involuntary and inadmissible custodial statements. Mr. Cunningham contends that the individual and cumulative effect of these errors rendered his trial structurally unsound and deprived him of his right to due process and a fair trial.

"It is an essential part of justice that the question of guilt or innocence shall be determined *by an orderly legal procedure* in which the substantial rights belonging

to the defendants shall be respected." (*People v. Cahill* (1993) 5 Cal.4th 478, 501, citing *People v. O'Bryan* (1913) 165 Cal. 55, 65, italics added.) Thus, while the State is free to regulate the procedures of its courts in accordance with its own law, the trial of an accused must respect the principles of justice which are "so rooted in the traditions and conscience of our people as to be ranked fundamental." (*Brown v. Mississippi* (1936) 297 U.S. 278, 285.) Consequently, both the United States and California Constitutions forbid the State from subjecting the accused to trial by ordeal: the State may not replace the witness stand with the rack and screw, and the State cannot allow the accused to be convicted in a trial which is a mere pretense to contrive a conviction. (*Ibid.*)

Mr. Cunningham contends that in this case he was in fact subjected to trial by ordeal which ultimately coerced so many involuntary waivers of his fundamental rights that the guilt phase of the case was beset with structural error. From his first day in court, Mr. Cunningham was shackled at the hands, waist and feet and the manacles were secured so tightly that Mr. Cunningham could not move his upper body, suffered serious cuts and abrasions which required medical care, and was left humiliated and defenseless against his known enemies when he was paraded, chained, through the public halls of the courthouse.

When the Superior Court ignored Mr. Cunningham's persistent objections to this inhumane treatment, Mr. Cunningham ultimately waived his right to be personally

present at the guilt phase of the trial as well as his right to a trial by jury. Consequently, Mr. Cunningham was convicted at a trial where his counsel presented no defense and conceded his guilt after the trial court admitted his involuntary confessions. The resulting structural errors rendered Mr. Cunningham's guilt phase trial fundamentally unfair and unreliable.

The imposition of a sentence of death is the most extreme sanction known to the law: "[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from only one or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Therefore, the qualitative difference between death and all other punishments demands a correspondingly higher degree of reliability in the determination that death is the appropriate punishment and "a correspondingly greater degree of scrutiny of the capital sentencing determination." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 329.).)

The United States Supreme Court has always demanded that when an accused faces the ultimate penalty, the state trial proceedings which lead to a sentence of death must be sufficient to recognize the gravity of the task and ensure that the trier of fact has an appropriate awareness of the "truly awesome responsibility." (*Caldwell v. Mississippi, supra,* 472 U.S. at 341.) "Accordingly, many of the limits that [the Supreme] Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable

exercise of sentencing discretion." (*Id.* at 329.) The same concerns apply to the procedures during the guilt phase which are designed to narrow the class of individuals who are eligible to receive the ultimate penalty. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, 197 (joint opinion of Stewart, Powell and Stevens).

Therefore, in scrutinizing procedures during the guilt and penalty phases of a capital trial, the United States Supreme Court has consistently emphasized the "twin objectives" of "measured consistent application and fairness to the accused." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-111.) Consequently, state trial procedures which render the death penalty unfair or unreliable violate the Eighth Amendment of the United States Constitution. (*Caldwell v. Mississippi, supra,* 472 U.S. at 329.)

Mr. Cunningham respectfully submits that the guilt phase bench trial which was held in his absence was fundamentally unfair and unreliable because of a combination of errors which, when considered separately and together, are presumptively prejudicial and amount to structural error. At all pre-trial proceedings in the San Bernardino Courthouse, Mr. Cunningham was subjected to extreme, painful and protracted pre-trial restraints. When his multiple requests for less restrictive and less painful alternatives were denied, Mr. Cunningham ultimately waived his right to be personally present at any further proceedings in the San Bernardino Courthouse and tried to withdraw completely from the process by also

waiving his right to a jury trial. As a result, Mr. Cunningham was convicted *in absentia* by a Superior Court judge in a trial where the prosecution was allowed to introduce his involuntary and inadmissible custodial confessions, and where his attorney submitted the case without presenting a defense and by conceding his guilt, but without obtaining a valid waiver of Mr. Cunningham's *Boykin/Tahl* rights.

Mr. Cunningham contends that the waivers of his right to be personally present and to a jury trial were involuntary and coerced by the abusive and unconstitutional conditions attendant to appearing in the Superior Courthouse of San Bernardino County. In addition, Mr. Cunningham argues that he was convicted at a court trial which was the functional equivalent of a slow plea of guilty without an adequate advisement of the constitutional rights he was relinquishing by agreeing to such an abbreviated trial. Finally, Mr. Cunningham insists that the trial court erred in admitting his custodial statements which were involuntary and taken in deliberate violation of his constitutional right to remain silent and only speak with law enforcement officers with the assistance of counsel.

Mr. Cunningham contends that the individual and cumulative effect of these structural errors compels this Honorable Court to reverse each of his criminal convictions without any harmless error analysis. In the alternative, Mr. Cunningham argues that he was prejudiced because, but for these multiple constitutional violations, the result of his trial may have been different.

I. MR. CUNNINGHAM WAS PAINFULLY RESTRAINED AND IMPROPERLY SUBJECTED TO PRE-TRIAL PUNISHMENT WITHOUT AN ADEQUATE SHOWING OF MANIFEST NEED IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

A criminal defendant has a constitutional right to appear in court free of shackles. (See, *Illinois v. Allen* (1970) 397 U.S. 337, 343-344 [in order to maintain judicial control a court should rarely bind and gag the accused].) "It has ever been the rule at common law that a prisoner brought into the presence of a court for trial, upon his plea of not guilty . . . was entitled to appear free of all manner of shackles or bonds." (*People v. Harrington* (1871) 42 Cal.165, 167.) Consequently, the use of manacles, waist belts and leg chains for all out-of-prison movement may, in some cases, amount to an improper form of pre-trial punishment which denies the defendant his state and federal constitutional right to due process and a fair trial and the presumption of innocence. (See, e.g., *Spain v. Rushen* (1989) 883 F.2d 712, 715, fn. 3.)

In this case Mr. Cunningham was heavily chained for all pre-trial proceedings in the San Bernardino Superior Courthouse. Although Mr. Cunningham was not so severely restrained when he appeared for a preliminary hearing in the Superior Court sitting in Rancho Cucamonga, and even though few other defendants appearing in the San Bernardino County Superior Court were subjected to such extreme mistreatment, for all court appearances in San Bernardino Mr. Cunningham was chained at his feet,

his hands, and his waist, and the manacles were often secured so tightly that they broke through the skin of his hands and ankles, causing unbearable pain. (See, CT Vol. 4, pp. 1049-1050.) After repeatedly complaining unsuccessfully about this extreme treatment, and after failing to persuade the trial court to pursue less restrictive alternatives such as returning the case to a courtroom in Rancho Cucamonga, Mr. Cunningham ultimately waived his right to be personally present at all further proceedings in San Bernardino and waived his right to a guilt-phase jury trial there. (CT Vol. 4, pp. 1049-1050; 1189-1190.)

Mr. Cunningham respectfully submits that he was denied his state and federal constitutional right to due process and a fair trial in a capital murder prosecution when he was repeatedly, severely and unnecessarily restrained during pre-trial proceedings without an adequate showing of manifest need and without employing less restrictive alternatives. Mr. Cunningham submits that this cruel and inhumane treatment rendered his trial structurally unsound and that he was prejudiced by this unnecessary shackling because the restraints exposed him to pain, were humiliating and demeaning, subjected him to a risk of harm, and adversely affected both his presumption of innocence and his ability to consult with his attorney. Mr. Cunningham was harmed by the excessive shackling because he felt forced to waive his right to be personally present at any proceedings, including a jury trial, to be held in the San Bernardino county courthouse.

A. Mr. Cunningham Was Unnecessarily Restrained In Violation of the State and Federal Constitutions.

The Due Process Clauses of the state and federal constitution impose an obligation on a reviewing court to ascertain whether the proceedings which resulted in a criminal conviction "offend the canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." (*Rochin v. California* (1952) 342 U.S. 165, 169.) One of these basic principles is the presumption of innocence and the concomitant physical indicia of innocence: consequently, the law has long forbidden the routine use of shackles during a criminal trial, permitting them "only in the presence of a special need." (*Deck v. Missouri* (2005) 544 U.S. 622; *People v. Harrington, supra,* 42 Cal. at p. 167.)

The prohibition against unnecessary and excessive shackling of a pre-trial detainee has "ever been the rule at common law." (*People v. Harrington, supra,* 46 Cal. at 167.) Courts have long recognized that "an order of the Court which, without evident necessity, imposes physical burdens, pains and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass [the defendant's] mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense." (*Id* at p. 168; see also *Parker v. Territory of Arizona* (1898) 5 Ariz. 283, 287; 52 P. 361, 363; see also *People v. Clark* (1977) 45 Ill.App.3d 24, 27; 358 N.E.2d 1362, 1363.)

At his first appearance in Superior Court to consider his motion to suppress his custodial statements, Mr. Cunningham was severely shackled, and his attorney immediately objected to this inhumane treatment. (RT Vol. 1, p. 18.) Counsel pointed out that Mr. Cunningham was brought to court with chains around his ankles and his waist and with his hands cuffed to the side, which made it impossible for him to move his arms and even made it difficult for him to sit upright in the chair next to counsel. (RT Vol. 1, pp. 18, 21.) Counsel also noted that the tightly applied handcuffs were cutting Mr. Cunningham's wrists, leaving deep red impressions and breaking his skin. (RT Vol. 1, pp. 19, 21-22.) Counsel argued that such excessive restraints were unnecessary and not justified by any showing of adequate need, and told the court that "I don't believe that we can have a fair hearing or [that] Mr. Cunningham would be able to cooperate with [me], with being held here in restraints." (RT Vol. 1, pp. 18-19.)

In defense of the extreme use of chains and manacles, the prosecution argued that the restraints were necessary because this was a death penalty case. (RT Vol. 1, pp. 22-23.) The prosecution also alleged that the handcuffs, waist chains and leg irons were necessary because Mr. Cunningham was a large man who had previous, specialized training in the military. (*Id.*)

In response to Mr. Cunningham's initial complaints about the shackles, the trial court determined that the shackles were justified by a legitimate, though unspecified,

security concern and that no further manifest need had to be demonstrated to permit the use of the restraints during pre-trial proceedings. (RT Vol. 1, pp. 20, 24.) The trial court also stated that it was not convinced that the waist chains and leg restraints impaired Mr. Cunningham's ability to participate in his own defense. (*Id.*)

After the trial court refused to unshackle Mr. Cunningham during his first appearance in Superior Court in San Bernardino, counsel noted that Mr. Cunningham's case was only transferred to San Bernardino for the convenience of the Superior Court Judge assigned to the case and that the use of such severe restraints was unique to the San Bernardino courthouse and was not required in the Rancho Cucamonga courthouse. (RT Vol. 1, p. 24.) Consequently, counsel asked for the case to be returned to Rancho Cucamonga as a less restrictive alternative to the continued use of the shackles, but the trial court took no action on this initial request. (RT Vol. 1, pp. 24-25.)

At each subsequent court hearing in San Bernardino, defense counsel reiterated his objections to the excessive shackling of Mr. Cunningham. Counsel objected that in addition to the pain and discomfort which impaired Mr. Cunningham's ability to participate in his own defense, the shackles were also humiliating and demeaning and exposed Mr. Cunningham to a risk of harm from his known enemies because for each court appearance he was transported through the public hallways of the courthouse while he was restrained. (RT Vol. 1, pp. 33-34.) Defense counsel consistently noted

that there were other courtrooms in San Bernardino county where such shackling was unnecessary and regularly repeated his request to return the case to the West End Division of the Court in Rancho Cucamonga. (RT Vol. 1, pp. 34-35.)[3]

In response to these continuing objections, the prosecution consistently claimed that the shackles were necessary because Mr. Cunningham was an escape risk, especially because he absconded from parole at the time of the alleged offenses. (RT Vol. 1, p. 40.) The prosecution also insisted that Mr. Cunningham had to be shackled at his hands, waist and feet at all times, *even while confined in a locked holding cell of the courthouse*, because he was a large, muscular man. (RT Vol. 1, pp. 40-41.)

Following these on-the-record objections to the excessive restraints, Mr. Cunningham subsequently filed an additional, written motion, registering his continuing objection to the unjustified use of such severe restraints. (CT Vol. 4, pp.1039-1050.) Mr. Cunningham argued that he was made to suffer from excessive restraints without any showing of a manifest need beyond the criminal charges in his case, that he remained unnecessarily chained throughout the day (even while he sat in a secure holding cell of the San Bernardino courthouse), and that this constant shackling seriously injured him and interfered with his ability to consult with his

---

3. Although Mr. Cunningham was placed in leg restraints while being transported to the preliminary hearing held in Rancho Cucamonga, it does not appear that he was restrained in the same painful manner as he was in San Bernardino. Instead, Mr. Cunningham alleged that while he was in court in Rancho Cucamonga the waist and wrist restraints were removed both when he was in the holding cell of the courthouse as well as while he was in courtroom. (CT, Vol. 4, p. 1050.)

attorney and participate in his own defense. (CT Vol. 4, pp. 1041, 1044.) Mr. Cunningham also complained that the restraints unnecessarily exposed him to anxiety and a known risk of harm because he was brought to the courtroom through the public corridors of the courthouse while he was chained, thereby exposing him to his enemies in a defenseless condition. (CT Vol. 4, p. 1042.) Finally, Mr. Cunningham argued that the restraints were not justified because he had never escaped from jail or attempted to escape, he had never committed any disciplinary infraction while in jail or prison, and he had never been accused of assaulting a jail guard or any other law enforcement or court official. (CT Vol. 4, p. 1042.)

In a sworn declaration in support of his motion, Mr. Cunningham stated that he was usually brought to the San Bernardino County Courthouse early in the morning while he was secured in hand, leg and waist chains. Mr. Cunningham told the Court that, as a large man, the restraints were often fastened so tightly that they cut his skin and dug into his flesh, which often required him to seek medical treatment for his injuries. (CT Vol. 4, pp. 1049-1050.) According to Mr. Cunningham, "when the leg irons are closed one click, the pain is usually bearable for short periods of time. When tightened more than one click, as some guards have done, the pain is intense." (CT, Vol. 4, pp. 1049-1050.) Mr. Cunningham further declared that he often remained shackled in this abusive manner for more than eight hours a day: Mr. Cunningham explained that he was chained at the legs, waist and hands (where he

could not move his arms) from dawn, when he left the West End Detention Center in Rancho Cucamonga, California, until he returned from the San Bernardino County Courthouse, usually no earlier than 2:00 p.m. in the afternoon (CT, Vol. 4, pp. 1050, 1041.)

In response to Mr. Cunningham's objections to the pre-trial shackles, the prosecution continued to argue that the nature of the crime justified the restraints. (CT, Vol. 4, pp. 1051-1052.) The prosecution also alleged that Mr. Cunningham's specialized military training, when combined with his muscular build, justified the use of shackles. (CT Vol. 4, p. 1052.) Finally, the prosecution alleged that Mr. Cunningham should be restrained even when he was locked in the holding cells of the San Bernardino courthouse because he was an escape risk. (CT Vol. 4, pp. 1052-1053.)

Following the submission of the written pleadings, the trial court once again overruled Mr. Cunningham's objections to the pre-trial restraints. (RT Vol. 1, pp. 42-44.) The court found that pre-trial detainees (whom the court incorrectly described as "prisoners") were brought to court in San Bernardino early in the morning and were held in the holding cells of the courthouse for several hours prior to their court appearance; consequently the court determined that there was no reasonable basis to keep Mr. Cunningham chained while he was in the holding cell or while he was in court, provided there was adequate security. (RT Vol. 1, p. 41-43.) However, the

court ultimately approved the continued shackling of Mr. Cunningham during his transportation to the San Bernardino courthouse and specifically left the determination of any less restrictive alternatives to the shackling of Mr. Cunningham to the officers in charge of his custody. (RT Vol. 1, p. 42.)[4] Finally, the trial court denied the request to transfer the matter to the courthouse in Rancho Cucamonga where such restraints would not be necessary. (RT Vol. 1, pp. 43-44.)

The trial court abused its discretion in sanctioning the extreme and painful shackling of Mr. Cunningham for all pre-trial appearances in the San Bernardino courthouse. First, the court erred by approving the use of restraints based on the bare fact that Mr. Cunningham was charged with a capital crime. Second, the trial court erred in failing to recognize that the prohibition on cruel and unusual shackling applies even during the pre-trial proceedings which are held outside the presence of the jury. Finally, the trial court erred by failing to approve other, less restrictive alternatives–such as moving the trial and pre-trial proceedings to Rancho Cucamonga–which would have easily avoided the need to hog-tie Mr. Cunningham for up to eight hours a day. Each of these errors violated Mr. Cunningham's state and

---

4. At his first appearance following the entry of this Order, Mr. Cunningham remained in painful leg shackles while in the holding cell and the courtroom despite the Court's earlier order and, because of alleged "unforseen" security problems, the shackles could not be removed. (R.T. Vol. 1, pp. 69-70.) Thus it is apparent that the trial court order was in effect no order at all because the decision to restrain Mr. Cunningham was essentially left to the exclusive discretion of the court security officers, irrespective of the Court's previous orders.

federal constitutional right to due process and a fair trial with the presumption of innocence.

1. There Was No Showing of a Manifest Need.

Mr. Cunningham respectfully submits that the trial court abused its discretion in approving the unjustified use of painful restraints without an adequate showing of a manifest need. The trial court erred because the prosecution never presented any evidence that Mr. Cunningham was disruptive, planned to escape, or otherwise posed a unique security risk; on the contrary, the record evidence adduced at a subsequent pre-trial hearing demonstrated that while Mr. Cunningham was confined in the California Department of Corrections he never committed any act of violence, he never tried to escape, and he obtained the lowest classification level possible. (RT Vol. 2, p. 430.) The court also erred by incorrectly concluding that the requirement of a "manifest need" only applied to proceedings held before the jury.

In California, a criminal defendant may not be physically restrained while in court unless there is a showing of manifest need. (*People v. Combs* (2004) 34 Cal.4th 821, 837.) A manifest need must be shown on the record by evidence that the defendant planned to engage in violent or disruptive behavior in court. (*Ibid.*) Moreover, a shackling decision must be based on facts demonstrated in open court, and not on "simple rumor or innuendo." (*Ibid*, citing *People v. Anderson* (2001) 25 Cal.4th 543, 595.) Consequently, there must be compelling evidence of imminent

threats to the security of the courtroom which are attributable to the defendant before the defendant may be shackled for court proceedings. (*People v. Duran* (1976) 16 Cal.3d 282, 293.)

A reviewing court cannot uphold the decision of the trial court to shackle the defendant if the court abuses its discretion. (*People v. Combs, supra,* 34 Cal.4th at 837.) The trial court abuses its discretion in shackling the defendant without a particularized finding of a manifest need: "the imposition of physical restraints in the absence of a record showing or *a threat of violence or other non-conforming conduct* will be deemed to constitute an abuse of discretion." (*People v. Combs, supra,* 34 Cal.4th at p. 837 (emphasis in the original), citing *People v. Hawkins* (1995) 10 Cal.4th 920, 944, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) Finally, the requirement of a manifest need to justify shackles applies to all court proceedings–pre-trial hearings as well as proceedings before the jury. (See, e.g., *United States v. Howard* (9th Cir. 2005) 429 F.3d 843 (holding that shackling of pre-trial detainees during their first appearance violates due process unless reasonably related to security).

In his written opposition to continued shackling, Mr. Cunningham alleged that there was no legitimate justification for his hand, waist, and leg chains because he had never escaped from custody or attempted to escape from custody and he had never been disruptive or assaultive while he was in any jail or state prison. (CT, Vol. 4, p.

1042.) Mr. Cunningham also argued that he had never acted disrespectfully or unruly in any courtroom and that he had no record of any disciplinary infractions while in custody. (RT Vol. 1, p. 19.) Therefore, Mr. Cunningham alleged that there was no showing whatsoever that he was violent, disruptive or posed any risk to the court of its staff which necessitated the use of such excessive restraints.

In response to Mr. Cunningham's multiple objections, the State could only allege that "in the case at bar the defendant is charged with three counts of murder including special circumstances." (CT, Vol. 4, p. 1051.) The prosecution tried to emphasize that Mr. Cunningham's status as a parolee who confessed to the crime, as well as his military training, together created a substantial risk to the court and its staff if Mr. Cunningham was not in shackles, even while awaiting his court hearings. (CT, Vol. 4, p. 1052; RT Vol. 1, p. 22.) However, this argument was insufficient to establish the required manifest need for physical restraints.

At first the trial court responded to Mr. Cunningham's objections to the lack of any manifest need for the restraints by ordering that Mr. Cunningham must remain in leg restraints and waist chains, but his hands could be cuffed in front of him while he was in court, so that he could actually move his arms and have the ability to write. (RT Vol. I, p. 20.) When counsel objected that there were still no facts which justified even these restraints, the trial court responded that legal limitations on the shackling of a defendant only applied to jury trials and that there were no similar

constitutional concern with restraining Mr. Cunningham during pre-trial proceedings before the court. (RT Vol. I, pp. 20, 24.) In this respect the trial court clearly erred and abused its discretion. Ultimately, the trial court never wavered from this position, approving the continued shackling of Mr. Cunningham so long as it was approved by the security officers in charge of his custody. (RT Vol. 1, p. 42.) There was no credible evidence to show that it was necessary to restrain Mr. Cunningham. The only justification offered by the prosecution for the excessive shackling was the allegation that this was a death penalty case involving a large, muscular military veteran who absconded from parole. The prosecution failed to introduce a single witness or piece of evidence to demonstrate that Mr. Cunningham ever threatened any violence or engaged in any non-conforming conduct while in custody or before any court of law, or otherwise posed any threat to the judicial proceedings. Therefore, the trial court abused its discretion in sanctioning the extreme shackling of Mr. Cunningham in the absence of any evidentiary support in the record demonstrating a manifest need for the restraints.

2. There Were Less Restrictive Alternatives to Shackling.

If the cumulative effect of the unnecessary physical restraints adversely impairs the defendant's ability to participate in the trial proceedings or consult with his attorney, then the resulting conviction is a violation of due process. (*Spain v. Rushen, supra,* 883 F.2d at p. 728.) Under these circumstances, a trial judge commits

constitutional error in failing to employ shackling only as a last resort. (*Ibid.*)

The mere fact that the defendant is charged with a violent crime is not sufficient to justify the imposition of pre-trial restraints. (*People v. Duran, supra*, 16 Cal.3d at 293.) Instead, the accused can only be restrained in a manner which threatens due process, if the trial court considers all other, less restrictive alternatives which were available to avoid the need for the restraints. (*Id.* at p. 291, fn. 8.)

At every hearing where Mr. Cunningham objected to the use of excessive shackles, he repeatedly asked that the matter be transferred to a different courtroom as a less restrictive alternative to the severe shackling in the San Bernardino County Courthouse. However, the trial court just as consistently denied this request and left the decision to employ any less restrictive alternatives to the officials who were responsible for Mr. Cunningham's custody, which ultimately resulted in no change in the abusive conditions.

The trial court erred when it ignored other, readily available and less restrictive alternatives to the excessive shackling of Mr. Cunningham. The trial court erred because it appeared the trial court put its own convenience in holding proceedings in San Bernardino above the need to avoid the unnecessary shackling of Mr. Cunningham. Although it was undisputed that Mr. Cunningham would not have been subjected to such severe restraints for such a prolonged period in the Superior Court located in Rancho Cucamonga, the trial court still refused to accept the less restrictive

alternative of transferring the proceeding to that court. Instead, the trial court improperly left the implementation of any less restrictive measures to the complete discretion of the officials who detained and transported Mr. Cunningham, the same officials who initially selected the excessive and abusive restraints. (RT Vol. 1, p. 44.)

Even after the trial court tried to remedy the worst effects of these unnecessary restraints, the court's orders were ultimately ignored by the security personnel who supervised Mr. Cunningham, leaving Mr. Cunningham to suffer the same abusive treatment as before the entry of the court's ostensibly remedial orders. (See, RT Vol. 1, p. 38.) Therefore, it is apparent that Mr. Cunningham was repeatedly subjected to cruel and painful treatment for every court appearance in the San Bernardino courthouse without an adequate factual basis, in violation of the state and federal constitutions.

By consistently refusing to transfer the case from its own courtroom to another courtroom in order to reduce or eliminate the hardship to Mr. Cunningham caused by excessive shackles, the trial court erred. Moreover, by leaving the implementation of any less restrictive alternatives to the discretion of detention officials who were not inclined to alter the restraints and who simply ignored the trial court's remedial orders, the implementation of less restrictive alternatives resulted in no alternative at all.

B. Mr. Cunningham Was Profoundly Prejudiced By the Improper Shackling.

Mr. Cunningham was prejudiced by the decision of the trial court to subject him to painful shackling for up to eight hours a day for every appearance in the San Bernardino courthouse. The decision to shackle Mr. Cunningham resulted in the wanton and gratuitous infliction of pain, subjected him to public humiliation, scorn, and a known risk of harm, adversely affected his presumption of innocence, had a deleterious effect on his ability to cooperate with his attorney, and irreparably compromised his desire to appear before the court in San Bernardino and defend the charges in this capital murder case before a jury.

The unjustified shackling of a criminal defendant substantially impairs the right to a fair trial. (See, e.g., *Deck v. Missouri* (2005) 544 U.S. 622 [holding that the visible shackling of a defendant before a jury in a capital trial violates due process absent case-specific security justifications for the shackling]; see also *Comer v. Schirro* (9th Cir. 2006) 463 F.3d 934, 963.) Shackling a defendant in a criminal trial violates due process because it is an unmistakable indication of the trial court's decision to separate the defendant from the community at large, despite the presumption of innocence. (*Holbrook v. Flynn* (1986) 475 U.S. 560, 569.)

Five basic considerations have led courts to the conclusion that unnecessary shackling is an affront to the United States Constitution. First, shackling suggests to the trier of fact that the defendant is dangerous, which undermines the trier's "ability

to weigh accurately all relevant considerations." (*Deck v. Missouri, supra,* 544 U.S. at p. 633). Second, shackling is an affront to the very "dignity and decorum of judicial proceedings." (*Id.* at p. 631.) Third, shackles greatly reduce a defendant's ability to communicate with counsel and participate in his own defense. (*Ibid.*) Fourth, physical restraints may also confuse and embarrass the defendant or impair his mental faculties. (*United States v. Howard, supra,* 429 F.3d at p. 851.) Finally, and most obviously, shackles cause physical and emotional pain. (*Ibid.*)

In objecting to the courthouse restraints, Mr. Cunningham repeatedly argued that he could not receive a fair hearing because the cruel and demeaning treatment attendant to the use of hand, leg and waist chains caused him extreme pain, subjected him to public humiliation and a risk of harm, adversely affected his ability to assist his lawyer or participate in the proceedings and showed that he was not being "treated as an individual." (RT Vol. 1, p. 19; CT Vol. 4, pp. 1041-1042.) Mr. Cunningham insisted that, even during pre-trial proceedings, these excessive and unnecessary restraints adversely influenced the general perception of him before the court because "he is being restrained and handled in a different way." (RT Vol. 1, p. 21.)

The pre-trial restraints caused Mr. Cunningham great pain. Throughout the entire time Mr. Cunningham was restrained he could not move his arms and could only turn his shoulders. (RT Vol. I, p. 21.) Mr. Cunningham's hand, waist and leg restraints routinely caused red marks and lacerations of the skin which required

medical attention. (CT, Vol. 4, p. 1050.) Moreover, on most of the days when he went to court in San Bernardino, Mr. Cunningham was chained and immobilized in this manner for more than eight hours. (CT, Vol. 4, p. 1050.)

"The unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment which is forbidden by the Eight Amendment" and, if pain is inflicted on a pre-trial detainee, then the wanton infliction violates the Fifth and Fourteenth Amendments as well. See, *Hope v. Pelzer* (2002) 536 U.S. 730, 737. Unnecessary and wanton inflictions of pain are those acts that are "totally without penological justification." (*Ibid.*)

In addition, it is apparent that the excessive pre-trial restraints in this case adversely affected Mr. Cunningham's ability to assist his counsel in his own defense. Instead, it is apparent that the hand, waist and leg chains literally drove Mr. Cunningham from the courtroom because, as he frankly disclosed to the court in his sworn declaration, he preferred to remain in his jail cell rather than to be subjected to a trial by ordeal in the San Bernardino County Courthouse. (See, CT, Vol. 4, p. 1050.)

Finally, the trial court's decision to shackle Mr. Cunningham improperly subjected him to cruel and inhumane punishment before he was ever convicted of the charged offense. Consequently, even though Mr. Cunningham was presumed innocent, for every court appearance in the San Bernardino courthouse Mr.

Cunningham was not afforded this basic presumption; on the contrary, when he appeared for court in San Bernardino, Mr. Cunningham was treated far differently than any other accused, and he was shackled at his hands, waist and feet while he traveled from the West End Detention Center, while he waited in the holding cell of the San Bernardino Superior Court, while he was transported through the public hallways, while he appeared in court, and during his return to the Detention Center.

Mr. Cunningham contends that the improper and extreme shackling resulted in a structural error which is presumptively prejudicial and compels a reversal of his criminal convictions. In the alternative, Mr. Cunningham contends that the error in requiring him to be shackled must result in a reversal of his criminal convictions because the error is clearly not harmless beyond a reasonable doubt.

1. The Improper Shackling Was Structural Error.

Mr. Cunningham respectfully submits that the trial court's decision to shackle him produced a trial setting which was structurally unsound, inherently unreliable, and fundamentally unfair. Consequently, Mr. Cunningham contends that the trial court's decision to shackle him is reversible without being subjected to any further harmless error analysis.

In general, a constitutional error does not automatically require reversal of a conviction and most constitutional errors can be reviewed for harmless error. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 306-307, citing *Rushen v. Spain* (1983)

464 U.S. 114, 117-118, and fn. 2 (denial of a defendant's right to be present at trial). However, there are some constitutional rights which are so basic to a fair trial that their absence can never be treated as harmless error. (*Chapman v. California* (1967) 386 U.S. 18.) In particular, this Court has previously recognized that the unjustified shackling of an accused is inherently prejudicial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 997, citing *People v. Duran, supra,* 16 Cal.3d 282.) Trial errors which occur during the presentation of the case to the jury, which may be quantitatively assessed in the context of other evidence presented, may be subject to harmless error analysis if the prosecution proves beyond a reasonable doubt that the error did not affect the fairness or the reliability of the trial. (*Arizona v. Fulminante, supra,* 499 U.S. at p. 308; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) In contrast, structural defects in the trial itself which "affect the framework within which the trial proceeds" are not "simply error in the trial process itself" and therefore defy harmless error analysis. (*Id* at 309-310.) Such structural errors include the denial of counsel (*Gideon v. Wainwright* (1963) 372 U.S. 335), the denial of counsel of choice (*United States v. Gonzales-Lopez* (2006) --- U.S. ---, 126 S.Ct. 2557), the denial of a public trial (*Waller v. Georgia* (1984) 467 U.S. 39), the denial of an impartial decision maker (*Tumey v. Ohio* (1927) 273 U.S. 510), racial discrimination in the selection of the grand jury (*Vasquez v. Hillery* (1986) 474 U.S. 254) and the denial of a right to trial by jury by giving a defective reasonable doubt instruction

(*Sullivan v. Louisiana* (1993) 508 U.S. 275).

The consequences of the unnecessary and excessive shackling of Mr. Cunningham bear directly on the "framework within which the trial proceeds" and affected the entire trial. (See, *United States v. Gonzales-Lopez*, *supra,* 125 S.Ct. at 2565, citing *Arizona v. Fulminante, supra,* 499 U.S. at 310.) Mr. Cunningham contends that the trial court's decision to shackle him produced numerous structural errors which defy harmless error analysis. First, the decision to shackle Mr. Cunningham stripped him of his presumption of innocence and undermined the legitimacy of the trial. Second, the shackling suggested that the trial court may have pre-judged the case and exhibited bias against Mr. Cunningham, especially in light of his disparate treatment with other, similarly situated, accused. Most important, because he was shackled after the trial court rejected less restrictive and readily available alternatives to the hand, leg and waist chains, the unjustified shackling led Mr. Cunningham to waive his right to be personally present at all further proceedings as well as to waive his right to a jury trial, thereby infecting the remaining portions of the guilt phase trial.

The error in unjustifiably shackling Mr. Cunningham for all court appearances in the San Bernardino County Courthouse qualifies as a structural error which is not subject to harmless error analysis. Mr. Cunningham was shackled without any compelling evidence of imminent threats or manifest need and the severe and

unnecessary shackling was inherently prejudicial because it exposed Mr. Cunningham to pain, impaired his ability to consult with counsel, subjected him to public humiliation and threats of harm, and ultimately drove him from the courtroom. Therefore, because of the extensive harm caused by the unconstitutional pre-trial restraints, each of Mr. Cunningham's criminal convictions must be vacated, without any further showing of prejudice, because each conviction was obtained at a criminal trial which was fundamentally unfair, unreliable and structurally unsound.

2. The Error in Restraining Mr. Cunningham Was Not Harmless Beyond a Reasonable Doubt.

Even assuming, *arguendo*, that the shackling of Mr. Cunningham is not a structural error, Mr. Cunningham nonetheless insists that this error was not harmless beyond a reasonable doubt. The use of extreme shackles demonstrably prejudiced Mr. Cunningham's right to participate in his own defense and infected every aspect of the guilt phase trial with unfairness. The shackles caused Mr. Cunningham pain, affected his ability to consult with his lawyer, and were an affront to the dignity of both Mr. Cunningham and the San Bernardino Superior Court. Moreover, it is apparent that the use of such unnecessary and excessive pre-trial restraints inexorably led Mr. Cunningham to permanently absent himself from all proceedings in San Bernardino so long as he was shackled. Therefore, Mr. Cunningham was clearly prejudiced by the abusive use of excessive restraints in this case, this error was not harmless beyond a reasonable doubt, and this error must lead to a reversal of the criminal convictions.

The amount of prejudice which may flow from a decision to impose physical restraints is not constant; instead, the degree of prejudice is a function of the extent of the shackles that are applied and their effect on the defendant. (*Spain v. Rushen, supra,* 883 F.2d at 722.) Nevertheless, it is obvious that shackling presents a number of distinct and potentially unconstitutional disadvantages. First, it has long been recognized that one of the highest costs incurred in shackling the accused is the pain and suffering it causes: Lord Coke commented more than three hundred years ago that "if felons come in judgment to answer they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason." (*Id.* at p. 723, quoting 3 Coke Inst. 34 (1797).) Another danger is the possibility that the defendant may feel confused, frustrated and embarrassed, thereby impairing his mental faculties. (*Id.* at p. 722.) Third, excessive shackling can seriously interfere with the defendant's ability to cooperate and communicate with his attorney. (*Ibid.*) Finally, the use of unnecessary restraints is an affront to the court and an insult to the non-violent accused: "manacles, shackles, waist belts and chains are painful devices . . . [which] engender pain, humiliation, rage and resentment. (*Id.* at p. 715, fn. 3)

The use of restraints prejudiced Mr. Cunningham because they impaired his ability to participate in the proceedings by causing him extreme pain, subjecting him to humiliating and demeaning treatment, and frustrating his ability to consult with his attorney. (See, e.g., RT Vol. 1, pp. 18-24.) In particular, there is abundant,

undisputed evidence that the excessive shackling impaired Mr. Cunningham's ability to participate meaningfully in his defense.

Counsel for Mr. Cunningham repeatedly informed the trial court that the restraints impaired Mr. Cunningham's ability to communicate with him and inevitably convinced Mr. Cunningham to remain in jail rather than come to court and defend his life. (RT Vol. 1, pp. 47-48.) Ultimately counsel bluntly told the court that, because of the shackles and the abusive and humiliating treatment of Mr. Cunningham in San Bernardino, "I will have more difficulty getting him to agree to come to court on, on multiple times for motions than I would like to spread out over this year than I will gain from having him here in court with me. And I think that will be impeded (*sic*) in filing motions." (RT Vol. 1, p. 48.) In response, the trial court asked, "so what you're saying is it would be, the net result would be a greater interference with effective assistance by forcing him to be here against his will," and counsel answered, "yes." (RT Vol. 1, p. 48.) Therefore, the record is clear that the painful and degrading shackling of Mr. Cunningham impaired his ability to consult with his attorney and personally appear in court to mount an adequate defense to this capital murder case.

In anticipation that the trial court would permit his continued shackling for all court appearances in the San Bernardino County Courthouse through trial, Mr. Cunningham ultimately stated in a sworn declaration that if he had to choose between

the continued, constant pain of the shackles and absenting himself from the courthouse in San Bernardino, he would prefer "not to be present in court." (CT, Vol. 4, p. 1044.) In this declaration Mr. Cunningham told the court that, "for as long as my case is to be heard in San Bernardino, and I am forced to remain in restraints . . . I wish to waive my presence and to remain in the West Valley Detention Center." (CT, Vol. 4, p. 1050.)

It is clear that Mr. Cunningham was prejudiced when the court continued to shackle him without an adequate justification. Because he could not endure the pain, humiliation, and insult exacted from being shackled at each proceeding, Mr. Cunningham could not assist his attorney and ultimately waived his appearance at any further proceeding in the San Bernardino County Superior Court in San Bernardino. (CT, Vol. 4, pp. 1049-1050.) This error–the coerced waiver of Mr. Cunningham's personal presence–is not harmless beyond a reasonable doubt; therefore, Mr. Cunningham's convictions must be reversed.

II. THE EXCESSIVE SHACKLING LED TO THE IMPROPER EXCLUSION OF MR. CUNNINGHAM FROM THE GUILT PHASE OF THE TRIAL.

Mr. Cunningham contends that the trial court violated his state and federal constitutional rights to due process and a fair trial which results in a reliable judgment of death under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and article I, sections 7, 15 and 16 of the California Constitution

when it excused him from numerous pre-trial proceedings and the guilt phase of the court trial based on an involuntary waiver of his personal presence which was induced by the painful and excessive shackling. In addition, Mr. Cunningham contends that the trial court violated sections 977 and 1043 by accepting involuntary waivers of his right to be personally present at the guilt phase of his capital murder trial without an adequate justification.

The error in excluding Mr. Cunningham from the guilt phase of his trial simply because he could not endure the effects of the wrist, waist and leg chains every day for more than eight hours a day is reversible without any further showing of prejudice because the error undermined the basic fairness and reliability of the trial. In the alternative, Mr. Cunningham respectfully submits that the error in permitting him to waive his personal presence at trial as the only alternative to avoid continued shackling was not harmless beyond a reasonable doubt.

This may be one of the few death penalty cases this Honorable Court has ever reviewed in which a capital murder defendant was convicted after a court trial where the defendant *was absent for the entire trial without ever being disruptive.*[5] It may

---

5. In virtually every case where this Honorable Court has confronted an individual who was absent from his guilt or penalty phase trial in a death penalty case, the absence of the defendant was only for a small portion of the trial and was justified because the defendant was being disruptive or threatened to be disruptive. (See, e.g., *People v. Huggins* (2006) 38 Cal.4th 175, 201 [defendant was disruptive and attacked his attorney]; *People v. Davis* (2005) 36 Cal.4th 510, 530 [defendant not present at a pre-trial hearing to discus the admission of a jail house tape recording]; *People v. Young* (2005) 34 Cal.4th 1149, 1212 [defendant not present for testimony of two teachers and a neuro-psychologist at penalty

also be rare in the experience of the Court to consider a case where it appears that the use of unnecessary and excessive restraints coerced a waiver of the defendant's personal presence. Unfortunately, Mr. Cunningham contends that is precisely the sad set of facts which now confronts the Court in this case.

A. Mr. Cunningham had a Constitutional and Statutory Right to Be Personally Present at the Guilt Phase of his Capital Murder Trial.

Mr. Cunningham had a constitutional and statutory right to be personally present at his capital murder trial which could not be easily waived, and he could not be excluded from the courtroom unless he was unruly or *voluntarily* absented himself. The trial court erred by failing to make any findings concerning the reasons for excusing Mr. Cunningham from his capital murder trial and also by failing to make any determination that the waiver of Mr. Cunningham's personal presence was entered knowingly, intelligently and voluntarily without any coercion or duress. (RT Vol. 1, p. 68-78.) Therefore, the trial court erred in permitting Mr. Cunningham to absent himself from the guilt phase of the trial without an adequate waiver of rights.

---

phase because he threatened to be disruptive]; *People v. Weaver* (2001) 26 Cal.4th 876, 967 [defendant asked to be removed during a showing of two video tapes]; *People v. Welch* (1999) 20 Cal.4th 701, 773-774 [defendant was excluded for a portion of the penalty phase because he threatened to be disruptive]; *People v. Majors* (1998) 18 Cal.4th 385, 414 [defendant excluded from parents' testimony during penalty phase because he threatened to be disruptive]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1357-1358 [defendant was not present in a chambers conference where his presence would not have aided counsel]; *People v. Mayfield* (1997) 14 Cal.4th 668.

Following the trial court's initial decision to continue to shackle Mr. Cunningham for all proceedings in the San Bernardino Courthouse, trial counsel explained that he would oppose having Mr. Cunningham present for any further proceeding if Mr. Cunningham was shackled. (RT Vol. 1, p. 33.) Counsel explained that "Mr. Cunningham will waive all appearances if he has to go through this shackling business." (RT Vol. 1, p. 33.)

In his sworn declaration on June 30, 1993, Mr. Cunningham supported counsel's claims and told the court that, if forced, he would choose the lesser of two evils and that he would rather absent himself from the proceedings than submit to additional pre-trial restraints. Consequently, Mr. Cunningham averred that "for as long as my case is to be heard in San Bernardino, and I am forced to remain in restraints and be exposed to the general public, I wish to waive my presence, and to remain in the West End Detention Center." (CT, Vol. 4, p. 1050.)

After July 1993, when Mr. Cunningham could endure no more shackling, he waived his personal presence at all further proceedings in the courthouse in San Bernardino. In particular, Mr. Cunningham renounced his right to be present at the trial in order to avoid continued shackling and the trial court never gave any assurance that the shackling would stop. (See, CT Vol. 4, pp. 1059-1060; CT Vol. 5, pp. 1089-1090;1145-1146;1167-1168; 1184-1185; 1187-1188; 1203; 1212; RT Vol. 1, pp. 44, 68-72.)

In accepting Mr. Cunningham's waiver of his personal presence at all proceedings in the San Bernardino Courthouse, the trial court did not make any separate findings that the waiver was voluntary or made with a full understanding of the meaning of the right of personal presence or the consequence of the waiver. (RT Vol. 1, pp. 69-71, 78.) Instead, the trial court simply asked counsel to provide a written waiver for each future court appearance in which Mr. Cunningham would not appear and then permanently excused Mr. Cunningham from all further guilt phase proceedings without any further inquiry. (RT Vol. 1, pp. 78-79.)

The trial court erred in approving the blanket waiver of Mr. Cunningham's personal presence because the waiver was coerced by the unconstitutional conditions of Mr. Cunningham's pre-trial confinement, denied Mr. Cunningham his state and federal constitutional right to be present at the guilt phase of the trial, and contravened the statutory requirement that Mr. Cunningham shall be present at any trial for a capital offense where evidence was received before the trier of fact. Mr. Cunningham was prejudiced by his exclusion from the guilt phase of the trial.

1. Mr. Cunningham Had a Constitutional Right to Be Personally Present at the Guilt Phase of his Capital Murder Trial.

Mr. Cunningham was improperly and unconstitutionally tried *in absentia.* Mr. Cunningham's total absence from the guilt phase of the trial violated his state and federal constitutional rights to be personally present at a trial which could be expected

to produce a reliable judgment of guilt.

"[A] defendant has a federal constitutional right, emanating from the confrontation clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, to be present at any stage of the criminal proceedings 'that is critical to its outcome if his presence would contribute to the fairness of the procedure.' [Citations.] In addition, a defendant has the right to be personally present at critical proceedings, pursuant to the state Constitution." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1356-1357; *Gardner v. Florida* (1977), 430 U.S. 349.) The right of the defendant to be personally present at trial is also rooted in the Due Process Clause and the Confrontation Clause of the United States Constitution. (*United States v. Gagon* (1985) 470 U.S. 522, 526; *Kentucky v. Stincer* (1987) 482 U.S. 730, 745.)

Therefore, under both the state and federal constitutions, a defendant has a right to be personally present at any part of his criminal trial where his presence is critical to the outcome and contributes to the fairness of the proceeding. (*Kentucky v. Stincer, supra,* 482 U.S. at 745; *People v. Bradford, supra,* 15 Cal.4th at 1356-1357.) This is so because the presence of the accused is essential in order to secure other fundamental constitutional rights, like the right to confront witnesses, the right to help prepare a defense by assisting counsel during trial, and the right to listen to live testimony. (*United States v. Gagon, supra,* 470 U.S. at p. 526.) Moreover, in a capital murder trial the accused should be personally present so that the public may

see that he is being dealt with fairly and not unjustly condemned, and to "keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." (*Waller v. Georgia, supra,* 467 U.S. at p. 46.)

After the trial court ruled that Mr. Cunningham would remain shackled for all proceedings held in the San Bernardino Superior Court (presumably including the guilt phase of the trial), Mr. Cunningham waived his right to be personally present for any further proceedings. (RT Vol. 1, pp. 68-72.) Mr. Cunningham expressly waived his right to be present on "any future date where the hearing is held in the courthouse in San Bernardino." (CT, Vol. 5, p. 1060.)

The trial court erred in approving a waiver of Mr. Cunningham's personal presence in violation of the state and federal constitutions. The trial court erred for precisely the reasons expressed by the Assistant District Attorney, who initially objected to the notion of allowing Mr. Cunningham to permanently absent himself during all of the pre-trial and guilt phase proceedings in a death penalty case, because of the harmful effect his absence would have on the reliability of the proceedings. The District Attorney argued:

> "if the defendant absents himself from the motions in a death penalty case, there's no way to have effective assistance as far as between him and his counsel. Because any number of things are going to be coming up where counsel needs to talk to his client." (RT Vol. 1, p. 45.)

The prosecution also argued properly that "there has, I think, to at least be a good showing for him not to be present here." (RT Vol. 1, p. 46, see also RT Vol. 1, p.

199.)

Despite the prosecution's legitimate concerns, the trial court ultimately acquiesced in Mr. Cunningham's choice of the lesser of the two evils without any consideration of the adverse effect on Mr. Cunningham's constitutional right to attend his trial. Consequently, the court easily allowed Mr. Cunningham to absent himself from all proceedings where he would be shackled without any other formal, in-court waiver or any particular findings of fact. (See, e.g., RT Vol. 1, p. 16, 32, 38, 70-79.) Instead, at the time of the waivers, counsel for Mr. Cunningham consistently alleged that the trial court's "illegal" orders regarding shackling compelled the waiver. (RT, Vol. 1, p. 73.)

The trial court erred in accepting a coerced waiver of Mr. Cunningham's personal presence which had the effect of permanently excluding him from his court trial, because the only reason offered for the purported waiver was that Mr. Cunningham could not endure the daily security gauntlet imposed by an appearance in San Bernardino. Therefore, the trial court erroneously permitted Mr. Cunningham to absent himself from a trial for his life rather than face daily, sometimes unbearable, pain caused by the shackling. The trial court erred in accepting this coerced waiver of Mr. Cunningham's right to personal present for all guilt phase proceedings, in violation of his constitutional right to be personally present at his trial for capital murder.

2. Mr. Cunningham Was Obligated to Be Present At the Guilt Phase of His Capital Murder Trial Under Sections 977 and 1043.

In addition to his constitutional right to be personally present at the guilt phase of the trial, Mr. Cunningham also had a statutory right to be personally present at the trial where his life hung in the balance. The trial court erred in permitting Mr. Cunningham to absent himself from the guilt phase of the trial, even though he was not disruptive, in violation of sections 977 and 1043.

At the time of Mr. Cunningham's trial, section 977(b)(1) provided, *inter alia,* that:

> "in all cases in which a felony is charged, the accused shall be present at the arraignment, at the time of the plea, during the preliminary hearing, *during those portions of the trial when evidence is taken before the trier of fact,* and at the time of the imposition of the sentence. The accused shall be personally present at all other proceedings unless he shall, with leave of court, *execute in open court, a written waiver* of his right to be personally present." (Emphasis added.)

In the same vein, at the time of the trial section 1043 provided, in relevant part, that:

> "(a) Except as otherwise provided in this section, the defendant in a felony case *shall* be personally present at trial. (b) The absence of the defendant in a felony case shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases: (1) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so *disorderly, disruptive and disrespectful* of the court that the trial cannot be carried on with him in the courtroom; (2) any prosecution for an offense which is not punished by death in which the defendant is voluntarily absent." (Emphasis added).)

(See, e.g., *People v. Majors* (1998) 18 Cal.4th 385, 414.)

"Read together, the version of section 977 in effect at the time of the guilt phase trial and section 1043 provide that capital defendants may not voluntarily absent themselves during the taking of evidence at their trials unless they have disrupted the trial and the court has reason to believe the disruptive behavior will continue." (*People v. Huggins* (2006) 38 Cal.4th 175, 201-02.) The plain language of section 977 permits no waiver of the right of the accused's personal presence at a capital trial and "a capital defendant may not voluntarily waive his right to be present during those portions of the trial where evidence is taken." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1211.) When read in harmony with section 1043, these statutory mandates do not permit a capital defendant to absent himself from the courtroom except under very narrow and limited circumstances. (*Id.* at 1210.)

A violation of sections 977 and 1043 which results in the defendant's absence from critical stages of his trial further violates the United States Constitution. This is so because an arbitrary violation of a state statute which deprives a defendant of a state-created liberty interest violates the Due Process Clause of the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 477 U.S. 343, 346.)

The trial court failed to comply with the statutory mandate of sections 977 and 1043 and ignored the obligation to ensure that Mr. Cunningham was personally present for the taking of evidence during the guilt phase of his trial. Mr. Cunningham

could not be involuntarily excluded from the guilt phase of the trial because he was not disorderly, disruptive or disrespectful; on the contrary, he patiently tried to explain to the trial court that with each appearance in the San Bernardino County Courthouse he faced intense pain for up to eight hours a day, and injuries which sometimes required medical attention. (RT, Vol. 1, pp. 70-73.)

At a hearing on July 9, 1993 (in which Mr. Cunningham remained shackled in violation of the court's previous orders) the trial court formally advised Mr. Cunningham of his right to be personally present at all hearings and asked him if he wanted to waive that right. In response, Mr. Cunningham told the court that he understood his rights and he gave up his right to be present at all court appearances in San Bernardino prior to jury selection and testimony. (RT Vol. 1, pp.68-71.)

After Mr. Cunningham waived his personal presence on July 9, he never returned to Court in San Bernardino. (RT Vol. 1, p. 70.) Instead, Mr. Cunningham occasionally executed written waivers from in custody and twice affirmed these waivers via video conference where he appeared alone in jail while the court and counsel were in San Bernardino. (RT Vol. 1, pp. 205-207; Vol. 4, pp. 1063-1067l CT, Vol. 5, pp. 1089-1090, 1145-1146, 1167-1168, 1186-1188, 1189.)[6]

---

6. At the time Mr. Cunningham first attempted to waive his personal presence the prosecution sought to obtain a waiver of Mr. Cunningham's right to appeal his exclusion from the court. (RT Vol. 1, pp. 208-210.) However in earlier proceedings counsel for Mr. Cunningham opposed any effort to elicit an appellate waiver on the issue. (RT Vol. 1, pp. 71-73.) Although both the prosecutor and defense counsel promised to file a written appellate waiver (RT Vol. 1, pp. 71, 74), no written waiver was ever filed.

In allowing Mr. Cunningham's unconstitutional pre-trial restraints in the San Bernardino County Courthouse to compel a waiver of his right to be personally present, the trial court ignored the narrow limitations imposed by sections 977 and 1043. Consequently, the trial court erred by arbitrarily denying Mr. Cunningham his statutory right to be personally present at all critical stages of a capital proceeding.

B. Mr. Cunningham's Waiver of His Right to Be Present Was Involuntary and Ineffective.

The trial court erred by approving a waiver of Mr. Cunningham's personal presence which was coerced by the painful conditions imposed on him at each court appearance in the San Bernardino County Superior Court. The trial court erred further by failing to determine whether the waiver was voluntary. Finally, the court erred because the waivers of Mr. Cunningham's right to be personally present did not comply with the plain language of section 977, subdivision [c].

At the hearing to advise Mr. Cunningham of his right to be personally present at all proceedings, counsel for Mr. Cunningham repeatedly insisted that Mr. Cunningham's waiver was induced solely by the court's illegal orders regarding shackling in the San Bernardino courthouse. (RT Vol. 1, pp. 73, 75.) This contention was never refuted by the prosecution and leads to the inescapable conclusion that Mr. Cunningham renounced his right to be personally present at his trial only because of the onerous conditions placed upon him during each court appearance in the San Bernardino courthouse. Therefore, the waivers were involuntary and violated sections

977 and 1043.

1. The Waiver of Personal Presence Was Involuntarily Coerced by the Improper Shackling.

The United States Supreme Court has repeatedly emphasized that there is a high standard of proof which is required to demonstrate that the defendant waived one of his fundamental constitutional rights. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) Waiver is "an intentional relinquishment or abandonment of a known right or privilege." (*Id.* at p. 464.) To preserve the fairness of the trial process the United States Supreme Court has established "an appropriately heavy burden on the Government before waiver can be found." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 236.)

The State bears the burden of showing a valid waiver of constitutional rights in a criminal case. (*Adams v. United States ex rel. McCann* (1942) 317 U.S. 269, 275-280.) The existence of a valid waiver depends on "the particular facts and circumstances surrounding the case, including the background, experience and conduct of the accused." (*Ibid.*) A defendant's waiver of a fundamental constitutional right is not valid unless the waiver is "voluntary." (*Whitmore v. Arkansas* (1990) 495 U.S. 149, 165.)

A waiver is voluntary if, under the totality of the circumstances, it is the product of a free and deliberate choice rather than coercion or improper inducement. (*People v. Howard* (1992) 1 Cal.4th 1132, 1178; *United States v. Doe* (9th Cir. 1998)

155 F.3d 1070, 1074. Conversely, a waiver is involuntary if it stems from coercion–either mental or physical. (*See, e.g., Brady v. United States* (1970) 397 U.S. 742, 752.)

In certain cases a decision to waive the right to pursue legal remedies in a criminal case may be involuntary if it results from coercion or duress: a procedure may be inherently coercive if it imposes an impermissible burden upon the assertion of a constitutional right. (*United States v. Jackson* (1968) 390 U.S. 570, 582-583.) In particular, a decision to waive the right to pursue legal remedies may be involuntarily induced by the defendant's onerous conditions of pre-trial confinement. (*Smith v. Armontrout* (8th Cir. 1987) 812 F.2d 1050, 1058-59(reviewing decision of the district court on whether petitioner's conditions of confinement rendered his decision to waive appeals invalid); *Groseclose ex rel. Harries v. Dutton* (M.D. Tenn. 1984) 594 F.Supp. 949, 961.) The United States Supreme Court has recognized the crippling affect of oppressive conditions of pre-trial confinement in involuntarily inducing waivers of fundamental constitutional rights and has held that any waiver of a fundamental constitutional right is not "effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause [of the waiver]." (*Minnick v. Mississippi* (1990) 498 U.S. 146, 155.)

Though constitutional rights may be waived, the government may not procure a waiver of an accused's rights through unconstitutional conditions. (*United States*

v. Scott (9th Cir. 2006) 450 F.3d 863, 866.) An unconstitutional condition exists where the government uses overwhelming leverage to coerce a person into accepting a waiver of his or her constitutional rights. See, Kathleen M. Sullivan, "Unconstitutional Conditions," 102 Harv.L.Rev. 1413, 1428 (1989). Giving the government free rein to exact such coercive waivers of a defendant's constitutional rights "creates the risk that the government will abuse its power by attaching strings strategically, striking lopsided deals, and gradually eroding constitutional protections." (*United States v. Scott, supra,* 450 F.3d at 866.)

When Mr. Cunningham was brought to court to enter the waiver of his personal presence, he was shackled during his transportation, and he remained in hand, waist and leg chains which could not be removed, despite the trial court's previous order that he could be unchained in the courtroom. (RT Vol. 1, pp. 68-69.) Counsel once again objected to the unconstitutional, blanket use of restraints, but the trial court curtly determined that the "relatively short" matter of taking Mr. Cunningham's waiver of his presence for all further proceedings in the San Bernardino County Courthouse did not justify removing the leg shackles. (RT Vol. 1, p. 69.) The trial court then proceeded to advise Mr. Cunningham of his right to be present at all of his court proceedings in order to assist his attorney, and the trial court specifically asked Mr. Cunningham if he wanted to give up his right to be present at all court appearances prior to jury selection. Mr. Cunningham then told the court that

he understood his rights and he wanted to waive his appearance. (RT Vol. 1, pp. 69-71.) At that point counsel told the court that Mr. Cunningham was waiving his personal presence under the circumstances expressed at the previous hearing on the motion regarding shackling. (RT Vol. 1, pp. 38-67.)[7]

These facts evince that the waiver of Mr. Cunningham's right to be personally present at the guilt phase of his capital trial was involuntarily induced by the intolerable conditions of being painfully shackled for hours on end while traveling to and from the San Bernardino courthouse. Even when he ultimately decided to waive his right to be personally present in court, Mr. Cunningham was still arbitrarily left in leg chains and restraints and the trial court did not enforce its previous order, thereby confirming to Mr. Cunningham that he would receive the same abusive treatment at every court appearance in San Bernardino because the use of the restraints was left completely to the discretion of security officers. (Compare RT Vol. 1, pp. 68-71; RT Vol. 1, p. 18-27.)

---

7. During the proceedings to elicit a waiver of Mr. Cunningham's personal presence the prosecution repeated its opposition to excusing Mr. Cunningham and asked the trial court to take a waiver of Mr. Cunningham's appellate rights on the issue. (RT Vol. 1, pp. 71-72.) Counsel for Mr. Cunningham opposed the effort to take any appellate waiver, arguing that "I don't want to get into a situation where we have waived something which we do not intend to waive." (RT Vol. 1, p. 73.) Counsel explained that the court's orders regarding shackling which necessitated the waiver, were illegal, and counsel insisted that Mr. Cunningham would not waive his right to challenge the waiver of his personal presence which was induced by the excessive shackling. (RT Vol. 1, p. 73.) Counsel also objected that he had received no previous notice of the prosecution's request for an appellate waiver. (RT Vol. 1, p. 70.)

Moreover, at the hearing to elicit the waiver of Mr. Cunningham's personal presence, counsel made it clear that Mr. Cunningham only agreed to waive his right to be present at the guilt phase because he could not endure being shackled for hours on end and transported chained through public halls of the court room. (RT Vol, 1, pp. 70-73.) Counsel for Mr. Cunningham insisted that Mr. Cunningham was not waiving his right to object to the court's "illegal" shackling orders which trial counsel alleged caused the waiver of personal presence. (RT Vol, 1, pp. 73, 76.)

The trial court erred by failing to recognize that Mr. Cunningham only waived his right to be personally present because he could not endure the painful treatment he received each time he appeared in court in San Bernardino. The waiver was coerced because the shackling imposed an impermissible burden on Mr. Cunningham's constitutional right to be personally present during the trial of the guilt phase. Finally, the trial court erred because the court never undertook any inquiry to determine whether Mr. Cunningham's waivers were knowing, intelligent, and voluntary, or if the waivers were induced by Mr. Cunningham's abusive conditions of confinement.

2. The Waiver of Mr. Cunningham's Personal Presence Did Not Comply With Section 977.

A capital defendant's ability to waive the right to be present at his trial is severely limited by statute. (See, Penal Code § 977; *People v. Weaver* (2001) 26 Cal.4th 876, 967-968.) Section 977 provides that "the accused *shall* be present at all

other proceedings unless he or she shall, with leave of court, *execute in open court*, a written waiver of his right to be personally present as provided by paragraph (2)."[8]

The scope of Mr. Cunningham's waiver of his right to be personally present at the guilt phase of the trial, as well as the manner in which the waivers were taken, violated section 977. In particular, most of Mr. Cunningham's waivers violated section 977 because the waivers were never executed in open court in the presence of counsel.

When Mr. Cunningham first waived his right to be personally present, he asked the court to excuse him, without any further inquiry, "during every absence of the defendant that the court may permit pursuant to this waiver." (CT 1089.) Thus, the court prospectively allowed Mr. Cunningham to waive his right to be present at all court appearances prior to jury selection and testimony, without requiring Mr. Cunningham to be personally present with counsel at the time he executed the waivers. (R.T. Vol. 1, p. 71.) Instead, following Mr. Cunningham's initial in-court, written waiver of his right to personally appear (R.T. Vol. 1, pp. 68-72; C.T. 1059-1060), all other waivers were not personally entered in court, on the record, or in the

---

8. Although section 977 now provides the court with the authority to conduct the initial appearance and arraignment by two-way, audio-video communication between the defendant and the court, in lieu of the physical presence of the defendant in the courtroom, that section nevertheless requires that the defendant's attorney must be personally present with the defendant during such an appearance and does not permit the defendant's appearance by audio-video communication for any purpose other than his initial arraignment. (Section 977, subdivision [c].)

presence of counsel. (See, e.g., C.T. 1089-1090 [7/2/93 motion for re-testing]; 1145-1146 [11/5/93 discovery motions]; 1183-1185 [motion to continue]; 1186-1187 [waiver of personal presence at court trial]; 1212; R.T. Vol. 1, p. 123 [9/10/93 motion for re-testing]; Vol. 1, p. 148 [11/5/93 discovery issues]; Vol. 1, p. 160-162 [court wants to take an oral waiver of Mr. Cunningham's right to a speedy trial and counsel objects because of the effect on Mr. Cunningham]; Vol. 1, p. 172 [12/3/93 time waiver, Mr. Cunningham not present]; Vol. 1, p. 182 [Mr. Cunningham not present at conference, no written waiver]; Vol. 1, p. 194 [Mr. Cunningham not present at motion to continue, no written waiver].) This procedure violated section 977 and left a silent record in assessing whether each waiver was knowing, intelligent and voluntary.

In addition to the lack of an in-court, on-the-record waiver of his personal appearance at pre-trial and guilt phase trial proceedings, other purported waivers offered by Mr. Cunningham failed to comply with the literal terms of section 977. Thus, on two occasions when Mr. Cunningham ultimately waived his right to a speedy trial and his right to a jury trial, the waivers were entered in an audio-video communication in which Mr. Cunningham was alone at the jail, while his attorney was present before the court in San Bernardino with the prosecution. (R.T. Vol 1, p. 174, p. 178, pp. 205-206.) Finally, during the guilt phase of the trial, the court asked whether Mr. Cunningham would be obligated to at least provide a written waiver of

his right to be personally present for every day of the court trial and, in response, defense counsel stated that he was unwilling to go out to the jail and meet with Mr. Cunningham every day, especially since the procedures used at the jail were so onerous. (R.T. Vol, 2, pp. 365-66.)

Thus, after Mr. Cunningham's initial waiver on July 9, 1993, none of the subsequent waivers of Mr. Cunningham's personal presence complied with section 977. The waivers were not executed in open court, in writing, by Mr. Cunningham, and accompanied by a finding by the trial court that the waivers were knowing, intelligent and voluntary. Therefore, the waivers are presumptively unreliable.

C. Mr. Cunningham Was Prejudiced By His Absence During the Guilt Phase.

A reviewing court applies a *de novo* standard of review to a trial court's exclusion of a criminal defendant from a trial. (*People v. Perry* (2006) 38 Cal.4th 302, 311-312.) Erroneous exclusion of the defendant is reversible if the defendant was prejudiced by his absence from the trial. (*Id.* at p. 312, citing *Rushen v. Spain, supra*, 464 U.S. at pp. 118-119.) Therefore, if the trial court errs in accepting the defendant's waiver of his right to be present at a capital murder trial, the error is reversible if it is reasonably probable that the result would have been more favorable to the defendant absent the error. (*People v. Riel* (2000) 22 Cal.4th 1153, 1196.)

Mr. Cunningham claims that under the Sixth and Eighth Amendments of the United States Constitution and Article One, sections 15 and 17 of the California

Constitution, the permanent exclusion of an accused in a capital murder case who is not disruptive or unruly should be considered a structural defect which can never be harmless. In the alternative, Mr. Cunningham contends that he was particularly prejudiced by his absence in this case and that the error is not harmless beyond a reasonable doubt

1. Mr. Cunningham's Absence Was Structural Error.

In general, if a defendant is briefly and erroneously excluded from a portion of his state murder trial, the error can be subjected to harmless error analysis. (*Rushen v. Spain , supra*, 464 U.S. at pp. 118-119.) However, in some circumstances "a defendant's absence from certain stages of a criminal proceeding may so undermine the integrity of the trial process that the error will necessarily fall within the category of cases requiring automatic reversal." (*United States v. Feliciano* (2d Cir. 2000) 223 F.3d 102, 112.)

This Court has previously considered the defendant's waiver of his personal presence only under limited circumstances where the alleged error was a statutory violation of sections 977 or 1043. In these circumstances, the Court has indicated that a judgment of death would be reversed only if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Jackson, supra,* 13 Cal.4th at p. 1211, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) However, this Court has not yet had occasion to

determine prejudice arising from an involuntary waiver of the right to be present at the entire guilt phase of a trial which is induced, not because the defendant is disruptive, but only because the defendant cannot endure the abusive conditions caused by cruel and unnecessary restraints.

Mr. Cunningham contends that if the accused refuses to be present because of onerous courtroom conditions, then the absence of the defendant at the capital murder trial is a structural error which should be reversible without any further showing of prejudice. In particular, Mr. Cunningham believes that the outrageous circumstances which induced his involuntary waiver of his right to be personally present at the guilt phase of the trial amount to structural error which is presumptively prejudicial. (*Yarborough v. Keane* (2d Cir. 1996) 101 F.3d 894, 897.)

This Court has recognized that certain fundamental, structural errors in trial procedure "are not susceptible to the 'ordinary' or 'generally applicable' harmless error analysis–i.e. the *Watson* 'reasonably probable' standard–and may require reversal of the judgment notwithstanding the strength of the evidence contained in the record in a particular case." (*People v. Vasquez* (2006) 39 Cal.4th 47, 66, citing *People v. Cahill* (1993) 5 Cal.4th 478, 493.) Therefore, although Article IV, section 13 of the California Constitution provides that no judgment shall be set aside because of an error in procedure unless the reviewing court concludes that the error has resulted in a miscarriage of justice, this standard does not apply if there is an

irreparable structural error. (*People v. Cahill, supra*, 5 Cal.4th at p. 492, citing *People v. Watson, supra*, 46 Cal.2d at p. 836.)

A defendant's complete absence from the guilt phase of a trial may be an irreparable structural error which calls into question the fundamental fairness of the trial process. (Cf. *Arizona v. Fulminante, supra*, 499 U.S. at pp. 307-310.) Like the complete absence of counsel, the absence of the defendant for the entire trial proceeding in a death penalty case renders the resulting verdict so unreliable, and must so thoroughly undermine a court's confidence in the outcome of the proceeding, that a case-by-case inquiry for prejudice is unnecessary. (See, e.g. *Holloway v. Arkansas* (1978) 435 U.S. 247, 490; *Mickens v. Taylor* (2002) 535 U.S. 162, 167 fn. 1.)

Mr. Cunningham respectfully submits that the potential effects of the error in excluding him from the pre-trial and guilt phase portions of the trial is a structural error which impugns the fairness of all subsequent proceedings, rendering them fundamentally unfair. Like a trial before a partial judge or racially skewed jury, the forced absence of a nondisruptive defendant from a trial because the defendant cannot endure daily abuse as a condition of attending court is precisely the type of structural error which cannot be subjected to harmless error analysis. (See, e.g., *Waller v. Georgia, supra*, 467 U.S. at p. 46.)

2. Mr. Cunningham Was Prejudiced By His Absence.

In the alternative, Mr. Cunningham contends that he was prejudiced by his permanent exclusion from his trial, that his absence during the proceedings led to a miscarriage of justice and that, but for this error, the result of his proceeding may have been different. The record shows that Mr. Cunningham was irremediably prejudiced by his absence during critical stages of these proceedings because he was completely prevented from participating in the guilt phase in any meaningful way and he was convicted *in absentia* in a criminal trial which was the functional equivalent of a slow plea of guilty.

The exclusion of Mr. Cunningham from the guilt phase of the trial was a miscarriage of justice. More importantly, but for the erroneous exclusion of Mr. Cunningham there is a reasonable probability that the result of the proceeding would have been different. If Mr. Cunningham had been personally present during the guilt phase of the trial he could have effectively assisted counsel in subjecting the prosecution's case to meaningful adversarial testing.

Moreover, Mr. Cunningham was prejudiced by his erroneous exclusion because a capital trial of an absent defendant is insufficient to satisfy the due process requirements of the state and federal constitutions and the requirements set out in sections 977 and 1043. Mr. Cunningham contends that, but for this error, there is a reasonable probability that if he had been personally present at the guilt phase of the

trial, the result of the proceeding may have been different.

III. THE WANTON INFLICTION OF PAIN LED TO AN INVOLUNTARY WAIVER OF MR. CUNNINGHAM'S RIGHT TO A JURY TRIAL DURING THE GUILT PHASE.

In addition to coercing a waiver of Mr. Cunningham's right to be personally present at the guilt phase of the trial, the severe shackling also compelled Mr. Cunningham to waive his right to a jury trial, rather than face the prospect of a guilt phase jury trial in which he would be absent. Because the waiver of Mr. Cunningham's right to a jury trial was similarly coerced by the inhumane courtroom restraints in the San Bernardino County Courthouse, the waiver is involuntary and Mr. Cunningham's criminal convictions must be reversed.

A criminal defendant has a fundamental federal and state constitutional right to a trial by jury. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16.) "Trial by jury . . . is fundamental to the American scheme of justice." (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149.) The right to a jury is inviolate because it safeguards "a person accused of a crime against the arbitrary exercise of power by prosecutor or judge." (*Batson v. Kentucky* (1986) 476 U.S. 79, 86.)

Therefore, the due process clauses of the state and federal constitutions guarantee an accused the right to a jury trial in a criminal case. (*Duncan v. Louisiana, supra,* 391 U.S. at 149.) A "fair" court trial does not cure the deprivation of this constitutional right. (*People v. Sandoval* (1987) 188 Cal.App.3d 1428, 1434.)

Although the right to a jury trial is "inviolate," the state and federal constitutions nevertheless permit the waiver of a jury trial in a criminal case. (*People v. Vera* (1997) 15 Cal.4th 269, 278.) Under the terms of Article I, section 16 of the California Constitution, a jury trial waiver in a criminal proceeding may be entered "by the consent of both parties expressed in open court by the defendant and the defendant's counsel." The failure to obtain a defendant's express and voluntary waiver of the right to a jury trial in a criminal prosecution violates this state constitutional mandate. (*People v. Ernst* (1994) 8 Cal.4th 441, 448.)

A defendant's waiver of the right to a jury trial may not be accepted by the court unless it is knowing and intelligent, that is "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it, as well as voluntary, in that it was the product of a free and deliberate choice rather than intimidation, coercion or deception." (*People v. Collins* (2001) 26 Cal.4th 297, 305.) Therefore, under both the state and federal Constitutions, a valid waiver of a defendant's right to a jury trial requires the record to reveal *on its face* direct evidence that the accused was aware of his right to a jury trial. (*People v. Wrest* (1992) 3 Cal.4th 1088, 1102-1103.) No specific formula is required, so long as the record shows that the accused was fully aware of his right to a jury trial and validly waived that right. (*Id.* at 1103.)

Shortly after Mr. Cunningham indicated that he would waive his presence for

all proceedings to be held in San Bernardino (RT Vol. 1, pp. 79), defense counsel and the prosecutor informed the trial court that they had discussed the possibility of having a court trial during the guilt phase. (RT Vol. 1, p. 189.) Defense Counsel explained, "I am inclined to agree to recommend to my client that if he's agreeable, the we're agreeable to a court trial on the guilt phase.. . .[but we would still want a jury trial in the penalty phase" (RT Vol. 1, p. 190.) Defense counsel also explained that if the case was tried to the court, without a jury, it would simply the presentation of pre-trial motions to suppress Mr. Cunningham's involuntary statements. (RT Vol. 1, p. 191.) Finally, counsel acknowledged that although he was inclined to accept a court trial, he still need to discuss the matter with Mr. Cunningham and determine whether he was willing to waive his right to a jury trial. (RT Vol. 1, p. 192.)

Shortly before Mr. Cunningham formally entered his waiver of the right to a jury trial during the guilt phase, defense counsel suggested that Mr. Cunningham's waiver was based on his desire to waive his personal presence during the guilt phase of the trial because Mr. Cunningham did not want to personally appear in court in San Bernardino "where he has to wander through the hall." Defense counsel reiterated that "we have a right to waive our presence and we'd do that." (RT Vol. 1, p. 199.) The trial court then indicated that the court would take the waiver of Mr. Cunningham's personal presence at the guilt phase at the same time he entered his waiver of the right to a jury trial. (RT Vol. 1, p. 199.)

Mr. Cunningham ultimately entered his waiver of the right to a trial by a jury during the guilt-innocence phase of this case and requested to be tried only by the court. (CT pp. 1189-1190.) In his written waiver Mr. Cunningham acknowledged that the waiver should be executed in open court, but he nonetheless asked not to be taken to the courtroom in San Bernardino and, despite the plain terms of Article I, section 16, instead requested to waive his right to a jury trial from jail via closed circuit television in an effort to avoid any additional shackling. (CT pp. 1189-1190.)

Mr. Cunningham "personally" entered his waiver of a jury trial during the guilt phase on January 20, 1995, in a closed circuit television appearance in which he was alone at the West Valley Detention Center while his lawyer, the prosecutor and the trial judge were all personally present in the courtroom in San Bernardino. (RT Vol. 1, p. 205.) The trial court then advised Mr. Cunningham that he had a right to a jury trial in the guilt phase where the prosecution would have to prove his guilt beyond a reasonable doubt to all twelve members of the jury, but by waiving his right to a jury trial he was agreeing to allow the court alone to decide the case. (RT Vol. 1, p. 206.) Mr. Cunningham acknowledged that he understood these rights, then he waived his right to a jury trial during the guilt phase, and defense counsel and the prosecutor concurred in the request. (RT Vol. 1, p. 207.)

In eliciting Mr. Cunningham's waiver of his right to a jury trial during the guilt phase, the trial court did not make any finding that Mr. Cunningham validly waived

his right to a jury trial with a full knowledge of the nature of the right and the consequences of the waiver. Nor did the trial court ever make any attempt to determine whether the waiver of the right to a jury trial was related to the coercive conditions attendant to Mr. Cunningham's appearance in the San Bernardino County courthouse.

The trial court erred in permitting a jury trial waiver which was induced by Mr. Cunningham's unconstitutional conditions of confinement while appearing in the San Bernardino County Courthouse. The court erred because the wanton infliction of pain caused by the daily courthouse shackling (which was unjustified by any legitimate penological justification) coerced not only a waiver or Mr. Cunningham's personal presence, but ultimately a waiver of Mr. Cunningham's desire to participate in any of the judicial proceedings in San Bernardino, including a jury trial. Instead, it is clear that Mr. Cunningham waived his right to a jury trial during the guilt phase in order to avoid the embarrassment and prejudice attendant to being tried by a jury in San Bernardino while he was not present.

Prior to Mr. Cunningham's waiver of his right to a jury trial, defense counsel explained to the court the difficulties he faced in persuading Mr. Cunningham to challenge his case following the trial court's refusal to end the severe shackling. Counsel for Mr. Cunningham explained:

> "Mr. Cunningham is a defendant whose will to resist the desire of the state to execute him wavers at times. And it's somewhat–I am in a

> constant–not constant but intermittent struggle with him to convince him that his life is worth saving and that we should not just roll over. Every time you [the court] bring him over [to the San Bernardino County Courthouse] you cause great problems in this–in this particular will to resist. And you basically, I think are interfering with the attorney-client relationship for no good reason. If it were– if there were any reluctance on Mr. Cunningham's part to waive time or something like that, if he had ever shown any reluctance at any waiver in the past I think you might have a point. But Mr. Cunningham, as you know, has been quite agreeable with everything that has been suggested." (RT Vol. 1, pp. 161-162.)

Mr. Cunningham respectfully submits that he was coerced into waiving his right to a jury trial because he could not endure trial by ordeal in San Bernardino, including confinement in shackles all day. Mr. Cunningham contends that the waiver of his right to a trial by jury was involuntary because it was coerced through the onerous use of excessive and unnecessary shackles which overbore Mr. Cunningham's will to participate in any judicial proceedings, especially a jury trial where he would be absent.

A. The Waiver of the Right to a Jury Trial Was Involuntary.

A defendant's waiver of the right to a jury trial may be accepted by the court only if it is knowingly, intelligently and voluntarily made, with a full awareness of the nature of the right being waived and the consequences of the waiver. (*People v. Smith* (2003) 110 Cal.App.4th 492, 500; see also *People v. Collins, supra,* 26 Cal.4th at p. 305.) In addition, the federal constitution requires procedural safeguards to protect the right to a jury trial and demands that any waiver of the right to a jury trial must be

taken from the defendant personally and expressly. (*Colorado v. Spring* (1987) 479 U.S. 564, 573; *New York v. Hill* (2000) 528 U.S. 110, 114-118; *People v. Montoya* (2001) 86 Cal.App.4th 825, 829.)

Whether the accused knowingly, intelligently and voluntarily waived his right to a jury trial is ordinarily a question of fact. (*People v. Smith, supra,* 110 Cal.App.4th at pp. 500-501.) However, ultimately the validity of a waiver of the constitutional right to a jury trial presents a question of law which is subject to *de novo* review. (*People v. Vargas* (1993) 13 Cal.App.4th 1653, 1660.)

In determining whether there has been an effective waiver of a jury trial in favor of a court trial, this Honorable Court does not require a specific formula or any "magic words" or extensive questioning beyond assuring that the waiver is personal, voluntary and intelligent. (*People v. Smith, supra*, 110 Cal.App.4th at p. 500.) Instead, to determine that a waiver of the right to a jury trial was knowingly, intelligently and voluntarily made, the reviewing court must only ascertain whether the defendant understood the nature of the right to be waived and the consequences of the waiver. (*People v. Collins, supra,* 26 Cal.4th at pp. 301, 305, fn. 2.)

Coercion, either in the form of penalizing a defendant for exercising a constitutional right or promising leniency to a defendant for refraining from exercising a right, renders a waiver involuntary. (*People v. Collins, supra,* 26 Cal.4th at pp. 306-309.) "To punish a person *because* he has done what the law plainly

allows him to do is a due process violation of the most basic sort . . . [and] is patently unconstitutional." (*Id.* at 306.)

Therefore, before accepting the defendant's waiver of his right to a jury trial, a trial court must conduct an examination of the defendant, in open court, to determine whether the proffered waiver is voluntary and not the product of duress or coercion. (*Ibid.*) To protect a defendant's fundamental rights, an appellate court must indulge every reasonable presumption against the waiver of fundamental constitutional rights. (*People v. Anderson* (1992) 1 Cal.App.4th 318, 324, citing *Johnson v. Zerbst, supra*, 304 U.S. at 464.)

A reviewing court will not presume a valid waiver of constitutional rights from a silent record; instead, the record must show an express and explicit waiver of rights. (*People v. Anderson, supra*, 1 Cal.App.4th at p. 324.) "The burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the matter to speculation and doubtful cases will be resolved against a waiver." (*People v. Smith, supra,* 110 Cal.App.4th at pp. 500-501.)

Mr. Cunningham's waiver of his right to a jury during the guilt phase of this trial was involuntarily coerced by the cruel and inhumane treatment which Mr. Cunningham experienced during each appearance in the San Bernardino courthouse. The record demonstrates that in December 1994 when Mr. Cunningham submitted a written waiver of his right to a jury trial, he acknowledged "that this waiver [must] be

taken in open court, but affirmatively requests that he not be taken physically to the courtroom to which this case is assigned[.]" (CT Vol. 5, p. 1189.) In addition, in the written waiver Mr. Cunningham acknowledged that he understood that he had a right to be personally present when he waived his right to a jury trial, but he specifically asked to waive his personal presence and submit his waiver by closed circuit television from the West Valley Detention Center, primarily to avoid any further pain and injury from being shackled. (CT, Vol. 5, pp. 1189-1190, 1193-1199.) As a result, Mr. Cunningham filed a written waiver of his right to a jury and then waived his right to a jury trial during the guilt phase during a video conference proceeding from jail, all as a part of his continuing effort to avoid any appearance in San Bernardino and the concomitant shackling. (RT, Vol. 1, p. 205.)

The record in this case is inadequate to demonstrate that Mr. Cunningham knowingly, intelligently and voluntarily waived his right to a jury trial during the guilt phase. Instead, it appears that the waiver of Mr. Cunningham's right to a guilt phase jury trial was foisted on him by the adverse conditions in the San Bernardino County Superior Court. The waiver was coerced because the State punished Mr. Cunningham simply because he had chosen to do what the law plainly allowed, namely to appear in court without being subjected to arbitrary and cruel forms of pre-trial punishment. In order to avoid these improper conditions, Mr. Cunningham was coerced into waiving not only his personal presence, but also his right to a jury trial in the San

Bernardino County Courthouse in which he would necessarily be absent. Therefore, Mr. Cunningham's waiver of his right to a jury trial during the guilt phase of the trial was involuntary and coerced by the unconstitutional conditions attendant to his court appearances in San Bernardino.

B. The Involuntary Waiver is Reversible.

A trial court errs, in violation of the Due Process Clauses of the state and federal Constitutions, when it offers an inducement to the defendant to persuade him to waive his fundamental right to a jury trial. (*People v. Collins, supra,* 26 Cal.4th at p. 309.) Where an improper inducement leads to a waiver of a jury trial, there is a structural error requiring reversal. (*Id.* at p. 312.)

Mr. Cunningham insists that his involuntary waiver of a jury trial during the guilt phase of the case was a structural error which was presumptively prejudicial. In particular, Mr. Cunningham contends that he was improperly induced to waive his jury trial in order to avoid additional shackling.

Under the United States Constitution, the right to a trial by jury is recognized as a fundamental right and its denial is structural error which compels a reversal of any resulting judgment without the necessity of a determination of prejudice. (*People v. Collins, supra,* 26 Cal.4th at p. 311, citing *Sullivan v. Louisiana, supra,* 508 U.S. at pp. 281-282.) Similarly, under the California Constitution, the right to a jury trial is fundamental and its denial is considered a "structural defect in the proceedings"

resulting in a "miscarriage of justice" within the meaning of article IV, section 13 of the California Constitution which requires the judgment of conviction to be set aside. (*People v. Collins, supra,* 26 Cal.4th at p. 311, citing *People v. Ernst, supra,* 8 Cal.4th at pp. 448-449.)

Therefore, when the waiver of the right to a jury trial has been coerced, the failure to obtain a valid waiver of the right to trial by jury is reversible per se without any additional showing of prejudice. (*People v. Collins, supra,* 26 Cal.4th at p. 311.) Additionally, where a case is improperly tried to the court rather than to a jury, "there is no opportunity meaningfully to assess the outcome that would have ensued in the absence of the error." (*Id.* at 313, citing *Sullivan v. Louisiana, supra,* 508 U.S. at pp. 278-282.)

Because Mr. Cunningham's waiver of his right to be tried by a jury in this criminal case was coerced by the oppressive and inhumane shackling which he experienced at every court proceeding in the San Bernardino Superior Court, the error in inducing the waiver is a structural defect in the proceeding which requires the judgment of conviction to be set aside. Thus, the error compels a reversal of the judgments of guilt because the waiver was improperly induced by the trial court's willingness to allow Mr. Cunningham to absent himself from all proceedings in San Bernardino–including a jury trial during the guilt phase– in an effort to avoid the wanton infliction of pain caused by the pre-trial restraints.

IV. THE TRIAL COURT ERRED IN ACCEPTING THE FUNCTIONAL EQUIVALENT OF A GUILTY PLEA WITHOUT AN ADEQUATE ADVISEMENT OF THE CONSTITUTIONAL RIGHTS BEING WAIVED.

Mr. Cunningham contends that he was denied his state and federal constitutional right to enter a knowing and voluntary guilty plea following a full advisement of rights when the trial court accepted the functional equivalent of a guilty plea during a bench trial in which counsel for Mr. Cunningham failed to present any defense and conceded Mr. Cunningham's guilt. Mr. Cunningham respectfully submits that, under the totality of the circumstances, the court trial in this case was tantamount to a slow plea of guilty and the trial court committed reversible error by failing to provide Mr. Cunningham with an adequate advisement of the constitutional rights he was surrendering by agreeing to an abbreviated bench trial. Therefore, Mr. Cunningham's convictions must be reversed.

The Fifth Amendment of the United States Constitution prohibits any plea of guilty or no contest to a crime if the plea is unknowing or involuntary. (*Boykin v. Alabama* (1969) 395 U.S.238, 242.) Because a guilty plea in a criminal case is perhaps the supreme instance of waiver known to our system of criminal justice, the United States Supreme Court has consistently and unwaveringly recognized that a guilty plea to a criminal offense must always represent a "voluntary and intelligent choice among the alternative courses of action open to defendant." (*North Carolina v. Alford* (1970) 400 U.S. 25, 31; *People v. Mosby* (2004) 33 Cal.4th 353, 359.)

"What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences." (*Boykin v. Alabama, supra,* 395 U.S. at pp. 243-244.) Therefore, in order to demonstrate that the accused entered a knowing and voluntary plea, the record must demonstrate that the defendant was apprised of his or her privilege against self-incrimination, right to a jury trial and right to confront a witness. (*Boykin v. Alabama, supra,* 395 U.S. at 243; *People v. Mosby, supra,* 33 Cal.4th at p. 841.) In order to satisfy *Boykin's* constitutional requirements, a trial court record must explicitly reveal "on its face" that before a defendant entered the functional equivalent of a plea of guilty, he was aware of the three major constitutional rights he was relinquishing by the plea. (*In re Tahl* (1969) 1 Cal.3d 122.)

Boykin and *Tahl* are generally aimed at fulfilling two purposes: "first, insuring that a defendant is aware of his constitutional rights and has voluntarily and knowingly waived them; and second, insuring that an adequate record of [this awareness] is made so as to facilitate review on appeal or collateral attack." (*Mills v. Municipal Court* (1973) 10 Cal.3d 288, 305.) These safeguards are designed to ensure that guilty pleas, slow pleas, and other uncontested submissions of a criminal case are all intelligently made. (*Id.* at 309.)

The bench trial in this case was tantamount to a slow plea of guilty. The guilt

phase was essentially a slow plea in a bench trial because Mr. Cunningham was not present, counsel presented no defense, and ultimately defense counsel conceded Mr. Cunningham's guilt on all charged offenses. Thus, it is manifest that Mr. Cunningham was convicted by a slow plea without entering a knowing and intelligent guilty plea with a full advisement of the constitutional rights waived by the plea, in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 15 of the California Constitution. This error requires reversal.

A. Mr. Cunningham was Convicted at a Bench Trial Which Was the Functional Equivalent of a Guilty Plea.

Mr. Cunningham contends that the bench trial during the guilt phase of his capital murder trial was fundamentally unfair and was the functional equivalent of a guilty plea because his attorney presented no witnesses or evidence in his defense, and ultimately conceded his guilt *on all charges* in his absence. The cumulative effect of counsel's actions resulted in a criminal trial which was the functional equivalent of a plea of guilty. (See, e.g. R.T. Vol. V, pp. 1079-1086.)

The term "slow plea" is defined as a submission of the question of the guilt or innocence of the accused to the court on the basis of a preliminary hearing transcript or some other abbreviated proceeding where conviction is a foregone conclusion if no defense is offered. (*People v. Sanchez* (1995) 12 Cal.4th 1, 28; see also *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.) "Deciding whether a submission is a

slow plea is often difficult, and courts must review such pleas based on the defendant's willingness to contest guilt during the court trial." (*People v. Sanchez, supra,* 12 Cal.4th at p. 28.) "[A]n appellate court, in determining whether a submission is a slow plea must assess the circumstances of the entire proceeding. . . . [A] submission that did not appear to be a slow plea because the defendant reserved the right to testify and call witnesses or to argue the sufficiency of the evidence, may turn out to be a slow plea *if the defense presented no evidence or argument contesting guilt.*" (*People v. Sanchez*, *supra,* 12 Cal.4th at pp. 28-29 (emphasis added).)

Generally, circumstances "tantamount to a plea of guilty" are those in which the proceeding admits all the facts necessary for a conviction and the defendant raises no affirmative defenses, presents no evidence, and does not offer any argument to contest guilt. Perhaps the clearest example of a slow plea is where the only evidence before the trial court "is the victim's credible testimony, and the defendant does not testify and counsel presents no evidence or argument on defendant's behalf." (*People v. Wright* (1987) 43 Cal.3d 487, 496.) Under these circumstances a submission of the case to the trial court without a jury is "tantamount to a plea of guilty" because the guilt of the defendant [is] apparent on the basis of the evidence presented at the preliminary hearing and . . . conviction [is] a foregone conclusion if no defense is offered." (*Ibid*, citing *Bunnell v. Superior Court*, *supra,* 13 Cal.3d at p. 602; accord *People v. Levy* (1973) 8 Cal.3d 648, 651.)

In cases involving a slow plea, a defendant must receive *Boykin-Tahl* warnings just as if he or she were entering an unconditional plea of guilty. (*Bunnell v. Superior Court, supra,* 13 Cal.3d at p. 605.) This is so because, "in circumstances in which conviction is a certainty . . . the defendant surrenders the same important constitutional rights, just as he would have if he had pleaded guilty." (*Bunnell v. Superior Court, supra,* 13 Cal.3d at 603.) Consequently, if a defendant submits a case to the trial court for a decision without a jury in any case where guilt appears to be a foregone conclusion, the defendant must be advised of the constitutional rights he or she is relinquishing by the "slow plea." (*Bunnell v. Superior Court, supra,* 13 Cal.3d at p. 602-603, citing *Boykin v. Alabama, supra*, 395 U.S. 238; *In re Tahl, supra*, 1 Cal.3d 122.)

This Court has previously held that a defense attorney's decision not to contest one or more allegations of murder at the guilt phase of a capital trial usually does not amount to a slow plea of guilty. (*People v. Cook* (2006) 39 Cal.4th 566, 590 citing *People v. Griffin* (1988) 46 Cal.3d 1011, 1029, see also *Florida v. Nixon* (2004) 543 U.S. 175.) However, in each of these cases the Court has held that there was no constitutional violation because the concession of guilt came only after other criminal charges were being tried in the defendant's presence before a jury. In these circumstances the Court has reasoned that there was no need to advise the defendant of his constitutional rights before his counsel conceded his guilt because the

defendant was necessarily aware of *and exercising* his constitutional rights as demonstrated by his personal presence at the jury trial. (*People v. Cook, supra*, 39 Cal.4th at p. 590, citing *People v. Cox* (1991) 53 Cal.3d 618, 670-71.)

Mr. Cunningham contends that cases which allow counsel to concede guilt at a jury trial held in the defendant's presence in an effort to secure a subsequent advantage before the jury are inapposite to the dilemma presented here. Thus, as difficult as it may be to determine whether the accused has submitted to a slow plea in most other cases, in this case this Honorable Court can easily conclude that the court trial in this case was the functional equivalent of a slow plea of guilty.

Reviewing the circumstances of the entire proceeding during the guilt phase court trial, it is apparent that the submission of the case to the court amounted to a slow plea of guilty. With the exception of contesting the documentary sufficiency of a prior felony conviction, during the court trial defense counsel admitted all the facts necessary for Mr. Cunningham's conviction of a capital crime, raised no affirmative defenses, presented no evidence, and offered no argument to contest guilt. Defense counsel offered no testimony or documentary evidence on behalf of Mr. Cunningham during the guilt phase court trial, did not seek any convictions on lesser included offenses, did not make any argument to the court on the legal significance of any disputed fact (with the exception of challenging the validity of a prior felony conviction for robbery), and, most important, failed to argue against <u>any</u> of the

charged offenses. Instead, at the conclusion of the trial, counsel for Mr. Cunningham ultimately conceded Mr. Cunningham's guilt in a closing argument which spanned eight pages of the Reporter's Transcript. (R.T. Vol. V, pp. 1079-1086.) All of these facts weigh in favor of a finding that the bench trial in this case was nothing more than a slow plea of guilty which lacked an adequate advisement of rights.

The trial court should have been aware *before trial* that the bench trial would be the functional equivalent of a slow plea of guilty. For example, at the time the prosecution and the defense announced that the parties would submit the case to the court for a trial without a jury, the prosecution advised the trial court that counsel for Mr. Cunningham did not intend to present a defense. (RT Vol. 1, pp. 189-190.) In response, the trial court specifically asked defense counsel if he did not intend to present any defense to the charges and counsel responded obliquely that he had no discovery to provide to the prosecution but he was still ready to begin the guilt phase of the trial. (RT Vol. 1, p. 190.) Although the trial court was given this information just before the guilt phase trial, the trial court nonetheless failed to appreciate that the bench trial was likely to be tantamount to a plea of guilty, thereby imposing an obligation to provide Mr. Cunningham with the required *Boykin/Tahl* warnings. In addition, the trial court never elicited a knowing, intelligent or voluntary waiver of Mr. Cunningham's right to remain silent, to present a defense, and to compel the prosecution to prove its case beyond a reasonable doubt..

When defense counsel conceded Mr. Cunningham's guilt in closing argument during the guilt phase, the trial court still did not immediately act to advise Mr. Cunningham that by submitting his case to a bench trial where his counsel conceded his guilt, Mr. Cunningham was, in effect, waiving his important constitutional right to remain silent, to present a defense, and to only be convicted if the prosecution adduced evidence to prove his guilt beyond a reasonable doubt. Although the trial court obtained a waiver from Mr. Cunningham of his rights to be personally present at the guilt phase trial and to confront and cross-examine witnesses (see RT Vol. 4, pp. 1064-1066), those waivers were insufficient to satisfy the constitutional rights set out in *Boykin-Tahl.*

Ironically, it was more than three months after the court trial, when the parties were discussing the jury questionnaire to be distributed to the prospective penalty phase jurors, that the trial court first realized that it may have accepted the functional equivalent of a guilty plea during a bench trial without adequately advising Mr. Cunningham of his *Boykin-Tahl* rights. (RT Vol 6, p. 1406.) Thus, after the trial court saw defense counsel quoted in a local newspaper representing that Mr. Cunningham did not contest his guilt, the trial court acknowledged on the record that, "it finally dawned on me in seeing that in the questionnaire that we probably need to take some additional waivers from the defendant with regard to the waiver on (*sic)* the jury trial that we did; if in fact the waiver of jury trial and having a court trial was in

effect a slow plea, the cases do require more of a waiver." (RT Vol. 5, p. 1406.)

In response to the trial court's belated concerns, defense counsel initially objected to trying to obtain a retrospective waiver of Mr. Cunningham's *Boykin/Tahl* rights after jeopardy attached. (RT Vol. 5, p. 1408.) However, after being confronted with this dilemma, the prosecution asked for additional time to brief the issue, and the court agreed to continue the question for further review. (RT Vol. 5, pp. 1406-1407.)

In written points and authorities, the prosecution argued that the guilt phase of Mr. Cunningham's trial was not the functional equivalent of a slow plea of guilty and that there was no need for any *Boykin/Tahl* waivers because Mr. Cunningham did not enter any plea to any of the charges and instead the prosecution proved every element of the charged offense. (RT Vol. 6, pp. 1499-1502.) The prosecution also argued that because the court advised Mr. Cunningham of his right to a jury trial, his right to confront and cross-examine the witnesses, and his right to be personally present there was an adequate advisement of rights in this case. (RT Vol. 6, p. 1501.)

In response, defense counsel once again noted that jeopardy had attached and therefore it was too late to vacate Mr. Cunningham's conviction or obtain additional waivers, As counsel explained, "what's done is done." (RT Vol. 6, p. 1503.) The trial court then took the matter under advisement. (RT Vol. 6, p. 1503.)

The next day the trial court addressed the concern that Mr. Cunningham's court

trial may have been the functional equivalent of a slow plea of guilty. The court acknowledged that there was authority for the proposition that where "there was a waiver of jury and a court trial and the defendant did not contest the charges at the court trial, i.e. asked no questions on cross-examination, called no witnesses and offered no arguments, then that was tantamount to a guilty plea and it required the same waivers as submission on a preliminary hearing." (RT Vol 6, p. 1573.)[9] However, after considering a variety of cases addressing a slow plea of guilty, the court concluded that "here we did take additional waivers from the defendant with regard to the various stipulations . . . and the defendant did specifically agree to that and waived his right to confront and cross-examine further in that regard. So I'm satisfied that under the current state of the law, at least, no additional waivers are required." (RT Vol. 5, p. 1574, see also p. 1575.)[10]

The trial court was incorrect in the conclusion that the submission of this

---

9. In considering the facts of this case, the trial court referred to the de-published decision in *People v. Plunkett* (1992) 5 Cal.App.4th 939 (review denied an ordered not to be published 7/30/92), where the Court of Appeal determined that, if the defendant entered a waiver of his right to a jury trial and trial counsel subsequently conceded the defendant's guilt, called no witnesses and offered no arguments in defense of the charges, then the submission was tantamount to a alow plea of guilty. (RT Vol. 6, p. 1573.)

10. At the conclusion of these findings, the trial court acknowledged (in a hearing in which Mr. Cunningham was once again not present) that "You know, in retrospect I think probably the better course might have been to go ahead and take all of those waivers and I would certainly be willing to give Mr. Cunningham the opportunity either to make those additional waivers or to decline to make the additional waivers. In which case I would be willing to vacate the guilt phase and let him have another guilt phase. But I understand [defense counsel's] position is what's done is done and you prefer to rely on the current state of the record." (RT Vol. VI, p. 1575.)

capital murder case at a bench trial where counsel presented no defense and conceded Mr. Cunningham's guilt on all charged offenses was not the functional equivalent of a guilty plea. The court erred further in determining that the waivers of Mr. Cunningham's right to a jury trial and to confront and cross-examine the witnesses were constitutionally adequate to justify such a slow plea, because this conclusion ignores the record evidence which suggest that these waivers were induced by the inherently coercive conditions imposed on Mr. Cunningham by the use of excessive restraints without a showing of manifest need and also disregards Mr. Cunningham's additional Fifth and Sixth Amendment rights to remain silent, to present evidence, and to demand that the prosecution prove its case beyond a reasonable doubt.

Trial procedures which violate the Fifth Amendment's guarantee against self-incrimination and the Sixth Amendment right to present a defense deprive the defendant of a fair trial. (See, e.g., *Arizona v. Fulminante, supra,* 499 U.S. 279 [Fifth Amendment]; *Delaware v. VanArsdall* (1986) 475 U.S. 673. These important Fifth and Sixth Amendment rights recognize "the principle that the central purpose of a criminal trial is to decide the factual questions of the defendant's guilt or innocence . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial." (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 681.) Thus the deprivation of these basic constitutional rights seriously affects the fairness, integrity and public reputation of judicial proceedings. (*Johnson v. United*

States (1997) 520 U.S. 461, 469.)

Mr. Cunningham's slow plea of guilty was a significant constitutional error which demeaned the fact-finding process, violated the respect due to the accused, and ignored the presumption of innocence. At the bench trial which resulted in his conviction, Mr. Cunningham was deprived of his Fifth Amendment right to remain silent, and his Sixth Amendment right to present a defense and to be presumed innocent because the proceeding was the functional equivalent of a slow plea of guilty. The deprivation of Mr. Cunningham's essential constitutional rights without an adequate advisement of rights and a knowing waiver undermined the truth-seeking function of the adversary process in Mr. Cunningham's case.

B. The Failure to Advise Mr. Cunningham of His Constitutional Rights Prior to the Submission of His Case Without any Defense is Reversible Because the Submission of the Case Was Not Voluntarily and Intelligently Made.

Mr. Cunningham submitted his case to the court sitting without a jury without any acknowledgment that he would give up his right to remain silent, to present any evidence on his own behalf in the defense of the charges, and to be presumed innocent and only be convicted of a capital murder charge if the prosecution proved he was guilty beyond a reasonable doubt. Moreover, Mr. Cunningham was never advised that if he submitted the guilt phase of his trial to the court sitting without a jury he would be relinquishing these basic rights. Finally, the trial court never advised Mr. Cunningham that, by submitting his case to the court without a jury, his conviction on

all charges was virtually a foregone conclusion. Therefore, based on the totality of the circumstances Mr. Cunningham submitted the issue of his guilt by slow plea without any knowing, intelligent, or voluntary waiver of his *Boykin/Tahl* rights.

Prior to 1992, this Court "treated the failure to comply with a defendant's *Boykin/Tahl* rights as requiring automatic reversal of the defendant's conviction." (*People v. Allen* (1999) 21 Cal.4th 424, 437.) But in *People v. Howard* (1992) 1 Cal.4th 1132, the court reevaluated the rule of automatic reversal and concluded "that the *Boykin/Tahl* rule merely requires that '[t]he record . . . affirmatively demonstrate that the plea was voluntary and intelligent *under the totality of the circumstances.*" (*People v. Allen, supra,* 21 Cal.4th at pp. 438-439.) Thus, if the record fails to disclose proper *Boykin/Tahl* advisements and waivers, the appellate court must determine, based on the totality of the circumstances, whether the submission was voluntarily and intelligently made. (*Ibid.*)

Mr. Cunningham was clearly prejudiced by the failure to advise him of the direct consequences of the submission of his case to the court in a proceeding where defense counsel presented no evidence and conceded Mr. Cunningham's guilt. Mr. Cunningham was prejudiced because the trial court never advised him that, under the circumstances, he would likely be found guilty if he submitted his case for a bench trial. Moreover, Mr. Cunningham was harmed because the trial court never advised him that, by submitting his case to the court without a jury, without any defense, and

after a concession of guilt by defense counsel, Mr. Cunningham would waive his right to remain silent, his right to present a defense, and his right to compel the prosecution to meet its burden of proving his guilt beyond a reasonable doubt. In short, on this record and under the totality of the circumstances, Mr. Cunningham did not receive proper advisements or voluntarily and intelligently waive his basic Fifth and Sixth Amendment rights.

Mr. Cunningham contends that if he had been advised of and understood his rights to remain silent, to present a defense, and to compel the prosecution to meet its burden of proof, the result of this proceeding may have been different. Instead, it is reasonably probable that Mr. Cunningham would not have consented to such an abbreviated bench trial if he had been adequately advised of his rights.

In addition, even after it became apparent to the trial court that Mr. Cunningham's guilt phase trial may have been the functional equivalent of a slow plea of guilty, Mr. Cunningham was still never personally advised by the trial court of the rights he relinquished by submitting the case to the court, nor was Mr. Cunningham ever told of the trial court's offer to allow him to withdraw his submission and receive a new guilt phase of the trial. (RT Vol. 6, p. 1575 ["I would be willing to vacate the guilt phase and let him have another guilt phase"].) Consequently, it is reasonably probable that if Mr. Cunningham had been advised of either his *Boykin/Tahl* rights or the option to withdraw his submission of the case to the court, the result of the

proceeding may have been different.

The United States Supreme Court has recognized that due process applies not only to the procedure for accepting a plea of guilty, but also to the request to withdraw a plea of guilty. It necessarily follows that a violation of the defendant's rights during a guilty plea proceeding raises a constitutional violation which must be fairly remedied. (*People v. Mancheno* (1982) 32 Cal.3d 855, 866.)

Under the totality of the circumstances it is apparent that the submission of Mr. Cunningham's case was a "slow plea" under circumstances which were tantamount to a plea of guilty. Moreover, the guilt phase trial proceedings in this case were fundamentally unfair and deprived Mr. Cunningham of his fundamental constitutional rights under the Fifth and Sixth Amendment both because Mr. Cunningham was never advised of his fundamental constitutional rights or even the trial court's belated offer to allow Mr. Cunningham to withdraw his plea and obtain a new guilt phase. Consequently, Mr. Cunningham's convictions must be reversed because he forfeited his privilege against self incrimination, his presumption of innocence, and his right to present a defense, unknowingly and unintelligently without an adequate advisement of rights or any valid waiver.

V. THE COURT ERRED IN ADMITTING MR. CUNNINGHAM'S INVOLUNTARY CONFESSIONS WHICH WERE OBTAINED IN A DELIBERATE VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS.

Mr. Cunningham contends that his state and federal constitutional rights to due

process, to be free from self-incrimination, and to be subjected to custodial interrogation only with the assistance of counsel were all violated by the introduction of his involuntary statements which were made during custodial interrogation. In particular, Mr. Cunningham submits that the trial court erred in admitting the contents of his custodial interrogations in Deadwood, South Dakota on July 24, 1992, as well as his videotaped re-enactment of the offense at the Surplus Office Sales Store in Ontario, California on August 2, 1992 during both the guilt and the penalty phases of the trial. (U.S. Const., Amends. V, VI, XIV; Cal.Const. art. I, §§ 7 and 15.)

During four separate interviews over two weeks, law enforcement officers from the Ontario Police Department deliberately violated his federal constitutional rights under *Miranda v. Arizona* (1966) 384 U.S. 436 and *Edwards v. Arizona* (1981) 451 U.S. 477. In these interrogations, detectives from the Ontario Police Department used a variety of coercive techniques to obtain his confessions. Therefore, Mr. Cunningham's custodial statements to law enforcement officers were involuntary and inadmissible.

On the day after he was arrested, Mr. Cunningham was interviewed by Detective Pat Ortiz and Detective Greg Nottingham of the Ontario Police Department. At the outset of the interview, even before the Detectives advised Mr. Cunningham of his *Miranda* rights, Mr. Cunningham asked whether his companion, Alana Costello, was in custody. (RT Vol. 1, pp. 246; 258-261.) In response, Detective Ortiz

falsely told Mr. Cunningham that Alana was "in custody" and went on to inaccurately represent to Mr. Cunningham that Alana could not be cleared as a suspect until the detectives spoke with him about the offense. (RT Vol. 4, pp. 604-605.)

After this conversation, Detectives Nottingham and Ortiz did not immediately read Mr. Cunningham his *Miranda* rights. Instead the detectives began their interrogation and questioned Mr. Cunningham about his background (including his previous employment at the Surplus Office Sales store), his military service and his previous relationships–all without any advisement of rights. (RT Vol. 2, pp. 330-331.) Only when the detectives began to question Mr. Cunningham specifically about the burglary and robbery at the Surplus Office Sales store did they finally read Mr. Cunningham his *Miranda* rights. (RT Vol. 1, p. 257; Vol. 2, p. 330.)

After advising Mr. Cunningham of his *Miranda* rights, the detectives did not obtain an explicit waiver of Mr. Cunningham's right to remain silent. Instead, consistent with their standard practice, the detectives specifically refused to ask Mr. Cunningham if he wanted to waive his right to remain silent and speak with the detectives; on the contrary, after reading Mr. Cunningham his *Miranda* rights the detectives merely asked him if he understood his rights, and when he said that he did, the detectives immediately launched into their interrogation without eliciting any additional, explicit waivers. (RT Vol. 2, pp. 320-321; Vol. III, pp. 555-556.)

After a considerable period of time questioning Mr. Cunningham about his past

and his relationships with Diana Jamison and Alana Costello, Detective Ortiz told Mr. Cunningham that he wanted to discuss the specifics of the events of June 27, 1992. At that time Mr. Cunningham stated "should I have someone here talking for me, is this the way its supposed to be done." (RT Vol. 2, p. 301.) In response, Detective Ortiz did not directly answer this question, instead he asked Mr. Cunningham if he would like to have his rights re-read and, when Mr. Cunningham told him yes, Detective Ortiz re-read the *Miranda* rights, once again asked Mr. Cunningham if he understood these rights, and then resumed his questioning without eliciting any explicit waiver of Mr. Cunningham's right to remain silent or to the assistance of counsel. (RT Vol. 2, pp. 332-335.)

Finally, during his initial interview on July 24, Mr. Cunningham was highly emotional, he often stopped the interview for prolonged periods of time, and the detectives repeatedly asked him if he was feeling well. (RT Vol. 1, pp. 262-265.) In addition, the interview of July 24 was repeatedly marked by incomprehensible statements from Mr. Cunningham, *non sequitur* references to Vietnam, and allusions to Mr. Cunningham's dreams. (*Ibid.*)

The detectives also questioned Mr. Cunningham on July 26, 1992, but the detectives did not provide any *Miranda* warnings during this interview. During the interview of July 26, Mr. Cunningham told the detectives that he had enemies in the California prison system, especially members of the Mexican Mafia, and that he

would not be safe in the "main line" general population housing units of the county jail. (RT Vol. 2, pp. 283-286) To address this concern, Mr. Cunningham asked the detectives to recommend that he be placed in protective custody in the county jail and the detectives assured Mr. Cunningham that they would help him. (RT Vol. 2, pp. 342-343.)

Upon his return to California, Mr. Cunningham was not housed in the California Institution for Men in Chino as the detectives suggested; instead, Mr. Cunningham was returned to the Administrative Segregation Unit of Folsom State Prison. (RT Vol. 1, p. 285.) While he was confined in Folsom Prison Mr. Cunningham looked tired and anxious. (RT Vol. 2, p. 405.) However, one week after he arrived at Folsom, Correctional Sergeant Wesley Lewis approached Mr. Cunningham (at the direction of Mr. Cunningham's parole officer and detectives of the Ontario Police Department) and asked Mr. Cunningham if he would be willing to conduct a video taped re-enactment of the crime. In response, Mr. Cunningham told Sergeant Lewis that he would do anything if it meant he could leave Folsom Prison. (RT Vol. 2, p. 420.)

On August 2, 1992, Mr. Cunningham was removed from Folsom Prison and transported to the Surplus Office Sales store in Ontario. (RT Vol. 2, p. 344.) When he arrived at the store, Detectives McGready, Nottingham, and Ortiz led Mr. Cunningham through a re-enactment of the offense which was video taped. (RT Vol.

2, pp. 287; 344; 361-362.)

The prosecution first sought to introduce Mr. Cunningham's custodial statements during the preliminary hearing and counsel for Mr. Cunningham objected to the admission of these statements because of an alleged intentional strategy on the part of the Ontario Police Department Detectives to deliberately circumvent the *Miranda* warnings. (CT, Vol. 2, pp. 419-423, 431-434; Vol. 3, pp. 552-557.) Counsel for Mr. Cunningham also argued that the Mr. Cunningham's custodial statements should not be admitted because he invoked his right to counsel during the first interview on July 24, 1992, when he asked "I committed an armed robbery. Shouldn't I have someone here talking for me? Is this the way it's supposed to be?" (CT Vol. 2, pp. 435-439.)[11] Counsel argued further that Mr. Cunningham's incriminating statements were involuntary because they were induced by the detectives' false statement that Alana Costello was in custody and that they only way they could clear her as a suspect was if Mr. Cunningham consented to an interview. (CT Vol. 2, pp. 425-428.)

---

11. At the preliminary hearing, Detective Ortiz frankly admitted that when Mr. Cunningham asked during his first interview "should I have someone talking for me" Detective Ortiz did not clarify the request because "I didn't want anybody talking for him. I wanted what information he had." (CT Vol. 3, p. 571.) Detective Ortiz also acknowledged that in his subsequent interviews when Mr. Cunningham mentioned lawyers, Detective Ortiz consistently dissuaded Mr. Cunningham from seeking the assistance of counsel: for example, on July 25, 1992 during an interrogation Detective Ortiz told Mr. Cunningham that once lawyers became involved in the proceedings everything was a lot more complicated. (CT Vol. 3, p. 768.)

In addition to objecting to the custodial statements of July 24, 1992, during the preliminary hearing counsel for Mr. Cunningham also sought to suppress the video tape re-enactment by arguing that detectives from the Ontario Police Department deliberately delayed Mr. Cunningham's arraignment on the capital murder charges in an effort to obtain more time to complete the video taped re-enactment before Mr. Cunningham's arraignment and the appointment of counsel.[12] Counsel also objected that the video tape re-enactment was the product of coercive pressure which was brought to bear on Mr. Cunningham to induce him to participate in the re-enactment.

At the conclusion of the preliminary hearing, the Magistrate Judge denied Mr. Cunningham's motion to exclude his custodial statements, finding that the detectives did not violate *Miranda,* did make any false statements which induced the confession and did not fail to clarify Mr. Cunningham's request for counsel; instead, the Magistrate Judge concluded that Mr. Cunningham's custodial statements were made freely and voluntarily. (CT Vol. 4, pp. 821-835.)

Prior to the guilt phase portion of trial, counsel for Mr. Cunningham filed a written motion to exclude the incriminating statements Mr. Cunningham made to the Ontario Police Detectives. (CT Vol. 5, pp. 1215-1230; 1243-1283.) Mr. Cunningham

---

12. During the preliminary hearing Detective Nottingham acknowledged that it was communicated to him that after an arrest warrant was filed it would be improper to try and complete the video tape re-enactment and, consequently, the detectives knew that the video re-enactment had to be completed before the filing of formal criminal charges. (CT Vol. 2, p. 459.)

argued that law enforcement officers from the Ontario Police Department knowingly and deliberately violated the prophylactic *Miranda* warnings in an effort to induce him to confess to the triple homicide at the Surplus Office Sales store and never gave him any opportunity to exercise his constitutional right to remain silent. (CT Vol. 5, pp. 1223, 1240-1242, 1253.) Mr. Cunningham also alleged that the interrogating detectives did not "scrupulously honor" his request for counsel during the interrogation because they were intent on continuing their questioning, even after an unambiguous request for the assistance of an attorney. (CT, Vol. 5, pp. 1225; 1256-1258.)

In addition, in his motion to suppress his custodial statements Mr. Cunningham sought to exclude all admissions which were made following his initial arraignment in South Dakota because law enforcement officers deliberately exploited the delay in appointing counsel for him. (CT Vol. 5, pp. 1230; 1261; 1279-1280.) Mr. Cunningham also objected to the admission of the video taped re-enactment of the crime at the Surplus Office Sales store and alleged the re-enactment was obtained only after the prosecution promised to remove him from prison to protect him from harm and then deliberately delayed his arraignment on capital murder charges in California in an effort to complete the re-enactment before counsel was appointed to represent Mr. Cunningham. (CT Vol. 4,pp. 1279-1280.)

Finally, in seeking to suppress the statements he made during custodial

interrogation, Mr. Cunningham argued that his statements were involuntary. Mr. Cunningham alleged that his custodial statements were nothing more than the product of "deliberate violations of the procedures which the court has established to protect" the right to remain silent. (CT Vol. 4, p. 1269.)

In response to Mr. Cunningham's Motion to Suppress his custodial statements, the prosecution argued that a preponderance of evidence demonstrated that Mr. Cunningham's custodial statements were voluntary, that the implied waiver of Mr. Cunningham's *Miranda* rights was sufficient, and that Mr. Cunningham's comment about having "someone here to help him" was not an unambiguous request for the assistance of counsel (CT Vol. 5, pp. 1231-1235.) The prosecution claimed that "from the entire record . . . it is clear that the defendant was fully advised of his rights, waived his rights, and spoke freely and voluntarily to the Ontario Police Detectives." (CT Vol. 5, p. 1237.)

At first the trial court decided to resolve the challenges to the admission of Mr. Cunningham's custodial statements by reviewing the relevant portions of transcript of the preliminary hearing which bore on the issues. (RT Vol. 1, p. 25.) However, ultimately the trial court heard testimony and accepted evidence at separate hearings on the Motion to Suppress the Statements. (RT Vol. 1, pp. 219-266; RT Vol. 2, pp. 268-356; RT Vol. 2, pp. 366-445.)

After conducting an evidentiary hearing, the trial court denied Mr.

Cunningham's motion to suppress his involuntary custodial statements. The trial court found by a preponderance of the evidence that, even though the officers used a variety of improper inducements to elicit incriminating statements, Mr. Cunningham nonetheless understood his constitutional rights and knowingly and voluntarily decided to waive them by freely agreeing to talk with the Ontario Police Department detectives. (RT Vol. 3, pp. 659-660.) Consequently, the court ruled that Mr. Cunningham's multiple confessions were admissible in the prosecution's case in chief during both the guilt phase and the penalty phase of the trial. (RT Vol. 3, p. 664.)

The trial court erred in admitting the involuntary statements Mr. Cunningham made during his custodial interrogation with Detectives from the Ontario Police Department. Mr. Cunningham's incriminating statements to the police in July and August 1992 were the product of deliberate, repeated and intentional violations of Mr. Cunningham's rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 15 of the California Constitution. In addition, the police used a variety of coercive tactics (such as deception and false promises to help Mr. Cunningham avoid perceived threats of harm) which, when considered together, demonstrate that his statements were involuntary. Finally, Mr. Cunningham contends that he was prejudiced by the erroneous admission of these confessions.

A. Mr. Cunningham's Confessions Were Obtained After a Deliberate Violation of *Miranda v. Arizona*.

Prior to trial, Mr. Cunningham consistently alleged that the Ontario Police Detectives who interviewed him in South Dakota were "trained to deliberately try to evade their responsibilities under *Miranda*, and to deliberately avoid giving effect to suspect's constitutional rights." (CT Vol. 5, p. 1112.) Mr. Cunningham argued that the prosecution should be barred from making any use of his custodial statements because the statements were only obtained after an intentional violation of Mr. Cunningham's constitutional rights to remain silent which was part of an improper, deliberate practice of the Ontario Police Department to limit the scope of *Miranda* advisements, a practice which persisted despite previous judicial condemnation. (CT Vol. 5, pp. 1240-1242.)

At the hearing on his Motion to Suppress, Mr. Cunningham demonstrated that the Ontario Police detectives who questioned him in South Dakota intentionally failed to seek an explicit waiver of his *Miranda* rights. Instead, after advising Mr. Cunningham of his *Miranda* rights, the detectives relied on the salesman's trick of assuming consent. Consequently. Mr. Cunningham argued that the detectives deliberately withheld the full scope of the *Miranda* advisements because they were specifically instructed not to "put any more into *Miranda* than you need to." (CT Vol. 5, p. 1113.)

At a hearing on the motion to suppress Mr. Cunningham's custodial

statements, Ontario Police Detectives Gregory Nottingham and Patrick Ortiz both admitted that they made a conscious decision not to seek an explicit waiver from Mr. Cunningham of his *Miranda* rights because they were afraid that if they asked him if wanted to waive his rights, it could suggest to him that he needed to invoke his right to remain silent. (See, e.g., RT Vol. 2, pp. 294-295, 323, 330-332; Vol. 3, p. 555.) The detectives also acknowledged that in their subsequent interviews with Mr. Cunningham in South Dakota they did not ask the second *Miranda* question or elicit any express waivers of Mr. Cunningham's right to remain silent. (RT Vol. 3, p. 340.)

The trial court expressed reservations about the detectives' attempt to intentionally circumvent the protections provided by *Miranda*. (RT Vol. 3, p. 648.) Nonetheless, the court concluded that when Mr. Cunningham indicated that he understood his rights and then proceeded to speak with the detectives without invoking his right to remain silent, he waived his Fifth Amendment right and thus there was no need for the detectives to obtain an express waiver of his rights. (RT Vol. 3, pp. 648-649.)

Mr. Cunningham respectfully submits that the trial court erred in admitting his custodial statements which were elicited as part of a standard pattern and practice by members of the Ontario Police Department to intentionally violate the constitutional protections established by *Miranda*. Mr. Cunningham contends that his custodial statements should have been suppressed because the detectives deliberately and

intentionally violated his state and federal constitutional right to remain silent. Mr. Cunningham also insists that the trial court erred in presuming a valid waiver of his *Miranda* rights from a silent record.

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 15 of the California Constitution safeguard the right of the accused to be free from coerced incrimination. The state and federal constitutional privilege against self-incrimination has consistently been accorded a liberal construction. (*Miranda v. Arizona, supra,* 384 U.S. 436.) Therefore, if an individual in custody is not adequately apprised of his constitutional right to remain silent and have the assistance of counsel during all custodial interrogation, both the Fifth and Sixth Amendments prohibit the use of any statements illegally obtained during the custodial interrogation. (*Miranda v. Arizona, supra,* 384 U.S. at 444 (emphasis added), see also *Missouri v. Seibert* (2004) 542 U.S. 600 [confession inadmissible where officers made a conscious decision to use an interrogation technique that deliberately circumvented the required *Miranda* warning].)

"Custodial police interrogation, by its nature, isolates and pressures the individual." (*Dickerson v. United States* (2000) 530 U.S. 428, 435.) In some cases relentless questioning by the police during custodial interrogation can ultimately "convey to the suspect a message that he has no choice but to submit to the officer's will and confess." (*Minnesota v. Murphy* (1984) 465 U.S. 420, 427.) To guard

against such compulsion, the privilege against self-incrimination "is protected in [these] 'inherently coercive' circumstances by the requirement that a suspect not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent [and] the presence of an attorney." (*People v. Sapp* (2003) 31 Cal.4th 240, 266.)

Therefore, both the state and federal constitution demand that individuals who are being questioned about a crime while in police custody must be given complete *Miranda* warnings before police officers may interrogate them. (*People v. Huggins* (2006) 38 Cal.4th 175, 198, citing *Rhode Island v. Innis* (1980) 446 U.S. 291, 297.) The in-custody individual must be warned of his right to remain silent and to seek the assistance of counsel because the circumstances surrounding questioning by law enforcement officers are often so inherently coercive that, without these adequate warnings, any answer to custodial interrogation must be considered to be compelled in violation of the Fifth Amendment. (*Miranda v. Arizona, supra,* 384 U.S. at 467-68, see also *People v. Neal* (2003) 31 Cal.4th 63, 67.)

In his motion to suppress his custodial statements, Mr. Cunningham argued that his response to the detectives' questioning following his acknowledgment that he understood his rights was insufficient to show that he validly waived his right to remain silent. (CT Vol. 5, pp.1255-1256.) Instead, Mr. Cunningham alleged that he was never even given any opportunity to invoke his right to remain silent because

detectives in the Ontario Police Department had developed a calculated policy to refuse to ask an in-custody suspect if, understanding his right to remain silent, he still wanted to speak with the police. Counsel for Mr. Cunningham argued that this policy was part of a deliberate effort to discourage in-custody criminal suspects, like Mr. Cunningham, from asserting their *Miranda* rights. (CT Vol 5, pp. 1252-1254.) Consequently, counsel averred, based on his experience as a supervisor in the West End office of the San Bernardino County Public Defender that, "in a large number of cases involving the Ontario Police Department, officers do not ask the second [*Miranda*] question to suspects" and do not inquire whether, having the *Miranda* rights in mind, the suspect wishes to speak with law enforcement officers. (CT Vol. 4, p. 869; Vol. 5, p. 1112.)

At the hearing on the motion to suppress the custodial statements, Mr. Cunningham presented additional evidence that law enforcement officers from the Ontario Police Department deliberately violated his *Miranda* rights. In particular, at the hearing both Detectives Nottingham and Ortiz admitted that when they questioned Mr. Cunningham in South Dakota they did not want to give him any opportunity to explicitly invoke his right to remain silent. (RT Vol. 2, pp. 294-295, 318, 330, 464.) Instead the detectives testified that omitting this second *Miranda* question was part of their standard practice because it made it more likely that they would successfully elicit an incriminating response during custodial interrogation. (RT Vol. 2, pp. 295,

321, 330, 349-350.)

The trial court condemned the detectives' practice of not asking for an explicit waiver of Mr. Cunningham's *Miranda* rights, and criticized the conscious effort by the detectives to evade the constitutional protections of the Fifth Amendment. (RT Vol. 3, pp. 648-649.) Nonetheless, the court concluded that, notwithstanding this practice, Mr. Cunningham voluntarily waived his right to remain silent and therefore his custodial statements were admissible. (RT Vol. 3, p. 649.)

Mr. Cunningham contends that the trial court erred in admitting his custodial statements despite the intentional violation of his right to remain silent because a valid waiver of *Miranda* rights requires something more than a implied finding that the accused understood his rights and then promptly responded to the officer's incriminating questions. Therefore, under the totality of the circumstances the record is insufficient to show by a preponderance of the evidence that Mr. Cunningham validly waived his *Miranda* rights.

On appeal, this Court reviews independently the trial court's ruling on a motion to suppress a statement under *Miranda*. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1092, see also *Arizona v. Fulminante, supra*, 499 U.S. at p. 287.) In doing so, this Court must "accept the trial court's resolution of disputed facts and inferences and its evaluations of credibility, if supported by substantial evidence." (*People v. Guerra, supra,* 37 Cal.3d at pp. 1092-1093.)

Miranda announced a prophylactic, constitutional rule that an individual held for interrogation must be clearly warned that "he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Miranda v. Arizona, supra,* 384 U.S. at 444.) "*Miranda* states required rules of conduct for police officers, drawn from the United States Constitution." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 30.) Thus, if a suspect makes a statement to a police officer during custodial interrogation without adequate *Miranda* warnings, the statement may not be admitted into evidence during the prosecution's case in chief. (*People v. Guerra, supra,* 37 Cal.4th at p. 1092.)

Moreover, state and federal courts have consistently recognized that the deliberate, intentional and repeated violation of *Miranda* and its progeny must be "strongly disapproved." (*People v. Jablonski* (2006) 37 Cal.4th 774, 816, citing *People v. Neal, supra,* 31 Cal.4th at p. 81.) "Respect for the rule of law is not advanced when the guardians of the law elect to deliberately violate it." (*Ibid.*) Therefore, this Court has consistently recognized that, in an appropriate case such as this, the "deliberate, intentional and repeated violation [of *Miranda*] . . . would compel [this Court] to reverse a conviction." (*Ibid.)*

Although the United States Supreme Court has never insisted on a rigid formula for the advisement of an individual's *Miranda* rights, reviewing courts

charged with the obligation of safeguarding constitutional rights have insisted that any *Miranda* warnings which are given to an accused must reasonably convey the rights required by *Miranda*. (*Duckworth v. Eagan* (1989) 492 U.S. 195, 203.) This is so because the United States Supreme Court has made it clear that "*Miranda* is a constitutional decision" and articulates "a constitutional rule." (*Dickerson v. United States, supra,* 530 U.S. at 438.)

A defendant's waiver of *Miranda* rights must be knowing, intelligent and voluntary and a valid waiver necessarily depends on the totality of the circumstances. (*Colorado v. Connelly* (1986) 479 U.S. 157, 170.) Although a *Miranda* waiver need not be express, and police officers need not ask explicitly whether a defendant intends to waive his or her rights (*United States v. Cazares* (9th Cir. 1997) 121 F.3d 1241, 1244), there is nevertheless a presumption against a silent waiver of *Miranda* rights. (*United States v. Garibay* (9th Cir. 1998) 143 F.3d 534, 536.) Thus, the burden is on the government to prove a voluntary waiver of *Miranda* rights by demonstrating the absence of police over-reaching. (*Colorado v. Connelly, supra,* 479 U.S. at 170.)

Although the trial court acknowledged that the detectives' improper actions during the interrogation created a presumption that Mr. Cunningham's custodial statements were obtained in violation of his *Miranda* rights, the trial court erred by improperly placing the burden on Mr. Cunningham to present "compelling evidence . . . that would be sufficient for the Court to find that the statements were

involuntary." (RT Vol. 3, p. 659.) The Superior Court erred by shifting the burden of proof to Mr. Cunningham and in concluding that he had failed to produce sufficient evidence to show that his custodial statements were the result of improper influences by law enforcement officers. (RT Vol. 3, pp. 659-660.)

In this case Mr. Cunningham was obviously subjected to "an interrogation environment . . . created for no purpose other than to subjugate the individual to the will of the examiner." (*Miranda v. Arizona, supra,* 384 U.S. at 457.) In their unmitigated zeal to investigate a criminal case, detectives from the Ontario Police Department pursued precisely the type of intentional violations of *Miranda* which have been consistently condemned by this Court in *Jablonski* and by the United States Supreme Court in *Seibert.* Consequently, the trial court erred in failing to suppress Mr. Cunningham's custodial statements because, in light of the detectives' intentional efforts to minimize *Miranda* warnings, there is insufficient evidence to demonstrate that Mr. Cunningham validly waived his right to remain silent.

The interrogating detectives frankly admitted that they failed to seek an explicit waiver of Mr. Cunningham's right to remain silent as part of their standard practice in an effort to continue with an interrogation following an advisement of rights until the in-custody suspect affirmatively objected to the questioning. Thus, this Court is once again confronted with the troubling prospect of law enforcement officers who pursued a deliberate, conscious and repeated violation of a suspect's *Miranda* rights

in a calculated and intentional effort to undermine its constitutional protections. Consequently, Mr. Cunningham respectfully submits that such knowing violations must be condemned and that the statements should have been excluded from the prosecution's case in chief. (See, e.g., *People v. Neal* (2003) 31 Cal.4th 63, 80-81.)

B. Mr. Cunningham's Custodial Statements Were Obtained After His Unambiguous Request for Counsel Was Ignored.

Mr. Cunningham contends that the law enforcement officer's failure to stop his first interrogation of July 24, 1992, after he specifically and unambiguously requested the assistance of counsel before discussing the facts of the robbery was coercive, violated the state and federal constitutions, and rendered all of Mr. Cunningham's subsequent statements involuntary and inadmissible. Because Mr. Cunningham clearly indicated his desire to be assisted by counsel during his first interview on July 24, 1992, and because the detectives were subjectively aware of Mr. Cunningham's request for an attorney, the trial court erred in admitting Mr. Cunningham's custodial statements. The custodial statements should have been excluded because Ontario Police Detectives Nottingham and Ortiz failed to scrupulously honor Mr. Cunningham's explicit invocation of the right to counsel.

At one point during his first interrogation on July 24, 1992, when Mr. Cunningham began to discuss the robbery, he stopped answering questions and asked, "I'm charged with robbery. Should I have someone here talking for me? Is this the way it's supposed to be done?" (CT Vol. 5, pp. 1256-1258; RT Vol. 2, pp. 301, 332.)

However, after this unequivocal assertion of his right to counsel, the Ontario Police Detectives nevertheless continued to interrogate Mr. Cunningham. (CT Vol. 5, p. 1259.)

At the hearing on the motion to suppress, the evidence showed that although detectives feigned some confusion over Mr. Cunningham's request for an attorney during the first custodial interrogation, both of the detectives were, in fact, subjectively aware that this statement indicated a desire by Mr. Cunningham to have "some person . . . there with him," because he "needed help." (RT Vol. 2, p. 352.) Nonetheless, neither Detective Nottingham nor Detective Ortiz sought to clarify Mr. Cunningham's request and neither specifically asked Mr. Cunningham if he wanted a lawyer present. Instead, in response to Mr. Cunningham's request for counsel, the detectives simply re-advised Mr. Cunningham of his *Miranda* warnings, asked him again if he understood those rights, and then continued to question him without eliciting any waiver of the right to counsel or the right to remain silent. (RT Vol. 2, pp. 302, 333-334.)

In addition, at the hearing on the motion to suppress, Mr. Cunningham presented additional evidence to show that in his custodial interviews, each time Mr. Cunningham spoke about the need to be assisted by a lawyer, Detective Ortiz actually discouraged Mr. Cunningham from invoking his right to counsel. Thus, Detective Ortiz admitted that in a subsequent interview on July 25 when Mr. Cunningham talked

about lawyers, Detective Ortiz spoke of the pain which lawyers caused to family members of murder victims and told Mr. Cunningham that once lawyers became involved in a case, everything became unnecessarily complicated. (RT Vol. 3, pp. 340-341, 349.)

Finally, during the hearing Mr. Cunningham presented evidence which demonstrated that, in other custodial interrogations of criminal suspects, these same detectives had a habit and custom of ignoring a suspect's clear and unambiguous invocation of the right to counsel. (RT Vol. 3, pp. 543-546.) Mr. Cunningham argued that, rather than honoring his clear request for counsel, the detectives who interviewed him in South Dakota continued to question him after he asked for a lawyer because they clearly had the intent to continue the interrogation under any circumstances. (CT Vol. 5, p. 1258.)

The trial court found that the interrogating detectives did not violate Mr. Cunningham's right to counsel because Mr. Cunningham's request for a lawyer during the interview of July 24 was "ambiguous" and did not require a cessation of the interview or any subsequent clarification. (RT Vol. 3, pp. 664-666.) The trial court also determined that Mr. Cunningham did not validly invoke his right to counsel because he was resigned to confessing his crime and admitted that he did not know how a lawyer could help him. (RT Vol. 3, p. 664.)

Mr. Cunningham contends that the trial court erred by concluding that his

request for counsel during the custodial interrogation on July 24, 1992 was ambiguous. The trial court erred because the evidence adduced at the hearing on the motion demonstrated that the detectives continued their questioning of Mr. Cunningham after his clear request for counsel and despite their subjective awareness that Mr. Cunningham had, in fact, unambiguously asked for an attorney. (See, e.g., R.T. Vol. 2, pp. 333-334 [Detective Ortiz understood Mr. Cunningham's request as a desire to have "some person there with him" and that "the potential was there . . . of his wanting an attorney" but he elected not to ask him specifically if he wanted an attorney present].) Instead, the evidence presented at the hearing established that each time Mr. Cunningham requested a lawyer, Ontario Police Detective Ortiz repeatedly insisted that a lawyer was not necessary and would only complicate the proceedings.

If, during questioning by law enforcement officers, a suspect indicates *in any manner* or at any stage that he would like to consult with an attorney, "the interrogation must cease until an attorney is present." (*Edwards v. Arizona, supra*, 451 U.S. at p. 482 [emphasis added].) This prophylactic rule establishes a bright line to protect the Sixth Amendment rights of individuals who are in custody and ensures that all questioning must cease once an accused requests counsel. (*Smith v. Illinois* (1984) 469 U.S. 91, 98.)

The rule that all custodial interrogation must cease once an accused invokes his right to counsel is "designed to prevent police from badgering a defendant into

waiving his previously asserted *Miranda* rights." (*Michigan v. Harvey* (1990) 494 U.S. 344, 350.) Therefore, when law enforcement officers continue to interrogate the accused in violation of the rules established in *Edwards*, the suspect's responses are presumptively involuntary and "are inadmissible as substantive evidence at trial." (*People v. Sapp, supra,* 31 Cal.4th at 266, see also *McNeil v. Wisconsin* (1991) 501 U.S. 171, 176-177.)

The fact that a police interrogator deliberately and repeatedly ignored the accused's request for an attorney and continued the interrogation despite an invocation of the right to an counsel must, at a minimum, give any reviewing court "cause for concern." (*People v. Coffman* (2004) 34 Cal.4th 1, 58; see also *People v. Crandell* (1988) 46 Cal.3d 833, 879.) In addition, the fact that a statement was obtained in violation of the defendant's request for the assistance of counsel is one circumstance which this Court may consider in determining whether a statement is voluntary. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1041; see also *People v. Neal, supra,* 31 Cal.4th at pp. 81-85 [officer's continued interrogation of defendant after defendant invoked his right to counsel was one of three circumstances considered in determining voluntariness of subsequent confessions].)

In reviewing the defendant's *Edwards* claim, this Court applies a *de novo* standard of review to the trial court's denial of defendant's motion to suppress. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 635.) This Court then conducts an

independent review of the law as applied to those trial court's findings of fact which are supported by substantial evidence. (*Ibid,* citing *People v. Louis* (1986) 42 Cal.3d 969, 985-987.)

The "rigid prophylactic rule" of *Edwards* requires a court to "determine whether the accused actually invoked his right to counsel." (*Smith v. Illinois, supra,* 469 U.S. at p. 95.) The rule that all custodial interrogation must cease if the accused asks for the assistance of counsel does not apply if the request for counsel is equivocal; "[r]ather, the suspect must unambiguously request counsel." (*Davis v. United States* (1994) 512 U.S. 452, 459.) "Although a suspect need not speak with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Ibid.*)

In this case it is apparent that detectives from the Ontario Police Department deliberately continued to question Mr. Cunningham even after they knew that Mr. Cunningham had invoked his right to counsel during his first custodial interview on July 24, 1992. (See, RT Vol. 3, pp. 333-334.) Moreover, unlike those cases which present an ambiguous request for counsel, in this case the evidence is clear that the interrogating officers were subjectively aware that Mr. Cunningham wanted "someone there to help him," and consistently responded to this and all other requests for the assistance of counsel by impugning the role of lawyers in the criminal justice

system and emphasizing the "pain" they cause the family members of victims of crime. Finally, any suggestion that the interrogating officers were "confused" by Mr. Cunningham's request is belied by the undisputed evidence that these particular Ontario Police detectives had a habit and custom of consistently and intentionally ignoring a suspect's clear and unambiguous invocation of the right to counsel in other cases.

In *People v. Peevy* (1998) 17 Cal.4th 1184, this Court addressed the issue of whether a law enforcement officer's intentional continuation of interrogation of a criminal suspect, despite the invocation of the right to counsel, renders the statement inadmissible in the prosecution's case in chief. The Court acknowledged that, in certain circumstances, the continuation of an interrogation in a criminal case after the suspect invokes the right to counsel can support a finding of involuntariness. (*Ibid*, see also *People v. Guerra, supra,* 37 Cal.4th at p. 1095.) Consequently, a detective's intentional conduct can be a significant factor in leading a court to conclude that the defendant's custodial statements were involuntary. (*People v. Neal, supra,* 31 Cal.4th at pp. 80-81.)

Under the totality of the circumstances, the trial court erred by failing to recognize that Mr. Cunningham had invoked his right to counsel as described in *Edwards.* Because the Ontario Police detectives failed to cease all questioning of Mr. Cunningham following his unambiguous request for the assistance of an attorney

during his first custodial interrogation, all of the subsequent statements which were made following this request should have been inadmissible.

C. The Video Taped Re-Enactment Was Obtained Only After Denying Mr. Cunningham Access to Counsel and Offering Improper Inducements.

Mr. Cunningham objected to the admission of all of his custodial statements made more than forty-eight hours after his arrest, including the videotaped re-enactment at the Surplus Office Sales store, by arguing that these statements were made after Mr. Cunningham was repeatedly denied his right to a prompt appointment of counsel in a capital case, as required by Penal Code Section 1550.1 and the state and federal constitutions. (CT Vol. 5, pp. 1261, 1279-1281; R.T. Vol. 3, p. 667.) In addition, Mr. Cunningham alleged that the video taped re-enactment should have been excluded because the Ontario Police Detectives knowingly exploited the delay in Mr. Cunningham's arraignment on capital murder charges in California in order to obtain additional, incriminating statements. (CT Vol. 5, pp. 1269, 1279-1281.) Finally, Mr. Cunningham argued that the re-enactment should be suppressed because members of the Ontario Police Department created an illegal inducement by offering to remove Mr. Cunningham from Folsom State Prison to protect him from a perceived threat of harm from the Mexican Mafia prison gang, so long as Mr. Cunningham agreed to the re-enactment. (CT Vol. 5, pp. 1263-1265; R.T. Vol. 3, pp. 667-668.)

The trial court refused to suppress Mr. Cunningham's custodial statements on

the grounds that he was not appointed a lawyer in the extradition proceedings in South Dakota or because the detectives improperly induced him by promising to remove him from Folsom State Prison. (RT Vol. 3, pp. 667-668.) Instead, the court determined that the video re-enactment and other custodial statements which were made after counsel should have been appointed were the product of Mr. Cunningham's free and voluntary choice and not the result of any improper inducement. (RT Vol. 3, p. 669.)

The trial court erred in failing to exclude all of the custodial statements Mr. Cunningham made after the State intentionally took advantage of the delay in the appointment of counsel in South Dakota and California. In particular, Mr. Cunningham argues that a combination of constitutional violations and coercive pressures rendered the video taped re-enactment of August 2, 1992 involuntary and inadmissible.

1. The Video Tape Re-Enactment Was Obtained After Detectives Took Advantage of the Delay in the Appointment of Counsel.

A capital accused has a constitutional right to counsel at all critical stages of a proceeding. (*Hamilton v. Alabama* (1961) 368 U.S. 52.) For example, Penal Code section 1550.1 (which enacts the Uniform Criminal Extradition Act) provides an accused a right to counsel at an extradition hearing. In addition, the accused in a criminal case has a constitutional and statutory right to a prompt arraignment within forty-eight hours of his arrest. (Penal Code section 825; *County of Riverside v.*

McLaughlin (1991) 500 U.S. 44, 56.) Unfortunately, each of these essential constitutional and statutory protections were ignored in this case in an effort to elicit additional, incriminating statements from Mr. Cunningham.

In his motion to suppress the statements which he made during his custodial interrogations, Mr. Cunningham argued that there was nothing in the record to suggest that he was ever notified of, or waived, his right to counsel at an extradition hearing. (CT Vol. 5, p. 1279.) Counsel argued further that, if Mr. Cunningham would have been appointed an attorney in a timely manner, the attorney would have counseled Mr. Cunningham to remain silent and would have prevented law enforcement officers from making any attempt to contact Mr. Cunningham without notifying his attorney. (CT, Vol. 5, p. 1280.) Counsel concluded that "the failure . . . to have an attorney to represent him deprived him of his Fifth, Sixth and Fourteenth Amendment rights as to all subsequent statements." (*Ibid.*)

Moreover, during the hearing on his motion to suppress, Mr. Cunningham demonstrated that the Ontario Police Detectives who questioned him in South Dakota knew that if Mr. Cunningham had received an attorney at his extradition hearing, the detectives would not have been allowed to continue to interrogate Mr. Cunningham. (RT Vol. 2, p. 338.) The Detectives also acknowledged that, if counsel had been promptly appointed for Mr. Cunningham in California, it was highly unlikely that any attorney would have allowed the Detectives to continue to question Mr. Cunningham

about the capital offense. (RT Vol. 2, pp. 338, 348.)

In addition, the detectives' testimony at the hearing on the motion to suppress also confirmed that law enforcement officials wanted Mr. Cunningham to complete a video taped re-enactment of the crime at the Surplus Office Sales store in Ontario before a warrant was issued for his arrest on capital murder charges and before he was arraigned on the capital charges in the San Bernardino Superior Court. The detectives admitted that they wanted to complete the re-enactment before the issuance of a warrant because after a warrant was filed for Mr. Cunningham's arrest it would have been improper to conduct a video-tape re-enactment without the consent of appointed counsel. (RT Vol. 2, pp. 291-292.) Thus the detectives deliberately exploited the delay in Mr. Cunningham's arraignment to complete the video tape re-enactment. (RT Vol. 2, p. 292.)

Courts will not tolerate any unnecessary delay in the arraignment of an accused in a capital murder case in an attempt to deprive the defendant of his right to counsel. Instead, delay in an arraignment of the accused is only acceptable "to complete the arrest, to book the accused, to transport the accused to court, for the district attorney to evaluate the evidence for the limited purpose of determining what charge, if any, is to be filed, and to complete the necessary clerical and administrative tasks to prepare a formal pleading." (*People v. Cook* (1982) 135 Cal.App.3d 785, 791.)

Any delay in the arraignment of the accused must be necessary and reasonable

and may not prejudice the defendant. (*People v. Turner* (1994) 8 Cal.4th 137, 176, abrogated on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555.) An intentional delay in the arraignment of the accused for the sole purposes of continuing an investigation or acquiring additional evidence is unacceptable. (*County of Riverside v. McLaughlin, supra,* 500 U.S. at 56; *People v. Thompson* (1980) 27 Cal.3d 303, 329.)

Therefore, in the absence of any legitimate pre-indictment delay, prosecutorial delay in bringing criminal charges against the accused may violate the Due Process Clauses of the state and federal Constitutions. (*People v. DePriest* (2007) 42 Cal.4th 1, 28, fn. 7; *United States v. Lovasco* (1977) 431 U.S. 783, 790-791.) In particular, an intentional delay in the arraignment of an accused will justify suppressing a confession if the defendant shows that the arraignment was delayed for the improper purpose of obtaining the challenged statements. (*People v. Thompson, supra*, 27 Cal.3d at pp. 329-330; see also *People v. Bonillas* (1989) 48 Cal.3d 757, 787-788; *People v. King* (1969) 270 Cal.App.2d 817, 823.)

In this case Mr. Cunningham was not provided a lawyer until almost a month after his arrest. Mr. Cunningham did not receive the assistance of counsel at the hearing in South Dakota where he waived extradition, nor was Mr. Cunningham provided a lawyer upon his immediate return to California because he was not promptly arraigned on the capital murder charges here. Moreover, the detectives who

orchestrated the video taped re-enactment on August 2, 1992, specifically acknowledged that they took advantage of these delays because of their fear that, with the assistance of counsel, Mr. Cunningham would refuse to participate in the re-enactment. Therefore, it is apparent that Mr. Cunningham's confessions during the video taped re-enactment were based on the officers' conscious decision to delay Mr. Cunningham's arraignment for the sole purpose of continuing the investigation without interference from defense counsel.

The fact that Mr. Cunningham was confined in Folsom Prison for a parole violation upon his return to California does not diminish the conclusion that detectives from the Ontario Police Department delayed the arraignment in an effort to induce Mr. Cunningham to participate in the video tape re-enactment. While it is true that a criminal defendant's right to the assistance of counsel under the Sixth Amendment of the United States Constitution does not exist until the State initiates adversary judicial criminal proceedings, there are nevertheless some circumstances where the right to counsel may nevertheless attach before formal charges if, as here, the criminal investigation "has begun to focus on a particular suspect." (*Escobedo v. Illinois* (1964) 378 U.S. 478, 490-491; *People v. DePriest, supra*, 42 Cal.4th at p. 33.)

Consequently, the defendant's right to counsel applies as soon as the State initiates criminal proceedings by way of a formal charge, or by pursuing an arraignment, a preliminary hearing, or an indictment or information. (*People v.*

Huggins, supra, 38 Cal.4th at p. 189.) Under those circumstances when the right to counsel should attach, an intentional delay in the arraignment of the accused which resulted in the defendant making an incriminating statement could lead to the suppression of the incriminating statement, even if the defendant is also in custody because of a parole hold. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 326.)

Mr. Cunningham respectfully submits that he was prejudiced by the intentional delay in pursuing his arraignment on capital charges in the San Bernardino Superior Court. In the period during the intentional delay, detectives from the Ontario Police Department persuaded Mr. Cunningham to participate in a video tape re-enactment, even though the detectives knew that if Mr. Cunningham had been promptly arraigned on the capital murder charges and if he had been appointed counsel, Mr. Cunningham's trial attorney would not have permitted him to participate in the re-enactment. Therefore, the prejudice inherent in the intentional delay is obvious.

2. The Video Taped Re-Enactment Was Obtained After Detectives Made Implied Promises of Leniency Which They Knew Would Coerce Mr. Cunningham's Agreement.

During his custodial interrogation on July 26, 1992, Mr. Cunningham told Detectives Nottingham and Ortiz that he was afraid of being returned to California State Prisons or county jails because of an on-going dispute with members of the Mexican Mafia arising from a previous, failed drug transaction. (CT Vol. 5, p. 1266; RT Vol. 2, pp. 275, 278-279.) As a result, Mr. Cunningham specifically asked the

detectives to assist him in avoiding placement in the general population of any prison or jail facility where he would be exposed to a risk of harm by helping him to be placed in protective custody. (RT Vol. 2, pp. 285, 342-344.) In response to this request, the Detectives assured Mr. Cunningham that they would recommend that he be placed in protective custody and they insisted that this request would not present any problems. (*Ibid.*)

Nevertheless, despite Mr. Cunningham's stated fear of being confined in a prison facility where he could be harmed by members of a notorious prison gang, when Mr. Cunningham was initially returned to California, he was placed in the Administrative Segregation Unit of the Folsom State Prison. (RT Vol. 2, pp. 283-285, 342-343.) However, after a short stay in prison, detectives from the Ontario Police Department contacted Mr. Cunningham through prison correctional officers and asked him to participate in a videotaped re-enactment at the Surplus Office Sales store, thereby holding out the chance to remove Mr. Cunningham from his threatening environment, so long as he consented to further acts of incrimination. (RT, Vol. 2, p. 345.)

Prior to trial Mr. Cunningham sought to suppress the re-enactment by claiming that his "agreement to come to S.O.S. was in response to the information that it would get him out of Folsom." (CT Vol. 5, p. 1265.) In addition, during the hearing on the motion to suppress, the Correctional Officer Sergeant who approached Mr.

Cunningham at Folsom State Prison confirmed that when he asked Mr. Cunningham if he wanted to conduct a video taped re-enactment of the crime, Mr. Cunningham asked if he would be transferred out of Folsom State Prison if he cooperated, and Sergeant Lewis told him yes. (RT Vol. 2, p. 420.) According to Sergeant Lewis, Mr. Cunningham then told him that he would be willing to do anything if it would help him leave Folsom State Prison. (RT Vol. 2, pp. 422, 424.)

An implied promise of leniency, including a promise to make things as good as possible if the accused cooperates, can render the resulting custodial statement involuntary. (*People v. Neal, supra,* 31 Cal.4th at pp. 84-85.) Promises of leniency or threats of harsh treatment have been recognized as corrosive of voluntariness. (*Hutto v. Ross* (1976) 429 U.S. 28, 30.)

"Coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition." (*Blackburn v. Alabama* (1960) 361 U.S. 199, 206.) That is why a confession cannot be obtained by "any direct or implied promises, however slight, nor by exertion of any improper influence." (*Arizona v. Fulminante, supra,* 499 U.S. at 285.) In particular, a confession is coerced if an interrogating police officer promises to protect the accused from a known risk of harm if the individual agrees to give a confession. (*Id.* at p. 288, citing *Payne v. Arkansas* (1958) 356 U.S. 560, 564-565.)

The trial court erred in failing to suppress the video taped re-enactment of the

crime because the evidence presented at the hearing on the motion to suppress established that detectives from the Ontario Police Department took advantage of Mr. Cunningham's fear of assault by members of the Mexican Mafia prison gang by promising to remove him from Folsom State Prison if he agreed to participate in a video tape re-enactment of the Surplus Office Sales store robbery. The evidence clearly demonstrates that at the time Mr. Cunningham agreed to the re-enactment, he told correctional officers and officials from the Ontario Police Department that he was willing to do anything that would help him leave Folsom State Prison. Therefore, on these facts, the re-enactment should have been suppressed because it was the product of an improper promise of leniency by law enforcement officers to protect Mr. Cunningham from a known risk of harm in exchange for his cooperation.

By exploiting Mr. Cunningham's fear of the Administrative Segregation Unit of the California State Prison at Folsom, officers from the Ontario Police Department were able to overbear Mr. Cunningham's will in such a way as to render his confessions during the re-enactment involuntary and the product of coercion. Like the promises in *Payne* to protect the accused from an angry mob, or the promises in *Fulminante* to protect the accused from other prisoners, here the promise to protect Mr. Cunningham from acts of violence from fellow prisoners confined in Folsom State Prison improperly induced Mr. Cunningham to participate in the video tape re-enactment.

Admittedly, Mr. Cunningham's custody situation might not have reflected "physical punishment" in its most classic form. (See, e.g., *Schneckloth v. Bustamonte, supra*, 412 U.S. at p. 226.) Still, a court may appropriately consider the defendant's harsh conditions of confinement in reviewing an allegedly involuntary statement, especially where the conditions only increased the defendant's feelings of helplessness. (*People v. Neal, supra,* 31 Cal.4th at 84.) Therefore, the trial court erred in admitting the videotape re-enactment.

D. Mr. Cunningham's Custodial Statements Were Involuntary.

Mr. Cunningham contends that his custodial statements to detectives from the Ontario Police Department were involuntary and were not the product of his free and rational thought. Mr. Cunningham argues instead that a combination of factors, including his compromised mental state, the officers' use of deception, and their implied promise to help a loved one, when combined with the other knowing violations of Mr. Cunningham's constitutional rights discussed *infra*, ultimately compelled Mr. Cunningham to confess involuntarily to the killings at the Surplus Office Sales store. Therefore, the admission of these involuntary statements during the guilt and penalty phases of Mr. Cunningham's capital trial violated his state and federal constitutional rights to due process and a fair trial.

The Due Process Clauses of the Fourteenth Amendment of the United States Constitution and article II, section 7 of the California Constitution preclude the

admission of any involuntary statement obtained from a criminal suspect through state compulsion. (*People v. DePriest, supra,* 42 Cal.4th at p. 34, citing *Dickerson v. United States* (2000) 530 U.S. 428, 433-434.) Involuntariness means the defendant's will was overborne. (*Dickerson v. United States, supra,* 530 U.S. at p. 434.)

Whether the defendant lost his free will and made involuntary statements does not depend on any one fact; instead, courts must examine the totality of the circumstances surrounding a confession to determine if the statement was made freely and voluntarily. (*Withrow v. Williams* (1993) 507 U.S. 680, 688-689; *People v. Jablonski, supra,* 37 Cal.4th at p. 814.) While the reviewing court independently decides whether the statements were involuntary, it accepts the trial court's factual findings if those findings are supported by substantial evidence. (*People v. Guerra, supra,* 37 Cal.4th at p. 1093.) On appeal, the trial court's rejection of a claim of involuntariness is reviewed independently and this Honorable Court considers the entire record, including all the surrounding circumstances such as the characteristics of the accused and the details of the encounter. (*People v. Neal, supra,* 31 Cal.4th at p. 80.)

If a defendant challenges his custodial statements on the grounds that they are involuntary in violation of the state and federal constitution, the statements cannot be used for any purpose at trial unless the prosecution proves by a preponderance of the evidence that the statements were given freely without any duress or coercion.

(*People v. Bradford, supra*, 14 Cal.4th at p. 1033, citing *Colorado v. Connelly, supra*, 479 U.S. at p. 168.) In order to meet its burden, the prosecution must show that the defendant relinquished the right to remain silent through a deliberate choice to speak to law enforcement officers, rather than simply acceding to intimidation, coercion, or deception. (*People v. Combs, supra,* 34 Cal.4th at 845.) The waiver of the right to remain silent and the agreement to speak with law enforcement officers must be made "with a full awareness of both the nature of the right being abandoned and the consequence of the decision to abandon it." (*Ibid.)*

Prior to trial, Mr. Cunningham moved to suppress all of the incriminating custodial statements which he made to detectives of the Ontario Police Department and claimed that the statements were involuntarily induced by detectives who, as counsel argued, "preached the redeeming power of love, that confession was good for the soul," and that lawyers needlessly caused stress and suffering. (CT Vol. 5, p. 1215.) Mr. Cunningham argued that, under the totality of the circumstances, the detectives' repeated questioning, improper inducements, and false statements ultimately undermined Mr. Cunningham's will to invoke his rights to remain silent and involuntarily induced him to confess. (CT Vol. 5, pp. 1276-1278.)

The trial court found that Mr. Cunningham's statements to law enforcement officers were free and voluntary. (RT Vol. 3, pp. 665.) The trial court concluded that none of the statements were involuntarily induced by deception, false promises or

undue influence. (R.T. Vol. 3, pp. 665.) Mr. Cunningham respectfully submits that in reaching these conclusions the court erred.

The Fifth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the California Constitution prohibit any use at trial of an involuntary confession obtained from a criminal suspect through state compulsion or coercion. (*Dickerson v. United States, supra,* 530 U.S. at pp. 433-434; *People v. Neal, supra*, 31 Cal.4th at p. 79.) A statement is involuntary if it was the product of coercive police activity or "extracted by any sort of threats . . . [or] obtained by any direct or implied promises, however slight." (*Hutto v. Ross, supra*, 429 U.S. at p. 30; *People v. Neal, supra*, 31 Cal.4th at p. 67; *People v. Williams* (1997) 16 Cal.4th 635, 659.)

Whether the defendant lost his free will and made involuntary statements does not rest on any one fact. (*People v. DePriest, supra,* 42 Cal.4th at p. 34.) Therefore, to determine whether a statement is voluntary, a court must consider the totality of the circumstances surrounding the making of the statement, including an evaluation of the defendant's age, experience, education, background, physical condition and mental health . (*People v. Neal, supra,* 31 Cal.4th at p. 84; *Withrow v. Williams, supra,* 507 U.S. at pp. 688-689.)

The trial court erred in finding that Mr. Cunningham's incriminating statements were "the product of his own independent decision and not the product of,

and not influenced by, any of the improper influences." (RT Vol. 3, p. 665.) The trial court erred because, under the totality of the circumstances, Mr. Cunningham's statements were coerced by the repeated and flagrant misconduct of law enforcement officers who never gave him the opportunity to invoke his right to remain silent, who ignored his requests for counsel, who exploited the absence of appointed counsel, and who used a combination of deceit and psychological coercion to overcome Mr. Cunningham's will.

Mr. Cunningham's statements to detectives of the Ontario Police Department in July and August 1992 were not free and voluntary, and were admitted at the guilt phase of the trial in violation of the state and federal constitution. (See, e.g., *Dickerson v. United States, supra*, 530 U.S. at 444.) The trial court erred in admitting these involuntary statements because most of the statements were the product of persistent violations of his constitutional rights, combined with the coercive pressures exerted by the detectives. (CT, Vol 5, pp. 1263-1264, 1276.)

The totality of the circumstances in this case weighs heavily against a finding that Mr. Cunningham's statements to law enforcement officers were voluntary. First, as set out above, Mr. Cunningham's statements were only obtained after detectives from the Ontario Police Department engaged in persistent and intentional violations of his right to remain silent and his right to counsel, and exploited the absence of appointed counsel with implied promises of leniency to help Mr. Cunningham avoid

a known risk of harm. Second, the statements were involuntary because the detectives from the Ontario Police Department used deception to elicit Mr. Cunningham's confessions, including an implied threat to arrest Mr. Cunningham's traveling companion, Alana Costello. Finally, and most importantly, at the time of the interrogation, Mr. Cunningham was obviously suffering from signs and symptoms of mental illness which prevented him from adequately calculating his own self-interest in deciding whether to cooperate with the police, and the police consciously exploited this mental incapacity. Therefore, Mr. Cunningham's statements to law enforcement officers were involuntary and inadmissible. (See, e.g., *People v. Neal, supra,* 31 Cal.4th at 68 [confession was involuntary under the totality of the circumstances based on, *inter alia*, officer's deliberate violation of *Miranda,* deprivation and isolation during confinement and implied promise of leniency].)

1. Mr. Cunningham's Statements Were Obtained by Deception and the Implied Threat to Arrest a Close Friend.

A statement is involuntary when it was extracted by any sort of threats or obtained by any direct or implied promises, however slight. (*People v. Neal, supra*, 31 Cal.4th at p. 79; *Bram v. United States* (1897) 168 U.S. 532, 542-543.) In particular, a defendant's statement to law enforcement officers may be involuntarily coerced by the psychological pressure to cooperate in an effort to exculpate a family member or loved one. (*People v. Haydel* (1974) 12 Cal.3d 190, 200-201.)

A confession obtained only after the accused was coerced by a threat to arrest a near relative is not admissible. (*People v. Matlock* (1959) 51 Cal.2d 682, 697.) Instead, "coercion of a confession by threat to arrest a near relative unless the accused admits his guilt renders the confession involuntary." (*People v. Shelton* (1957) 151 Cal.App.2d 587, 588.) In addition, false statements by a police officer during questioning may affect the voluntariness of the defendant's confession. (*People v. Guerra, supra,* 37 Cal.4th at p. 1097.) If the police deliberately lie to a suspect under questioning, this dishonesty can affect the voluntariness of the ensuing confession if the lies are reasonably likely to procure an untrue statement. (*People v. Farnam* (2002) 28 Cal.4th 107, 182, see also *People v. Guerra, supra,* 37 Cal.4th at p. 1097.) "[T]he use of deception or communication of false information to a suspect does not alone render a resulting statement involuntary . . . [but it] is a factor which weighs against a finding of voluntariness." (*People v. Thompson* (1990) 50 Cal.3d 134, 167.) Therefore, if the police employ deception which is likely to produce a false statement, then the deception can render the confession involuntary. (*Ibid,* citing *People v. Farnam, supra*, 28 Cal.4th at p. 182.)

In arguing that his incriminating statements to detectives from the Ontario Police Department were involuntary, Mr. Cunningham insisted that the officers first induced him to confess by lying to him in order to convince him to implicate himself in order to exonerate his traveling companion, Alana Costello. Mr. Cunningham

alleged that "tricking a person to confess is a fact and circumstance which goes to the involuntariness of the confession." (CT, Vol. 5, p. 1264.)

The last time Mr. Cunningham saw Alana Costello before the interview on July 24, 1992, Alana was being removed from their vehicle at gun point. Consequently, when Mr. Cunningham asked Detectives Nottingham and Ortiz what happened to Alana, Detective Ortiz replied deceptively that Alana was in their custody, that she had not been cleared as a suspect, and that the detectives were still not certain if she would be charged with a crime. Thus, the detectives falsely suggested to Mr. Cunningham that Alana Costello could only be cleared as a suspect if Mr. Cunningham made inculpatory statements during the interrogation. (RT Vol. 3, pp. 564-566, 604, 621.)

In fact, at the time Mr. Cunningham asked about Alana Costello, Alana was not actually under arrest or even in police custody. Moreover, at that time Detectives Ortiz and Nottingham knew that Alana was not a suspect in the Surplus Office Sales crimes and knew that Alana was not facing criminal charges. Nonetheless, Detective Ortiz lied to Mr. Cunningham and told him that Alana was "in our custody." (RT Vol. 2, p. 348; Vol. 3, p. 549.) After making this false statement Detective Ortiz went on to improperly suggest to Mr. Cunningham that Alana would be charged with a crime unless Mr. Cunningham exonerated her. (*Id.*)

When the detectives initially questioned Mr. Cunningham they were aware that

he had a strong desire to clear Alana in any involvement in the charged offense and they exploited this feeling by making false statements to induce Mr. Cunningham's involuntary confession. (RT Vol. 3, pp. 550-551.) In response to the detectives' lies, Mr. Cunningham told the Detectives that Alana should not be in custody and at that point the detectives told Mr. Cunningham that they could not clear Alana as a suspect in the crime until they spoke with him. (RT Vol. 1, pp. 258-261.)

The trial court found that the detectives' false statements about Alana were designed by the officers to evoke statements from Mr. Cunningham which could tend to incriminate him in his efforts to exonerate Alana. (R.T. Vol. 3, p. 652.) The trial court further concluded that the officer's comment about Alana amounted to a type of psychological pressure or inducement. However, the trial court ultimately concluded that the detectives' deceptive ploy did not render Mr. Cunningham's subsequent statements involuntary and inadmissible. (RT Vol. 3, p. 653.)

Mr. Cunningham respectfully submits that the trial court erred because the detectives' deception about Alana Costello's custody status and the potential that she could be a suspect in the Surplus Office Sales crimes is precisely the type of lie by a law enforcement officer which is reasonably likely to produce a false confession. In addition, Mr. Cunningham contends that the interrogating officers used this psychological ploy involving Alana to coerce Mr. Cunningham's confession through an implied promise to free Ms. Costello if Mr. Cunningham accepted responsibility.

Therefore, this deception and implied promise rendered Mr. Cunningham's subsequent custodial statements involuntary.

2. During His Confession Mr. Cunningham Exhibited Bizarre and Irrational Behavior.

A statement is involuntary when the record establishes that the defendant was subjected to "compelling influences, psychological ploys, or direct questioning." (*People v. Haley* (2004) 34 Cal.4th 283, 301.) Although coercive police activity is a prerequisite for a finding of involuntariness, such coercion is present if law enforcement officers are aware of, and subsequently exploited, a defendant's psychological vulnerability in order to obtain an incriminating statement. (*People v. Williams, supra,* 16 Cal.4th at p. 659; see also *Colorado v. Connelly, supra*, 479 U.S. at pp. 169-170.)

Prior to trial, Mr. Cunningham alleged that at the time of the interrogations the detectives from the Ontario Police Department knew that Mr. Cunningham may have been experiencing possible psychiatric and/or mental health problems. Mr. Cunningham argued that the Detectives were aware of his fragile mental health because prior to the initiation of any *Miranda* warnings they discussed Mr. Cunningham's sanity, his history of blackouts and alcohol and substance abuse, and his poor adjustment following his return from the Vietnam war. (CT Vol. 5, p. 1220.) Mr. Cunningham also argued that at the time of the interrogation the detectives were aware that Mr. Cunningham may not have slept for many days prior to the interview.

Finally, both Detectives Nottingham and Ortiz acknowledged that during their questioning Mr. Cunningham was extremely soft spoken, very sullen, and consistently vague in his responses. (RT Vol. 2, pp. 288, 331.)

Mr. Cunningham's statements during his custodial interrogation evince a state of mind which was incapable of calculating his self-interest in remaining silent. Instead, Mr. Cunningham's first confession to law enforcement officers is so full of *non sequiturs* that it is apparent the detectives exploited his frail metal condition to elicit a confession. For example, when he was first questioned by the detectives, Mr. Cunningham told them he was "afraid to go back to that day." (CT Vol. 4, p. 1227.) Later during his interrogation Mr. Cunningham explained, "What I believe I don't know while I'm in my right mind I want to talk to you guys." (CT Vol. 4, pp. 982, 1234.) The detectives also admitted that Mr. Cunningham often displayed unusual behavior during the interrogation, for example by freely admitting that his knowledge of the crucial events was supplied by information he received in dreams. (RT Vol. 3, p. 663, 708.)

It is apparent from a review of the detectives' testimony about their interviews with Mr. Cunningham that at the time of the interrogation Mr. Cunningham appeared to be suffering from a mental disease or defect which undermined the exercise of his free will. Therefore, Mr. Cunningham contends that the detectives violated his rights because they exploited his compromised mental state by eliciting involuntary and

inadmissible statements during his custodial interrogations.

E. Mr. Cunningham was Prejudiced by the Erroneous Admission of His Confessions.

The erroneous denial of the defendant's motion to suppress his confession is reversible unless the prosecution can show, beyond a reasonable doubt, that the improper admission of the defendant's confession was harmless. (*Chapman v. California, supra*, 386 U.S. 18; *Arizona v. Fulminante, supra,* 499 U.S. at pp. 311-312 (opn. of Rehnquist, J.).) The court reviews the record *de novo* in an effort to determine whether the error was harmless and the State must prove beyond a reasonable doubt that the admission of the unlawful confessions did not contribute to the defendant's conviction. (*Arizona v. Fulminante, supra,* 499 U.S. at p. 296.)

The beyond-a-reasonable doubt standard of *Chapman* "requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra,* 386 U.S. at p. 24.) "To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered." (*Yates v. Evatt* (1991) 500 U.S. 391, 403.) The inevitable issue in conducting a harmless error analysis is "whether the . . . verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 279.)

The improper admission of an involuntary confession is a type of trial error

which may be assessed in the context of other evidence in order to determine whether the admission of the confession was prejudicial or harmless. (*People v. Cahill, supra,* 5 Cal.4th 478, 503.) However, confessions as a class often defy harmless error analysis because a confession is like no other evidence in a criminal trial and operates "as a kind of evidentiary bombshell which shatters the defense." (*Ibid.*) Consequently, "the improper admission of a confession is much more likely to affect the outcome of a trial than are other categories of evidence." (*Ibid.*) (*Id.* at p. 502.)

While the erroneous admission of a confession might be harmless in a particular case, it nevertheless is likely to be prejudicial in most cases. "A full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision." (*Arizona v. Fulminante, supra,* 499 U.S. at p. 296.) If a coerced confession is admitted in a criminal trial, the risk that the confession is unreliable "requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless. (*Ibid.*)

Mr. Cunningham was prejudiced by the improper admission of his coerced and involuntary custodial statements. It is clear that a successful prosecution against Mr. Cunningham depended on the trier of fact believing the truth of the statements made in the multiple confessions: indeed, without these confessions it is unlikely that Mr. Cunningham would have been prosecuted at all. But for Mr. Cunningham's

confessions, there would have been virtually no substantial evidence of premeditation and deliberation, let alone any concrete evidence to connect Mr. Cunningham to the charged offense. However, with the admission of his multiple confessions, the evidence which linked Mr. Cunningham to the offense was clearly significant. Therefore, there can be no doubt that Mr. Cunningham was profoundly prejudiced by the erroneous admission of his involuntary confessions.

VI. THE CUMULATIVE EFFECT OF THE ASSERTED ERRORS AT THE GUILT PHASE OF THE TRIAL REQUIRES REVERSAL.

Under the Eighth Amendment of the United States Constitution and Article I, section 17 of the California Constitution, an accused has a right to a reliable judgment of death. In particular, this Honorable Court has "long applied a more exacting standard of review when [it] assess[es] the prejudicial effect of state law errors" during a capital murder trial. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) Similarly, the United States Supreme Court has also recognized that the greater need for reliability in capital cases means that death penalty trials must be policed at all stages for procedural fairness and accuracy in fact-finding. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 262-263.)

In addition, state law errors that render a trial fundamentally unfair may at the same time violate the Due Process Clauses of the state and federal constitutions. (*Estelle v. McGuire* (1991) 502 U.S. 62, 68.) Finally, errors during the trial of a death

penalty case that might not be so prejudicial as to violate due process when considered alone may nonetheless cumulatively produce a trial setting which is fundamentally unfair. (*People v. Hill* (1998) 17 Cal.4th 800, 844-845.)

Mr. Cunningham contends that even if the alleged errors at the guilt phase of this trial are individually harmless, they are cumulatively prejudicial. Because the errors during the guilt phase impinged upon Mr. Cunningham's fundamental constitutional rights, including his Fifth Amendment right to be free from inhumane shackling, his Fifth and Sixth Amendment right to be personally present at a trial during the guilt phase, his Fifth Amendment right to remain silent, his Sixth Amendment right to present a defense and the Eighth Amendment's guarantee of reliability in death judgment, Mr. Cunningham insists that the State must now bear the burden of showing beyond a reasonable doubt that the cumulative errors in this case did not infect the judgment of guilt. (*Chapman v. California, supra,* 386 U.S. at p. 18.) On this record the State simply cannot meet this burden.

This Court will reverse a judgment in a criminal case where the defendant clearly shows that his trial resulted in a miscarriage of justice. (*People v. Hill, supra,* 17 Cal.4th at p. 844.) Consequently, a series of trial errors which may independently be harmless may in some circumstances "rise by accretion to the level of reversible and prejudicial error." (*Ibid.)*

The guilt phase trial of this case bordered on a farce, a mockery and a sham.

Mr. Cunningham was effectively convicted *in absentia* in a show trial more befitting a totalitarian regime than a court of law bound by a fidelity to the United States and California Constitutions. The accumulation of trial errors in this case must undermine this Honorable Court's confidence in the fairness and reliability of these proceedings and compel the Court to reverse all of the criminal convictions and special circumstances findings and remand the case for a new trial.

THE PENALTY PHASE

Mr. Cunningham contends that the cumulative effect of errors during the penalty phase violated his state and federal constitutional rights to be free from cruel and unusual punishment and to a reliable judgment of death.[13] Mr. Cunningham contends that serious mistakes in the selection of the jury and the presentation of evidence during the penalty phase combined to create a trial which was fundamentally unfair.

In particular, Mr. Cunningham contends that during the penalty phase he was denied his right to a jury venire drawn from a representative cross section of the community, the trial court erroneously removed a juror for cause without voir dire based on the juror's skepticism of the death penalty and the prosecution improperly

---

13. Prior to the start of the penalty phase of the trial, counsel for Mr. Cunningham made an unopposed motion that all of defense counsel's objections at the penalty phase of the trial (including objections to the admission of evidence, to jury selection procedures and to a juror's conduct) should be deemed objections under the Constitutions of both the State of California and the United States. (CT Vol. 6, pp. 1541-1542.)

exercised four race-based peremptory challenges to remove African-American jurors.[14] In addition, Mr. Cunningham alleges that the trial court erred in denying a continuance, by failing to appoint second counsel *sua sponte*, by admitting a series of irrelevant and highly prejudicial photographs, by failing to adequately investigate prejudicial juror misconduct, and in failing to modify the sentence of death because Mr. Cunningham's sentence of death is disproportionate, and the death penalty statute in California violates the United States Constitution. Mr. Cunningham contends that, in light of these errors, singly or in combination, his sentence of death must be reversed.

VII. THE TRIAL COURT ERRED IN DENYING THE MOTION TO QUASH THE JURY PANEL BASED ON THE SYSTEMATIC EXCLUSION OF HISPANICS.

Mr. Cunningham contends that the trial court deprived him of his state and federal constitutional rights to due process and a fair trial with an impartial jury because the jury selection procedures in the West End Judicial District of the San Bernardino County Superior Court systematically excluded Hispanic-Americans. The trial court erred in failing to grant Mr. Cunningham's motion to quash the venire because the jury that was summoned to decide Mr. Cunningham's fate was not composed of a representative cross-section of the community where Mr. Cunningham

---

14. Because Mr. Cunningham waived his right to a jury trial during the guilt phase of the trial (RT Vol. 5, pp. 1189-1190) jury selection arguments will appear in this portion of the Opening Brief.

was tried, in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 16 of the California Constitution.

The jury selection procedures used in this case systematically excluded Hispanic-Americans, a cognizable group which had experienced a recent history of discrimination in San Bernardino County. Mr. Cunningham objected to the under-representation of Hispanic-Americans in the venire called for the penalty phase and alleged that systematic deficiencies in jury selection resulted in the disproportionate exclusion of Hispanic-Americans. (CT Vol. 5, pp. 1296-1309 [Motion for Discovery of Jury Pool Data]; CT Vol. 6, pp. 1576-1613 [Motion to Quash Jury Panel].)

Under the federal and state Constitutions, an accused is entitled to a jury drawn from a representative cross-section of the community. (U.S. Cons., Amend. VI; Cal. Const., art. I, § 16; *Duren v. Missouri* (1979) 439 U.S. 357, 358-67; *People v. Howard, supra*, 1 Cal.4th at p. 1159; see also Code of Criminal Procedure, §§ 197, 203.) "In California, the right to trial by jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution (*Taylor v. Louisiana* (1975) 419 U.S. 522, 530) and by article I, section 16 of the California Constitution. (*People v. Wheeler* (1978) 22 Cal.3d 258, 272)." (*People v. Sanders* (1990) 51 Cal.3d 471, 491.)

The Sixth Amendment demands that petit juries must be truly representative of the community, not just representative of any special group or class. (*Glasser v.*

United States (1942) 315 U.S. 60, 85-86; *People v. Garceau* (1993) 6 Cal.4th 140, 173-74.) The Sixth Amendment guarantee of a representative jury venire mandates that the pools from which juries are drawn must not systematically exclude distinctive groups in the community. (*People v. Ramirez* (2006) 39 Cal.4th 398, 444.) Therefore, "selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." (*Taylor v. Louisiana, supra*, 419 U.S. at p. 528.)

Prior to trial, Mr. Cunningham filed a motion to quash the jury panel which was summoned in the West End Judicial District of the San Bernardino Superior Court located in Rancho Cucamonga, California. Mr. Cunningham asked the court to quash the venire until the Jury Commissioner of the County of San Bernardino instituted procedures for selecting and summoning which would ensure Mr. Cunningham of a jury panel which represented a fair cross section of the community. (CT Vol. 6, pp. 1576-1613.) In particular, Mr. Cunningham argued that the source list which was used to summon jurors for service was not sufficient to provide a fair cross section of the community because it disproportionately excluded non-Whites, and that the initial mailer which invited excusal and disqualification, when combined with the lack of follow-up procedures for jurors who failed to appear, "further slants the venire against people of color." (CT Vol. 5, p. 1302.)

In support of the motion to quash Mr. Cunningham provided expert testimony

from Dr. John Weeks of San Diego State University, who concluded that, based on a recent study he conducted, 16.9% of the people summoned for jury duty in the Rancho Cucamonga courthouse were Hispanic. (RT Vol. 6, p. 1513.) Dr. Weeks estimated from 1990 census data that by the time of the trial Hispanics represented 23.1% of the "jury-eligible population" in Rancho Cucamonga in 1995, reflecting an absolute disparity of 6.2% and a relative disparity of 27%. According to Dr. Weeks, this meant that there were 27% too few Hispanics in the jury pool of the Rancho Cucamonga Courthouse.[15] (RT Vol. 6, pp. 1513-1514.) Based on this data, Dr. Weeks concluded that "there is both a substantive and a statistically significant under-representation of Hispanics showing up for jury duty in the Rancho Cucamonga District Courthouse." (RT Vol. 6, p. 1519.)

Dr. Weeks opined that the Superior Court could have ended the systematic discrimination and dis-enfranchisement of Hispanic-American citizens in San Bernardino County by prohibiting the removal of jurors except for the reasons authorized under Code of Civil Procedure section 203, by preventing jury clerks from removing jurors without judicial authorization, and by taking measures to ensure adequate follow-up of jurors who initially failed to appear for jury service. (RT Vol. 6, pp. 1519-1522.) Based on Dr. Weeks' assessment, Mr. Cunningham argued that

---

15. To be "jury eligible," an individual must be a United States citizen who is at least eighteen years old, who can speak English, and who has resided in the judicial district for at least one year.

all of these improper jury selection procedures combined to systematically under-represent potential Hispanic-American jurors. (CT Vol. 6, p. 1580.)

The trial court denied the motion to quash the venire. (RT Vol. 6, pp. 1704-17.) The trial court found the jury selection process in Rancho Cucamonga could certainly be improved, and that there was some disparity in the participation of jury-eligible Hispanic-American citizens. (RT Vol. 6, pp. 1704, 1710.) Nonetheless, the court held that neither the relative nor absolute disparity in the participation of Hispanic-American jurors in Rancho Cucamonga was significant nor the product of any systematic exclusion. (RT Vol. 6, pp. 1708-1717.)

Mr. Cunningham respectfully submits that the trial court erroneously denied his motion to quash the jury panel because he established a prima facie case of the systematic under-representation of a cognizable class, namely Hispanic-American jurors, in the jury selection procedures of the West End Judicial District of the San Bernardino Superior Court. Mr. Cunningham contends that the discrimination in the selection of the petit jury is a structural error which is *per se* reversible.

A. The Jury Selection Procedures Systematically Excluded Hispanic Jurors.

The right to a jury venire drawn from a representative cross section of the community guarantees that "a party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross section of the community as the process of random draws permits." (*People v. Wheeler, supra,* 22 Cal.3d at p. 277.) Although

a defendant has no constitutional right to a petit jury that includes members of his own race, "he or she does have the right to be tried by a jury whose members are selected by non-discriminatory criteria." (*Powers v. Ohio* (1991) 499 U.S. 400, 404.) Consequently, juries must be selected "without systematic and intentional exclusion" of any cognizable economic, social, religious, racial, political or geographical group. (*Thiel v. Southern Pacific Co.* (1946) 328 U.S. 217, 220; *People v. Coleman* (1985) 38 Cal.3d 69, 98, citing *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 22.)

The systematic exclusion of people from grand or petit juries based solely upon the individual's membership in a racial or other ethnic group violates not only the defendant's rights to a jury drawn from a cross section of the community, it also violates the prospective juror's state and federal constitutional rights to the equal protection of the laws and "to participate as jurors in the administration of justice." (*Rose v. Mitchell* (1979) 443 U.S. 545, 551, 556, quoting *Alexander v. Louisiana* (1972) 405 U.S. 625, 628-29; see also *People v. Anderson, supra*, 25 Cal.4th at p. 566.) Therefore, both the accused and the potentially excluded juror's state and federal constitutional rights are violated any time "the pools from which juries are drawn . . . systematically exclude distinctive groups in the community." (*People v. Horton* (1995) 11 Cal.4th 1068, 1087-1088.)

In order to establish a prima facie violation of the defendant's state and federal constitutional right to a jury drawn from a fair cross section of the community, the

defendant must show: (1) that the group of jurors who are alleged to be excluded are a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such people in the community; and (3) that this under-representation is due to the systematic exclusion of the group in the jury selection process. (*Duren v. Missouri, supra,* 439 U.S. at p. 364; *People v. Howard, supra,* 1 Cal.4th at p. 1159.) The relevant "community" for cross-section purposes is the community of qualified jurors in the judicial district in which the case is to be tried. (*People v. Currie* (2001) 87 Cal.App.4th 225, 233.)

"Once the defendant has shown substantial under-representation of a distinctive group, he has made out a prima facie case of discriminatory purpose." (*Castaneda v. Partida* (1977) 430 U.S. 482, 495.) If a defendant establishes a prima facie case of systematic under-representation, then "the burden shifts to the prosecution to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result." (*Castaneda v. Partida, supra,* 430 U.S. at 494; *People v. Anderson, supra,* 25 Cal.4th at p. 566.)

In his motion to quash the jury panel, Mr. Cunningham argued that without any remedial measures in the jury selection process in the Rancho Cucamonga Courthouse of the San Bernardino Superior Court, he would be denied his state and federal

constitutional rights to a jury which is drawn from a representative, fair cross section of the community. (CT Vol. 6, pp. 1582-1583.) In support of the motion Mr. Cunningham submitted the testimony of Dr. John Weeks, who was the Director of the International Population Center at San Diego State University. Dr. Weeks used United States Census Bureau data from the 1990 to determine the number of "jury eligible" Hispanic-Americans in San Bernardino County in 1995 and concluded that Hispanic-Americans were "substantively, and statistically significantly, under-represented among jurors in the Rancho Cucamonga Courthouse." (CT Vol. 6, p. 1590.)[16]

The prosecution resisted any effort to disturb the jury venire. The District Attorney argued that the jury pool was properly summoned and that the jury summons procedures did not produce any "substantial" disparity in the representation of Hispanic-American juror which was statistically significant. (CT Vol. 5, pp. 1313-18.) In addition, the prosecution argued that any under-representation of Hispanic-Americans was not the product of any systematic exclusion. (*Ibid.*) Finally, the prosecution strenuously argued that Dr. Weeks' 1995 estimate of the Hispanic American population in San Bernardino County was excessive. (RT Vol. 6, 1693-

---

16. In his declaration Dr. Weeks explained that he obtained his Ph.D in Demography from the University of California at Berkeley and, at the time of the trial, had been a professor at San Diego State University for twenty one years, including the last seven as a full professor in Geography. Dr. Weeks authored a textbook on population and had previously qualified as an expert witness in demography and statistics in more than 50 cases. (CT Vol. 5, p. 1587.)

1695.)

In arriving at the 1995 estimate of jury-eligible Hispanic-Americans, Dr. Weeks relied on generally accepted data from the 1990 census and from the Demographic Research Group of the California Department of Finance. (RT Vol. 6, p. 1515.) Dr. Weeks testified that both the sources of the data, and the equation used to arrive at the estimate were recognized as scientifically valid in the demographic community and explained in Dr. Weeks' preeminent textbook on population. (RT Vol. 6, pp. 1542-44.) [17]

The trial court denied the motion to quash the jury panel. The trial court found that the under-representation of Hispanic-American jurors in the Rancho Cucamonga Courthouse was neither statistically significant nor the product of systematic exclusion. (RT Vol. 6., pp. 1705-17.) Relying on 1990 population figures from the United States Census Bureau, the trial court concluded that Hispanic-Americans comprised 18.7% of the jury-eligible population and 16.9% of the jurors summoned for service, amounting to an actual disparity of less than two percent, which the court

---

17. In his testimony at the hearing on the Motion to Quash Dr. Weeks noted that in 1980 Hispanics were 18.5% of the total population in San Bernardino County and in 1990 Hispanics accounted for 26.7% of the total population. (RT Vol. 6, p. 1517.) Dr. Weeks also testified that the State Department of Finance estimates suggested that Hispanics would make up 34.3% of the total population in San Bernardino County in the year 2000. (RT Vol. 6, p. 1518.) In fact, this estimate was borne out by figures from the 2000 United States Census which established that Hispanics represented 39.2% of the population of San Bernardino County. U.S. Census Bureau, American FactFinder, San Bernardino County, California, http://factfinder.census.gov (12/7/07).

concluded "clearly would not be a significant or substantial disparity." (RT Vol. 6, p. 1710.)

The trial court rejected the 1995 estimate of the Hispanic-American population which was provided by Dr. Weeks. The trial court explained that it did not credit Dr. Weeks' estimate because it was "a geometric extrapolation that tends to be just that, an estimate." (RT Vol. 6, p. 1710.) The court also noted that even if it accepted Dr. Weeks' estimate, "we end up with a jury-eligible Hispanic community of 24 percent and still 16.9, almost 17 percent showing up, an actual disparity of just over 7 percent. If we use the relative disparity we get about, almost 30 percent" (RT Vol. 6, p. 1711.) Once again the court concluded that his disparity:

> "does not in the court's view rise to the level of showing that the number of Hispanics on the – in the jury pool as opposed to the venire, if we're going to use the jury pool, is not fair and reasonable in relation to the number of such persons in the community. And I think that's particularly true in this case. I think that the 16.9 almost 17 percent that are shown in the survey is significant and does demonstrate a fair and reasonable proportion in relation to the number of persons in the community." (RT Vol. 6, p. 1711.)

Finally, the trial court determined that any disparity in the under-representation of Hispanic-Americans was not due to any systematic exclusion. (RT Vol. 6, p. 1713.)

The trial court erred in denying the motion to quash the jury panel because the un-refuted evidence presented at the hearing showed that the jury selection procedures in the West End Judicial District of the San Bernardino County Superior Court operated to systematically exclude Hispanics. The trial court should have quashed the

venire because Hispanic-Americans were significantly under-represented in the venire in comparison to the numbers in the general population and the trial court erred in rejecting credible population estimates which were used to measure the number of jury eligible Hispanic-Americans in San Bernardino County in 1995.

1. The Evidence Demonstrated the Systematic Exclusion of Hispanic-American Jurors.

At the hearing on the Motion to Quash the jury panel, Dr. Weeks testified that several factors in the jury selection process in the Rancho Cucamonga Courthouse combined to systematically exclude Hispanic-Americans and other groups from the jury pool in San Bernardino County and resulted in a serious lack of community participation in the jury system. (RT Vol. 6, pp. 1518-1519.) In particular, Dr. Weeks determined that because of excessive number of jurors who failed to appear and the improper removal of jurors in the Rancho Cucamonga Courthouse, Hispanics made up only 16.9% of potential jurors called for service in Rancho Cucamonga at the time of Mr. Cunningham's trial, even though (according to his estimate based on 1990 census data) Hispanics accounted for at least 23.1% of the "jury eligible" population in San Bernardino County in 1995. (RT Vol. 6, p. 1513-1515.)[18]

According to Dr. Weeks, the under-representation of Hispanic-Americans

---

18. Dr. Weeks noted that the statistical evidence of a systematic under-representation of Hispanic jurors was even more pronounced for the sub-group of Hispanic male jurors and he determined that in 1995 there was a 7.2% absolute disparity and a 30% relative disparity of Hispanic male jurors in the jury pool in the Rancho Cucamonga District Courthouse. (RT Vol. 6, p. 1515.)

could be corrected if the jury commissioner instituted remedial follow-up procedures to ensure that more jurors who were summoned to court actually appeared for jury selection. (RT Vol. 6, p. 1519.) Thus, Dr. Weeks suggested that the jury commissioner should rescind its policy prohibiting the forwarding of a juror summons and instead authorize the summons to be forwarded to a new address. (RT Vol. 6, pp. 1520-1521; 1544.) Dr. Weeks also suggested that the systematic under-representation of Hispanic-American jurors could be reduced if the juror summons did not prominently invite requests for excusals and if jury clerks were more circumspect in their out-of-court excusal of potential jurors. (RT Vol. 6, pp. 1521-22, 1544.) Dr. Weeks testified:

> "I think that probably the single biggest issue in terms of the disparity with Hispanics probably is the lack of follow-up. . . . They do not forward the summons, and they do not ask for an address correction. And so they have no ability to have that summons follow people as it goes out.
>
> And the Hispanic community is, on average, lower income than the non-Hispanic population within the community, more likely to be renting a home than owning a home, and more likely to be residentially mobile than the non-Hispanic community. And that means that the jury summons itself is less likely to reach its intended person if that person is Hispanic than non-Hispanic." (RT Vol. 6, p. 1520.)

According to Dr. Weeks, based on changes which were instituted in the San Diego Superior Court, if the juror summons provided for an address correction and additional delivery to forwarded address, and if the commissioner re-evaluated its position about the excusal or jurors or the more-vigorous enforcement of the jury

summons for jurors who fail to appear, the response rate would increase for all jurors, including Hispanics. (RT Vol. 6, p. 1522.) Tellingly, although Dr. Weeks concluded that Hispanic-American residents of San Bernardino County were significantly under-represented among jurors at the Rancho Cucamonga Courthouse because of jury selection procedures which systematically operated to exclude them, the prosecution never offered any reasons why these relative easy corrections could not be made to the jury summons process. (CT Vol. 6, pp. 1588-1590.)

During the hearing on the motion to quash, the Jury Commissioner of San Bernardino County also testified and admitted that a significant number of potential jurors (and a disproportionate group of Hispanic jurors) failed to appear for jury service without any sanction. The Jury Commissioner said that if a potential juror initially failed to appear for jury service, a second notice is sent to the potential juror, but if the juror still fails to comply with this second request the juror is simply ignored because "they're not removed from the list. We just don't follow up." (RT Vol. 6, p. 1449; see also pp. 1441, 1448, 1456.) The Jury Commissioner also stated that the jury clerks in the Rancho Cucamonga Courthouse regularly excuse jurors without the prior permission of the court, based on the local Rules of Court and the statutory exemptions in the Code of Civil Procedure. According to the jury commissioner, jury clerks summarily dismissed potential jurors in San Bernardino County if they demonstrated a financial hardship, if they showed that they were responsible for the

care of another person (including a child under the age of 14), or if they established that they did not have adequate transportation to appear in court. (RT Vol. 6, pp. 1440-1450.) Finally, the Jury Commissioner estimated that between the jurors who failed to report for service and those who appear but are summarily excused by the Clerk, almost eighty percent of jurors are removed before *voir dire* and that, in some cases, if notices are sent to 500 prospective jurors, as few as 100 jurors may actually appear in court. (RT Vol. 6, pp. 1452-53; Vol. 6, pp. 1452-53, 1679-80.)

The prosecution did not present any evidence in opposition to the Motion to Quash the Jury Panel but opposed the motion. Even though the prosecution acknowledged at the hearing on the motion that Hispanics were a distinctive group in the community, the prosecution nonetheless disputed that this group was significantly under-represented in jury selection or that Hispanics were systematically excluded from jury service in the West End Judicial District. (RT Vol. 6, pp. 1693.) In addition, the prosecution challenged Dr. Weeks' estimate of the 1995 Hispanic population in San Bernardino County and, relying instead exclusively on the 1990 Census data, argued that the absolute disparity of Hispanic jurors summoned for jury service was less than two percent. (RT Vol. 6, p. 1695.) Finally, the prosecution claimed that there was no systematic exclusion of Hispanic-American jurors because the jury selection process in San Bernardino was race-neutral. (R.T. Vol. 6, p. 1699.)

In denying Mr. Cunningham's motion, the trial court acknowledged that there

was no question that Hispanics are a distinctive group in the community (RT Vol. 6, p. 1705), but the court ultimately found, based on the 1990 census, that the absolute disparity of less than two percent of Hispanic jurors and the comparative disparity of less than ten percent together were insufficient to show that the representation of Hispanic jurors in the venire was not fair and reasonable. (RT Vol. 6, p. 1710.) The court rejected the defendant's proffered 1995 estimate of jury eligible Hispanic in San Bernardino County, finding they were not proven to be reliable. (RT Vol. 6., pp. 1711-14, 1717.)

Despite the clear evidence of a prima facie case of discrimination based on the exclusion of Hispanic potential jurors, the trial court never shifted the burden of proof to the State to rebut the presumption of unconstitutional action. (See, e.g., *Castaneda v. Partita, supra,* 430 U.S. at 494.) Thus the trial court erred further by failing to show that the disparity in the participation of Hispanic jurors was caused by racially neutral selection criteria. Indeed, based on the concessions of the Jury Commissioner, the prosecution simply could not make such a showing.

The trial court erred in rejecting Mr. Cunningham's motion to quash the jury panel. The uncontested evidence adduced in support of the motion demonstrates that the under-representation of Hispanics in the San Bernardino County jury pools was the product of an improper jury selection process which systematically and disproportionately excluded Hispanics. Mr. Cunningham presented sufficient

evidence to show that there was a systematic exclusion of Hispanic-American jurors in San Bernardino County which was caused by the jury commissioner's failure to vigorously pursue those jurors who were summoned for jury service yet failed to appear, to permit the forwarding of the jury summons, and to reduce the number of jurors excused by jury clerks. In addition, the trial court erred because Mr. Cunningham demonstrated that the systematic exclusion of Hispanic jurors in San Bernardino County was exacerbated by the hostile atmosphere against Hispanic-Americans following the recently passed initiative known as Proposition 187 (which sought to curtail the legal rights of non-citizens), the Governor's failure to comply with the "Motor Voter Act," and the long-standing history of discrimination against Hispanic-Americans in Rancho Cucamonga, which included a legacy of segregated schools, churches and businesses. (RT Vol. 6, pp. 1471-72, 1480-81, 1487.)

The first prong of the *Duren* test is self-explanatory, and–as in this case–there is rarely a dispute as to whether the individuals excluded are part of a distinctive group. (See, e.g., *People v. Anderson, supra,* 25 Cal.4th at p. 567.) A "distinctive" group of citizens is a group of citizens who share a common perspective gained precisely because of membership in the group, which perspective cannot be adequately represented by other members of the community. (*Rubio v. Superior Court* (1979) 24 Cal.3d 93, 98.) Thus, the trial court correctly found that, in this case, the first factor in *Duren* was clearly satisfied because Hispanics (or people with

Spanish surnames who are also known as "Latinos") clearly constitute a distinct group for purposes of considering a challenge to jury venire based on the absence of a fair cross section of the community. (Compare R.T. Vol. VI, pp. 1705; *Castaneda v. Partida, supra*, 430 U.S. at p. 495.)[19]

Moreover, Mr. Cunningham satisfied the second prong of the *Duren* test by presenting statistical data which showed that in 1995 in San Bernardino County the jury pool did not represent the distinctive group of Hispanic-Americans in adequate numbers in relation to their numbers in the community. Although the United States Supreme Court has not yet definitively spoken on "the means by which disparity may be measured or the constitutional limit of permissible disparity," (*People v. Anderson, supra,* 25 Cal.4th at p. 566), in looking at whether a distinctive group is adequately represented in a jury pool, this Court has often examined both the "absolute disparity" and the "comparative disparity" between the composition of a distinctive group of jurors summoned for jury duty with the presence of this group in the general population. (*Id.* at p. 567.)[20] Finally, a defendant can meet the burden of

---

19. A defendant need not be a member of the excluded or under-represented group to maintain his challenge that the venire from which they jury that tries him is drawn does not represent a fair cross-section of hte community. (*Peters v. Kiff* (1972) 407 U.S. 493; see also *Taylor v. Louisiana, supra,* 419 U.S. at 526.)

20. "Absolute disparity" is the *difference* between the under-represented group's percentage in the jury-eligible population and the group's percentage in the actual jury venire. "Comparative disparity" measures the *percentage* by which the number of group members in the actual venire falls short of the number of group members one would expect from the overall population of the group who are eligible for jury service. (*People v. Anderson, supra,* 25 Cal.4th at 564, fn. 6.)

demonstrating that the under-representation of a distinctive group was due to the systematic exclusion of a distinctive group by showing that the statistical disparity is the result of an improper feature of the jury selection process. (*Id.* at p. 566, citing *People v. Howard, supra,* 1 Cal.4th at p. 1160.)

Mr. Cunningham met his burden of demonstrating the existence of the second factor of the *Duren* test by presenting evidence of a significant statistical disparity between the percentage of Hispanic-Americans in the venire and the percentage of jury eligible Hispanic-Americans in San Bernardino County. Statistics provided by Dr. Weeks demonstrated that, at the time of his trial, adult Hispanic citizens made up an estimated 23 percent of the population in San Bernardino County, but Hispanics accounted for only 16.8 percent of the jurors who appeared for jury duty in West End Judicial District of the San Bernardino County Superior Court. Thus, there was an almost seven percent absolute disparity and a 27 percent comparative disparity of Hispanics in the jury pool of West End Judicial District. (RT Vol. 6, p. 1489.)

The disparity between the eligible Hispanic potential jurors and those who answered the jury summons in the present case was constitutionally significant under the second prong of *Duren,* because the absolute disparity of Hispanic jurors shows that Hispanics were under-represented in the jury pool by 27%. Stated differently, the actual representation of Hispanics is 27% of what would be expected if the system were functioning in accordance with the Constitution.

This significant disparity is also demonstrated by the test used by the United States Supreme Court in *Castaneda v. Partida, supra,* 430 U.S. 482, 496, fn. 17, where the percentage of Hispanics in the venire, compared to the eligible population of the judicial district, is expressed in terms of standard deviations from the expected values. As described in *Castaneda*, this relatively simple analysis proceeds in three steps. First the percentage of the members of the cognizable group in the relevant population (which in *Castaneda* was 79.1% of Mexican-Americans in the county) is multiplied by the number of individuals in the relevant subset of that population (there the 870 total of summons recipients) to calculate the expected number of group members in the subset (which in *Castaneda* should have been 688 Mexican-Americans). Second, the "standard deviation" value is calculated by multiplying the number in the subset, the chance of any person in the group being a subset member, and the chance of any person in the subset not being a group member (i.e. 870 x 0.791 x 0.209), and then–taking the square root of the result (in *Castaneda* the value was "approximately 12"). Third the difference between the expected number of the group members in the subset calculated in step one (688) and the number actually observed (there, 339 Mexican American potential jurors) is divided by the standard deviation to arrive at the number of standard deviations between the observed value and the expected value. If that number is greater than two, an inference of purposeful discrimination is justified. (*Castaneda v. Partida, supra,* 430 U.S. at 496, fn. 17.)

The record in this case contains all of the information which is needed to apply the *Castaneda* analysis. First, the percentage of Hispanic prospective jurors in the cognizable group–the juror eligible citizens in the West End Judicial District– was 23.1%. The relevant subset of the population was the 574 people surveyed by Dr. Weeks in the venire, and the expected number of Hispanic potential jurors among those respondents (0.231 x 574) was 133 (rounded to the nearest whole person). Second the standard deviation value is the square root of (574 x 0.231 x 0.769) or approximately 10.1. Third, the difference between the expected number of Hispanic respondents (133) and the observed number (97) is 36, and that number divided by the standard deviation value (10.1) is approximately 3.56. Thus, this process shows that the difference between the expected number of Hispanics responding to the summons and the actual number is much *more* than the two standard deviations found in *Castaneda,* and thereby establishes a prima facie case of discrimination.

Finally, Mr. Cunningham demonstrated that the under-representation of Hispanics in the San Bernardino County jury venire was due to the systematic exclusion of Hispanic-Americans based on a combination of jury selection procedures which discouraged service by lower-income people and long-standing barriers to the inclusion of Hispanic-Americans in all aspects of the civic life of San Bernardino. Mr. Cunningham showed that the systematic under-representation of Hispanics was inherent in the particular jury selection process used in San Bernardino, and not the

result of random variations. (RT Vol. 6, p. 1519-22.) Mr. Cunningham also showed that the systematic exclusion of Hispanic jurors in the West End Judicial District was exacerbated by the hostile atmosphere created by a long-standing history of discrimination against Hispanics, the passage of Proposition 187 and a jury selection process which was skewed because the Governor of California refused to implement the federal "Motor Voter" law. (R.T. Vol. VI, p. 1487.)

Under the third prong of *Duren*, "disproportionate exclusion of a distinctive group from the venire need not be intentional to be unconstitutional, but it must be systematic." (*Randolph v. California, supra,* 380 F.3d at 1141.) Consequently, a defendant only needs to show that the disparity is the result of an improper feature of the jury selection process. (*People v. Burgener* (2003) 29 Cal.4th 833, 857.) A defendant satisfies the "systematic exclusion" prong of *Duren* if he makes a sufficient showing that under-representation results from the use of inadequate juror source lists or improper jury selection procedures. (*People v. Harris* (1984) 36 Cal.3d 36 (plurality opinion).) As a consequence, a constitutional attack on the composition of a jury venire may be supported by statistics which demonstrate a discriminatory result rather than any discriminatory design. (*In re Rhymes* (1985) 170 Cal.App.3d 1100, 1113.)

The trial court erred in denying the motion to quash the jury venire because the un-refuted evidence adduced at the hearing on the motion demonstrated that the jury

selection procedures in San Bernardino county were not race neutral. The trial court should have quashed the venire because of the systematic effect of jury selection procedures which operated disproportionately to exclude Hispanic-Americans who were eligible to serve on a jury in the West End Judicial District of the San Bernardino County Superior Court.

The statistical disparity shown by the evidence raises a presumption of discrimination. (*In re Rhymes, supra*, 170 Cal.App.3d at 1113.) The prosecution did not dispel this presumption in the selection process and did not advance a compelling interest for the jury selection procedures which resulted in the under-representation of Hispanic-American jurors. Therefore, the evidence demonstrates the systematic exclusion of potential Hispanic-American jurors.

2. The Trial Court Erred in Rejecting Population Estimates.

In denying Mr. Cunningham's Motion to Quash, the trial court rejected Dr. Weeks' estimate of the population of jury-eligible Hispanics in the West End Judicial District at the time of Mr. Cunningham's trial. The trial court concluded that "we don't know how accurate those figures are" and determined that Dr. Weeks' conclusions were nothing more than an expert estimate. (RT Vol. 6, p. 1711.) In rejecting these legitimate estimates without an adequate factual basis, the trial court again erred.

The trial court erred in considering the motion to quash the jury panel by

failing to apply the updated population estimates of jury eligible Hispanics which were provided by Dr. Weeks. Dr. Weeks relied on generally accepted demographic estimates to determine that the Hispanic population in San Bernardino County increased at a higher rate than the non-Hispanic population since the 1990 census. The trial court erred in rejecting these estimates because they were reliable and generally accepted in the demographic community, they were not rebutted by the prosecution, and they provided a more accurate estimate of the true number of Hispanic potential jurors in San Bernardino County than the population figures in the 1990 census.

In analyzing the statistical disparity in the number of Hispanic people in San Bernardino County and the number who appeared for jury duty, Dr. Weeks estimated the1995 jury eligible Hispanic population in San Bernardino County. Dr. Weeks explained that, in arriving at this estimate, he relied on 1990 census data (and compared it to 1980 census data) and he also consulted the California State Department of Finance Demographic Research Unit and its ethnicity projections for every county and city within California. (RT Vol. 6, p. 1515.) Dr. Weeks testified that it was necessary to estimate the jury eligible Hispanic population of San Bernardino County because the number of Hispanic citizens increased more rapidly than other segments of the population, and was steadily increasing over time; therefore, to arrive at a 1995 estimate of Hispanic citizens in San Bernardino, Dr.

Weeks extrapolated the population forward by using a natural logarithmic function which he discusses in his leading textbook on Population. (R.T. Vol. 6, pp. 1517, 1526, see also footnote 17, *infra*.)

In rejecting Mr. Cunningham's motion to quash the jury panel, the trial court (relying on *People v. Breaux* (1991) 1 Cal.4th 281) found that it was appropriate to assess the exclusion of jurors based on 1990 census figures, despite the five-year delay in the timeliness of the census figures. (RT Vol. 6, p. 1710.) The trial court rejected the 1995 population estimates provided by Dr. Weeks by finding that "it's a geometric extrapolation that tends to be just that, an estimate." (RT Vol. 6, p. 1710.) The court further found that there was no evidence to show that Dr. Weeks' estimates were accurate. (RT Vol. 6, p. 1711.)

The trial court erred in rejecting the 1995 estimate of jury eligible Hispanics provided by Dr. Weeks. First, the trial court's finding that the 1995 estimates were not accurate and were based only on Dr. Weeks' expert opinion is objectively unreasonable and not supported by any evidence. Instead, the uncontested evidence presented at the hearing shows that these population estimates were based on Dr. Weeks' training and experience as an expert in population analysis as well as the generally accepted data provided by the United States Census Bureau and the Demographic Research Group of the California Department of Finance. Dr. Weeks experience as an expert in population trends, combined with his testimony about the

general acceptance of his estimation methodology, provide substantial evidence that Dr. Weeks' population estimates were accurate.

In assessing a claim that the jury venire did not represent a fair cross-section of the community, numerous courts have relied on population estimates to evaluate the absolute and relative disparity of excluded jurors. Thus, expert testimony on population trends and population forecasts is admissible to evaluate a Sixth Amendment cross-section challenge to the jury venire. (See, e.g., *In re Rhymes, supra,* 170 Cal.App.3d at 1104 (absolute disparity measured against state studies documenting the increase in African-Americans in Pomona).) In particular, this Court has previously considered a challenge to a jury venire which was based on an estimate by Dr. Weeks of the percentage of the jury eligible Hispanic population of the Central Judicial District of the Los Angeles Superior Court. (*People v. Ramirez, supra,* 39 Cal.4th at 441.)

The United States Supreme Court has long recognized the importance of statistical analysis in cases in which the existence of discrimination is a disputed issue: "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." (*International Board of Teamsters v. United States* (1977) 431 U.S. 324, 340.) In *Duren v. Missouri, supra,* 439 U.S. at 365, the United States Supreme Court suggested that the government has the right to

present its own evidence to challenge the defendant's estimate of changing population patterns. Consequently, some courts have concluded that the government's failure to present any evidence to contradict a population estimate suggests that the proffered statistical evidence is valid. (*United States v. Sanchez-Lopez* (9th Cir. 1989) 879 F.2d 541, 547.)

The trial court has discretion to determine the validity and value of statistical evidence in order to assess an alleged claim of discrimination. (*Pullman-Standard v. Swint* (1982) 456 U.S. 273, 287-90.) A trial court is authorized to accept an expert estimate of population patterns, so long as the proffered expert analysis is valid and reliable. (*Kumho Tire v. Carmichael* (1999) 526 U.S. 137, 152.)

Dr. Weeks arrived at his expert estimate of the number of jury eligible Hispanics in San Bernardino County in 1995 by relying on his training and experience to apply a generally accepted equation for measuring population trends in a rapidly growing sub-group of the community. (RT Vol. 6, p. 1517.) As Dr. Weeks testified, his estimate was based on data and analysis that has been repeatedly used, studied and tested by ethnographers, sociologists and local and state urban planners and which he endorses in his best-selling textbook on population. (RT Vol. 6, pp. 1515-18, 1526, 1542-43.) Dr. Weeks affirmed that the formula he used was generally recognized within the demographic community as valid. (RT Vol. 6, p. 1543.)

The prosecution failed to present any evidence to contradict Dr. Weeks'

estimate of the number of jury eligible Hispanics in San Bernardino County 1995. Therefore, the trial court erred in assuming that the Dr. Weeks' population estimate was inaccurate without an adequate factual basis.

B. The Systematic Exclusion of Hispanics is a Structural Error Which Requires Reversal.

The obligation to ensure that juries are drawn from a representative cross-section of the community is fundamental to the Sixth Amendment right to trial by jury. (*Taylor v. Louisiana, supra*, 419 U.S. at p. 530.) Consequently, the selection of a petit jury in violation of either the equal protection clause or the fair cross-section guarantee is a structural error which entitles a defendant to relief without any demonstration of prejudice. *(Id.)*

In the case of *Smith v. Texas* (1940) 311 U.S. 128, 130, Justice Hugo Black said:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society."

A half century later the United States Supreme Court reaffirmed this principle in *Vasquez v. Hillery, supra*, 474 U.S. 254, stating that reversal is required automatically whenever a certain racial group is systematically excluded from judicial proceedings. Writing for the Court, Justice Marshall reaffirmed that racial discrimination in the

selection of a grand jury is never harmless because discrimination on the basis of race strikes at the fundamental values of our judicial system and is a "grave constitutional trespass." (*Id.* at 262, citing *Rose v. Mitchell* (1979) 443 U.S. 545.)

In this case the un-refuted evidence established that a combination of jury selection procedures in the West End Judicial District of the San Bernardino Superior Court resulted in the systematic exclusion of Hispanic potential jurors. Therefore, Mr. Cunningham's sentence of death must be reversed because he was sentenced by a jury in which Hispanic people were systematically excluded.

VIII. THE TRIAL COURT ERRONEOUSLY EXCUSED A QUALIFIED JUROR FOR CAUSE WITHOUT VOIR DIRE BECAUSE THE JUROR EXPRESSED A SKEPTICISM OF THE DEATH PENALTY IN HIS JUROR QUESTIONNAIRE.

The trial court erroneously excused a prospective juror for cause, based solely on his written answers to a jury questionnaire in which he expressed skepticism regarding the death penalty, and without any opportunity for voir dire. (RT Vol. 8, p. 2088.) If the erroneously excluded juror would have been given the opportunity to respond to questions during *voir dire*, defense counsel and the trial court could have clarified whether the juror was qualified to serve on a capital jury. The improper removal of this qualified juror subjected Mr. Cunningham to "a tribunal organized to return a verdict of death" in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 15 and 16 of the California Constitution. (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521; *People*

v. Stewart (2004) 33 Cal.4th 425, 440-41.)

Prior to jury selection in this case defense counsel and the prosecutor met and agreed that, after a review of the juror questionnaires, they would agree that certain jurors could be excused based on their claimed hardship. (RT Vol. 7, pp. 1965-71.) However, the trial court then extended this summary review of the juror questionnaires to consider challenges for cause to certain jurors based on the court's review of the jury questionnaire and without conducting any additional *voir dire*. (RT Vol. 8, p. 1974-2034.) Although the trial court used this procedure primarily to exclude people whom the court concluded could not impose the penalty of life in prison without the possibility of parole (see, e.g., RT Vol. 7, p. 1974-2007), unfortunately in the process the court also erroneously excluded one juror for cause based on the court's summary determination that this juror could not impose a judgement of death. (RT Vol. 8, p. 2041.) It was error to exclude this juror because he was qualified to serve on a capital jury and he could not be removed for cause simply because he expressed strong opposition to the death penalty.

The trial court excluded potential juror G. P. for cause, without conducting any *voir dire*. (RT vol. 8, p. 2088.) After reviewing G.P.'s questionnaire, the trial court granted the State's for-cause challenge, finding that G.P.'s views about the death penalty could substantially impair his abilities to act as a juror. (RT Vol. 8, p. 2041, 2045-48, 2088.) The trial court prejudicially erred in making this determination

without allowing G.P. to participate in *voir dire*.

According to the trial court's summary of G.P.'s questionnaire, G.P. acknowledged that his religion did not agree with the death penalty and discouraged the concept of judging other people. The trial court also noted that in his questionnaire G.P. stated that he was strongly opposed the death penalty. (RT Vol. 8, p. 2046.) The trial court then commented that in his questionnaire G.P. indicated that he had no reluctance to sit in judgment on a jury but also somewhat inconsistently stated that "sentencing someone is against my beliefs." (RT Vol. 8, p. 2046.) Finally, the trial court noted that in his questionnaire G.P. indicated that his religious beliefs would greatly influence him but G.P. nonetheless expressed a willingness to impose a penalty of death in some cases if the defendant asked to die and he was in sound mind and body. (RT Vol. 8, p. 2048.)

Counsel for Mr. Cunningham argued that the State's challenge for cause should be denied. According to Counsel, G.P. indicated in his questionnaire that he would be willing to hear the case for both life without parole and death and he would not make up his mind until he heard the case. (RT Vol. 8, p. 2047.) Based on these purported responses, counsel argued that even though G.P. expressed a preference for a penalty of life without parole, he also acknowledged that he would be willing to listen to the case before selecting a punishment. (RT Vol. 8, p. 2047.)

The trial court excused G.P. for cause without any further *voir dire*. The court

found that:

> "the combination of the strong religious beliefs, and not – because of those strong religious beliefs, not believing he should judge someone . . . combined with the statements regarding the death penalty, that he's strongly opposed to it, couldn't think of a crime that deserves the death penalty, indicates that he would certainly be substantially impaired in seriously considering death penalty as an option. So the Court will grant the challenge for cause." (RT Vol. 8, p. 2048.)

In making this determination, the trial court erred.

A. The Evidence Was Insufficient to Show that the Excused Juror's Views About the Death Penalty Would Have Impaired his Performance.

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution demand a "fair trial in a fair tribunal" as an essential aspect of due process of law. (*In re Murchison* (1955) 349 U.S. 133, 136.) "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution." (*Lombardi v. California Street Railway Co.* (1899) 124 Cal. 311, 317.) Therefore, the denial of an impartial jury violates the Due Process Clauses of the Fourteenth Amendment of the United States Constitution and the California Constitution. (*Irwin v. Dowd* (1961) 366 U.S. 717, 725-29; *People v. Wheeler, supra,* 22 Cal.3d at p. 265.)

Under both the federal and state constitutions, a potential juror may not be excused for cause in a capital case simply because of a strong opposition to the death penalty, especially if the juror can fairly consider the death penalty in a specific case.

(*Adams v. Texas* (1980) 448 U.S. 38, 45; *People v. Lewis* (2001) 25 Cal.4th 610, 631.) Instead, a trial court may properly remove a juror for cause in a death penalty case only if the juror's views about the death penalty would "prevent or substantially impair" the juror from performing his duties or following the instructions of the trial court. (*Wainwright v. Witt* (1985) 469 U.S. 412, 424; see also *Gray v. Mississippi* (1987) 481 U.S. 648, 658.) "A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate." (*People v. Stewart, supra,* 33 Cal.4th at p. 441.)

A reviewing court can "uphold a trial court's ruling on a for-cause challenge by either party if it is fairly supported by the record, accepting as binding the trial's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." (*People v. Lewis, supra,* 25 Cal.4th at p. 631; *Wainwright v. Witt, supra,* 469 U.S. at p. 631.) However, the trial court's determination that a juror is unqualified for service will be reversed if the "evidence upon the examination of the juror is so opposed to the decision of the trial court that the question becomes one of law." (*People v. Ashmus* (1991) 54 Cal.3d 932, 962, citing *People v. Fredericks* (1895) 106 Cal. 554, 559.)

The State's power to exclude jurors for cause in a death penalty case extends only to those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths."

(*Gray v. Mississippi, supra,* 481 U.S. at 658.) The State does not have the authority to exclude jurors simply because they are opposed to capital punishment in the abstract. To permit the exclusion for cause of other prospective jurors based merely on their expressed opinion on the death penalty "unnecessarily narrows the cross section of the venire members. It 'stack[s] the deck against the [accused]. To execute [such a] death sentence would deprive [the accused] of his life without due process of law." (*Id.* at 658-59, quoting *Wainwright v. Witt, supra,* 469 U.S. at 423.) Consequently, personal objections to capital punishment, standing alone, are not sufficient to exclude a person from jury service in a capital case, so long as the juror can clearly state a willingness to temporarily set aside those personal beliefs in deference to the rule of law. (*People v. Stewart, supra,* 33 Cal.4th at p. 446.)

A court may not improperly assume that a prospective juror who is personally opposed to the death penalty is incapable of following the law, especially if the juror can assure the court that he can set aside his personal views and consider the ultimate penalty. (*People v. Kaurish* (1990) 52 Cal.3d 648, 699; *Ross v. Oklahoma* (1988) 487 U.S. 81, 91, fn. 5.) "It cannot be assumed that a juror who describes himself as having 'conscientious or religious scruples' against the infliction of the death penalty 'in a proper case' thereby affirms that he could never vote for the death penalty." (*Witherspoon v. Illinois, supra,* 391 U.S. at p. 515, fn. 9.) On the contrary, a potential juror who believes capital punishment should never be inflicted and who is

irrevocably committed to its abolition could still set aside his personal views and abide by his oath as a juror to follow the law as contained in the court's instructions. (*Ibid*, p. 515, fn. 7.) Therefore, before granting a challenge for cause concerning a prospective juror, over objection, a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would "prevent or substantially impair" the performance of his or her duties. (*People v. Stewart, supra,* 33 Cal.4th at 445.)

In the same vein, a juror's answer that he or she "probably" would automatically vote against the death penalty, or that he or she would find it "very difficult" to vote for death are not sufficient in themselves to permit disqualification. (*People v. Fields* (1983) 35 Cal.3d 329, 355.) As a result, a juror may be excused based on his or her inflexible attitude about the death penalty only if there is substantial support in the record for the conclusion that the juror's emotional opposition to the death penalty will prevent or impair his ability to follow the court's instructions. (*People v. Cain* (1995) 10 Cal.4th 1, 61; *People v. Clark* (1993) 5 Cal.4th 950, 1025-26.)

Applying these standards in this case, the trial court erred in excusing juror G.P. for cause, based solely upon the trial court's summation of his written answers on a jury questionnaire and without an adequate showing of bias. First, none of G.P's written responses (as summarized by the court) were sufficient to demonstrate such

a fixed position on the death penalty which would render him unqualified to serve in this case. Second, G.P.'s strong religious beliefs and personal opposition to the death penalty were not sufficient to justify his removal, especially since he indicated that he would be willing to hear the evidence on both sides of the case and consider both penalties in selecting the appropriate sentence. (RT Vol. 8, p. 2047.) Third, although the trial court correctly noted that G.P. wrote that his religion opposes the death penalty and taught him "to try to understand why people become the way they are and that one might always forgive and not lose hope" (RT Vol. 8, p. 2046), *Lockhart* and *Kaurish* make clear that many members of society–and thus many prospective jurors–may share those same sentiments, and yet remain qualified to sit as a juror.

As summarized by the court and counsel, G.P. did not make such strong and unequivocal statements about the death penalty that he was unmistakably unqualified to serve in Mr. Cunningham's case. (See, e.g., *People v. Holt* (1997) 15 Cal.4th 619; *People v. Ashmus, supra,* 54 Cal.3d 932.) In fact, most of juror G.P.'s responses were no more disqualifying than the responses given by other jurors in cases where death judgments were reversed in light of *Witt*. (See, e.g., *Szuchon v. Lehman* (3d Cir. 2001) 273 F.3d 299, 329-31; *United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1271-72; *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 330-31.)

There is insufficient evidence to support the trial court's decision to exclude juror G.P. based on a disqualifying, anti-death-penalty bias. Therefore, the court's

findings that juror G.P. was unqualified must be disregarded because they are not supported by the record. (*Wainwright v. Witt, supra,* 469 U.S. at p. 431; *People v. Ashmus, supra,* 54 Cal.3d at p. 962.)

B. The Trial Court Erred in Excusing the Juror Without Conducting Any Voir Dire.

In order to ensure an impartial jury in a criminal case, the defendant has the right to *voir dire* the jury to explore any area of potential bias and identify potentially unqualified jurors. (*Hardy v. United States* (1964) 375 U.S. 277, 279-280.) "*Voir dire* plays a critical function in assuring the criminal defendant that his right to an impartial jury will be honored." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729-730.) "Without adequate *voir dire*, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." (*Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) The risk of a biased jury as a result of unduly limiting *voir dire* is "most grave when the issue is life or death." (*Aldridge v. United States* (1931) 283 U.S. 308, 314.)

To be constitutionally adequate, *voir dire* in a capital case must provide sufficient information to expose "potential biases, both known and unknown, on the part of potential jurors." (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 554.) Sufficient voir dire is also necessary to determine whether the juror's views would "prevent or substantially impair the performance of his duties as

a juror in accordance with his instructions and his oath." (*Wainwright v. Witt, supra,* 469 U.S. at p. 424.) Consequently, if the trial court relies exclusively on written questionnaires to perform the important function of identifying jurors who have fixed opinions about the death penalty without conducting any clarifying follow-up examination, the court errs. (*People v. Stewart, supra,* 33 Cal.4th at p. 448.)

The information in prospective juror G.P.'s written questionnaire as summarized by the trial court was insufficient to conclude that he had an attitude which would prevent or substantially impair his ability to serve as juror, and does not support the trial court's decision to excuse G.P. for cause. Unfortunately, because he was excused without being questioned by counsel, this Honorable Court now simply does not now know how G.P. would have responded to appropriate clarifying questions posed to assess his potential bias. (See, *People v. Stewart, supra,* 33 Cal.4th at pp. 450-451.) "Accordingly . . . on the record before the trial court . . . the trial court erred in dismissing the . . . prospective jurors for cause without first conducting any follow-up questioning." (*People v. Stewart, supra,* 33 Cal.4th at p. 451.)

The responses of other jurors who expressed reservations about the death penalty (as summarized by the trial court and counsel) further demonstrate the error in summarily excluding G.P. without allowing him to participate in *voir dire*. For example, when the court spoke with juror S.A., she admitted she was opposed to the death penalty and expressed a reluctance to impose the penalty because of her

religious beliefs. (RT Vol. 8, pp. 2122, 2124, 2130.) S.A. also said that she would not want to have the decision to sentence someone on her conscience and that she did not think she could impose the penalty. (RT Vol. 8, p. 2121.) However, after the court explained the process of weighing the evidence for life or death, S.A. admitted that–under some circumstances–she could return a sentence of death if she believed it was the appropriate penalty. (RT Vol. 8, p. 2123.) At the conclusion of *voir dire,* S.A. affirmed that she would follow the court's instructions on the factors to consider in imposing either penalty. (RT Vol. 8, p. 2129.)

The court denied the prosecutor's challenge for cause of S.A., finding that "she's obviously someone who initially would probably be leaning somewhat against the death penalty. But that certainly isn't the standard we use for granting a challenge for cause." (RT Vol. 8, p. 2132.) The court also found that despite S.A.'s strong religious beliefs, she acknowledged a willingness to follow the law by weighing aggravating and mitigating circumstances. (RT Vol. 8, p. 2132.) Therefore the trial court denied the challenge for cause. (RT Vol. 8, p. 2132.)

Similarly, juror S.G. told the court that her feelings on the death penalty have changed because she used to believe that the death penalty was barbaric. (RT Vol. 8, p. 2168.) J.G. also told the court that she could return a sentence of death but "it's not something I could do easily" and she reiterated her statement in the questionnaire that she did not know if she could sentence someone to death. (RT Vol. 8, pp. 2169,

2178.) Nonetheless, after listening to the trial court's explanation of the weighing process in considering aggravating and mitigating evidence, J.G. told the court that she could impose the death penalty if she felt it was an appropriate sentence; consequently, the trial court concluded that, in light of this promise, there was no basis to remove J.G. for cause. (RT Vol. 8, p. 2179.)

The trial court's efforts during *voir dire* to clarify potential jurors' ambiguous responses to inquiries about the death penalty in the juror questionnaire highlights the inherent difficulty in removing G.P. for cause without conducting any *voir dire*. Indeed, the trial court proved to be so thorough at explaining the process that could lead to the imposition of the death penalty that the prosecutor ultimately interposed an objection, arguing that "the court has given them two or three or four times to try to rehabilitate themselves when they've come and are adamantly opposed to the death penalty." (RT Vol. 8, p. 2139.) In response, the trial court stated:

> "Well, the difference is the ones that have been excused based on the questionnaires, they have in fact indicated their strong viewpoints on this more than once, more than twice, because of the number of questions that are asked in different forms. [¶] And I would never rely on – I should probably never say never – but rarely would I rely on a single response in a questionnaire for granting or denying a challenge for cause. But rather it's the totality of the circumstances in the questionnaire. [¶] And sometimes when we ask a juror something initially, orally, they may not completely understand or they may have one thing in their mind. And I think that it is important to again, just as we do on the questionnaire, ask the same question in different ways so we can assure ourselves of the juror's position. [¶] And, indeed, the purpose of the hearing is to give not only the challenging party the opportunity to further elucidate a basis for a challenge for cause, but to

give the other side an opportunity to rehabilitate." (RT Vol. 8, pp. 2139-2140.)

Unfortunately, juror G.P. never had an opportunity to explain his answers in the questionnaire and, more important, never had an opportunity to be rehabilitated during *voir dire*. Instead G.P. was removed based solely on his answers in a jury questionnaire, in which he expressed a strong skepticism concerning the death penalty. Therefore, the trial court erred in dismissing G.P. without first conducting any follow-up questioning in *voir dire*.

C. The Improper Removal of the Potential Juror Is Reversible *Per Se*.

The error in excusing for cause jurors who did not have fixed opinions regarding the death penalty without an adequate justification requires reversal, without any inquiry into prejudice. (See, *Davis v. Georgia* (1976) 429 U.S. 122, 123; *Gray v. Mississippi, supra*, 481 U.S. at pp. 657-659.) A jury culled of all people who have conscientious scruples against the death penalty violates both the federal and state constitution and improperly creates a tribunal which is organized to return a death judgment. (*Adams v. Texas, supra,* 448 U.S. at p. 43; *People v. Ghent* (1987) 43 Cal.3d 739, 767-768.)

A sentence of death simply cannot constitutionally be carried out if the jury that imposed the penalty was chosen by excluding members of the venire for cause based upon their general objections to the death penalty, or their conscientious or religious scruples. (*Witherspoon v. Illinois, supra,* 391 U.S. at pp. 522-523.) The

United States Supreme Court has established a "*per se* rule requiring the vacation of a death sentence imposed by a jury from which a potential juror, who has conscientious scruples against the death penalty but who nevertheless under *Witherspoon* is eligible to serve, has been erroneously excluded for cause." (*Gray v. Mississippi, supra,* 481 U.S. at 659-660.) If even one juror is improperly dismissed, reversal of the death penalty is required. (*Id.* at p. 668.)

Mr. Cunningham's death sentence cannot stand because one juror, G.P., was improperly removed from the jury panel after the trial court erroneously granted the prosecution's challenge for cause. Although G.P. expressed a reluctance to impose a sentence of death, the trial court acknowledged that in his questionnaire G.P. indicated that he was willing to consider both a sentence of death and life in prison without the possibility of parole, and he affirmed that he would follow the instructions of the trial court. (RT Vol. 8, p. 2047.) By improperly removing G.P., the trial court created an unacceptable risk that the jury that was empaneled to consider Mr. Cunningham's fate was improperly organized in favor of death. Therefore, the sentence of death imposed in this case must be reversed.

IX. THE PROSECUTION IMPROPERLY EXERCISED ITS PEREMPTORY CHALLENGES TO STRIKE AFRICAN-AMERICAN POTENTIAL JURORS FROM THE JURY PANEL.

In selecting a jury for the penalty phase, the state exercised a total of eight peremptory challenges to potential jurors–six during the selection of the twelve jurors and two during the selection of the six alternate jurors. Of the six peremptory challenges exercised in seating the jury, the prosecution used four peremptory challenges to remove African-American jurors: D.W., A.L., S.A-M. and A.C. (See, RT Vol. 10, pp. 2408-09, 2427-28, 2443A, 2450, and 2460.) Mr. Cunningham respectfully submits that the prosecution's use of its peremptory challenges established a prima facie case of racial discrimination because the facts and circumstances surrounding challenges raised a compelling inference that the prosecution was improperly using its peremptory challenges to remove African-American jurors.

During voir dire, defense counsel objected to the state's pattern of devoting more time to the extensive questioning of African-Americans than other potential jurors, arguing that in his estimation eighty percent of the State's questioning during voir dire had been directed against African-Americans. (RT Vol. 10, pp. 2408-2409.) In addition, counsel argued that the prosecutor had improperly exercised a disproportionate number of "for cause" challenges against African-Americans, alleging that approximately fifty percent of the people challenged for cause were

black. (RT Vo. 10, p. 2409.) Finally, Counsel argued that because of this pattern, "if [the prosecutor] exercises a peremptory challenge against any black person, a *prima facie* case has already been made which would require him to give a justification for doing it." (RT Vol. 10, p. 2408.) The trial court rejected this suggestion, finding that "at this point, based on the – what I've seen in the challenges for cause and the reasons that the prosecutor offered for the challenges for cause to minority and non-minority jurors, the Court does not find that there has been any attempted systematic exclusion of minorities." (RT Vol. 10, p. 2415.)

Immediately after defense counsel raised this premature *Batson* challenge, the state exercised its second peremptory challenge to remove D.W., an African-American. (RT Vol. 10, p. 2427; RT Vol. 9, pp. 2330, 2394 [prosecution first peremptory challenged exercised against J.E., a Korean War veteran].) Defense counsel, as promised, immediately imposed a *Batson* challenge. (RT Vol. 10, p. 2427.) In ruling on the challenge, the trial court stated that:

> "at this point the Court does not find that there has been a systematic pattern of exclusion of minorities. And so the Court will deny the *Wheeler/Batson* challenge. [¶] That having been said, if the district attorney wishes to put on the record his reasons for exercising this peremptory you can do so. But he is not obligated to since the Court has found there is no systematic exclusion." (RT Vol. 10, 2428.)

The prosecutor declined the court's invitation to give a statement of his reasons for the challenge of juror D.W. (*Id.*)

With its next peremptory challenge, the prosecution removed A.L., another

African-American. (RT Vol. 10, p. 2443A.) Counsel for Mr. Cunningham imposed a second objection by stating, "*Batson* again." (*Ibid.*) However, at that point the trial court did not consider this second objection. (*Ibid.*)

The prosecution used its third peremptory challenge to excuse juror S.A-M. (RT Vol. 10, p. 2449.) At that point counsel for Mr. Cunningham attempted to phrase an objection by stating, "I'll wait till he does one more, then I'll do that. I'm going to make a motion. So we don't have to argue it each time." (RT Vol. 10, p. 2450.) The prosecution then assured the court, "I expect to have one or two more, so if there's going to be an issue on it we can handle it at the end of my preempts, which I'm getting close to the end." (*Ibid.*) The court commented, "good," Mr. Cunningham passed his peremptory challenge, and the prosecution promptly challenged A.C., another African-American. (RT Vol. 10, pp. 2450, 2460.) The prosecution then used its last peremptory to excuse R.A.(whose husband served in the United States Army). (RT Vol. 10, pp. 2462, 2469.)

The trial court selected six alternates. (RT Vol. 10, p. 2472.) The prosecution used one peremptory challenge to excuse S.G., an Hispanic juror (RT Vol. 10, p. 2497), and one peremptory challenge to remove J.N., a Vietnam Veteran who served in the Fourth Infantry of the 101st Airborne (RT Vol. 10, pp. 2502, 2510).

After the jury was selected the prosecutor noted, "counsel brought up an issue of a *Batson* after the first juror. Is that motion still pending?" (RT Vol. 10, p. 2524.)

Defense counsel replied that the motion was denied and the trial court agreed, saying "it was." (*Ibid.*) The prosecution then recalled that counsel for Mr. Cunningham objected that "there were some other individuals of minority status that were used as peremptory challenges. And so that's the only issue that I was bringing up. There was no prima facie case to all three?" (RT Vol. 10, p. 2524.) In responding to this inquiry the trial court stated:

> "If I recall correctly, the – [defense counsel] made a *Batson-Wheeler* motion after the first peremptory of a black juror by the prosecution. The Court made a specific finding that there was not a prima facie showing of any systematic or attempted systematic exclusions of blacks or any other minority and denied the challenge. And therefore, did not require an explanation from the prosecution as to the reasons for the excusal. As I recall there were two other – (RT Vol. 10, pp. 2524-2525.)

At that point counsel for Mr. Cunningham interjected "there were two other blacks, Mrs -," and the prosecution specifically referred to S.A-M. and A.C. (RT Vol. 10, p. 2525.) The court then commented:

> "Even after the two additional challenges the Court is still satisfied that there is not a prima facie showing or a prima facie demonstration to the court of any systematic or attempted systematic exclusion of black jurors by the prosecution, particularly with regard to the last two peremptories of black jurors. [¶] The responses in the questionnaire, and the responses of the jurors orally, in the Court's view provided adequate non-racial basis for the peremptory challenges. And if the motion had been renewed, it would have been denied again at that point, again on the basis that there was not a prima facie showing. [¶] Court will also note that the jury that the prosecution passed on that was actually sworn does include two black jurors Which is, again, additional evidence to the Court that there was not an attempt to systematically exclude blacks." (RT Vol. 10, pp. 2525-2526.)

Even though the trial court had made the finding that there was not a prima facie showing of systematic exclusion, the court once again offered the prosecutor the opportunity to explain the reasons for the excusals. (RT Vol. 10, p. 2526.) This time the prosecution accepted the offer and told the court that he excused juror D.W. because she was removed and argumentative during questioning and her occupation as a prison guard was a potential problem. (*Ibid.*) The prosecutor claimed he struck potential juror A.C. because she did not complete her juror questionnaire in full and had serious reservations about the death penalty. (RT Vol. 10, pp. 2527-2528.) Finally the prosecutor claimed that he removed potential juror S.A-M. because she was reluctant to impose the death penalty and had a family member killed by a member of the Los Angeles County Sheriff's Office. (RT Vol. 10, pp. 2528-29.)

After the jury was selected and sworn, the trial court ultimately rejected Mr. Cunningham's *Batson* challenges. The trial found that Mr. Cunningham had failed to establish a prima facie case of purposeful discrimination. (RT Vol. 10, pp. 2524-28.)

Mr. Cunningham contends that the prosecution exercised four improper, race-based peremptory challenges to African-American jurors and thereby deprived him of his state and federal constitutional right to due process and a fair trial in a capital murder prosecution. In addition the prosecution's use of peremptory challenges to strike most African-American prospective jurors violated Mr. Cunningham's state

and federal constitutional rights to a trial by a jury drawn from a representative cross section of the community under the Fifth, Sixth and Eighth Amendments of the United States Constitution and Article I, sections 15 and 16 of the California Constitution, as well as his right to the equal protection of the law under the Fourteenth Amendment of the United States Constitution. (*People v. Wheeler, supra,* 22 Cal.3d 258; *Batson v. Kentucky, supra,* 476 U.S. at pp. 84-89.) Finally, the improper removal of four African-Americans because of their race threatened Mr. Cunningham's right to a reliable judgment of death from a tribunal which is not prone to convict, in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, section 17 of the California Constitution..

"Both the state and federal Constitutions prohibit the use of peremptory challenges to exclude prospective jurors based on race." (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.) "Purposeful racial discrimination in [the] selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. 'The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.'" (*Batson v. Kentucky, supra,* 476 U.S. at p. 86, quoting *Strauder v. West Virginia* (1880) 100 U.S. 303, 308.) "Such a practice also violates the defendant's right to the equal protection of the law

under the Fourteenth Amendment to the United States Constitution." (*People v. Bonilla, supra,* 41 Cal.4th at 341.) Therefore, while a prosecutor ordinarily is entitled to exercise peremptory challenges for almost any reason at all, " the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race." (*Batson v. Kentucky, supra,* 476 U.S. at p. 89.)

There is a rebuttable presumption that a peremptory challenge is being exercised properly and the burden is on the opposing party to demonstrate impermissible discrimination. (*People v. Bonilla, supra,* 41 Cal.4th at 341.) To overcome the presumption, a defendant:

> "Must first 'make out a prima facie case' by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral justification is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful . . . discrimination. [Citation.]." (*Johnson v. California* (2005) 545 U.S. 162, 168, fn. omitted.) The same three-step procedure applies to state constitutional claims. (*People v. Bell* (2007) 40 Cal.4th 582, 596.)" (*People v. Bonilla, supra,* 41 Cal.4th at 341.)

Mr. Cunningham established a prima facie case of discrimination by showing that the totality of the relevant facts raised an inference of an improper, racially motivated purpose in the exercise of the prosecution's peremptory challenges. By using four of its six first peremptory challenges to strike African-Americans, the prosecutor removed most of the African-Americans in the jury pool, used a

disproportionate number of his challenges to strike an identifiable group, and impermissibly exercised a challenge based only on race because, in all other respects, the four jurors were as heterogenous as the community as a whole.

A. The Trial Court Erred in Failing to Find a Prima Facie Case of Discrimination.

1. Standard of Review.

If a defendant believes that the prosecution is using its peremptory challenges to exclude jurors on the basis of group bias alone, the defendant must make a timely objection and establish a prima facie case of purposeful discrimination by showing that there is an inference, under the totality of the circumstances, that the prosecutor has exercised peremptory challenges to remove members from the jury venire based on a group bias. (*Johnson v. California* (2005) 545 U.S. 162, 169; see also *Powers v. Ohio, supra*, 499 U.S. 400 (a defendant of any race can raise an equal protection challenge to the prosecution's discriminatory use of peremptory challenges).) Once the defendant has established a prima facie case, the burden shifts to the prosecution to come forward with an adequate explanation for the use of its peremptory challenges. (*Johnson v. California, supra,* 545 U.S. at 169; see also *People v. Howard, supra*, 1 Cal.4th at pp. 1153-54.)

When a trial court denies a *Batson-Wheeler* challenge without finding a prima facie case of group bias, ordinarily "the appellate court reviews the record of *voir dire* for evidence to support the trial court's ruling." (*People v. Guerra, supra,* 37

Cal.4th at p. 1101). Under these circumstances, this Court will affirm the ruling if substantial evidence in the record supports the trial court's conclusions that there were race-neutral grounds upon which the prosecutor might reasonably have challenged the jurors. (*People v. Jenkins, supra*, 22 Cal.4th at pp. 993-94.)

However, if it appears that the trial court employed an improper standard in assessing a prima facie case of race-based peremptory challenges, then this Court reviews the *Batson* claim *de novo.* (See, e.g. *People v. Zambrano* (2007) 41 Cal.4th 1082, 1105.) In cases where the trial court found no prima facie case had been established, but it is not clear whether the court applied the correct standard, this Court reviews "the record independently to 'apply the high court's standard and resolve the *legal* question whether the record supports an inference that the prosecutor excused a juror' on a prohibited discriminatory basis." (*People v. Bonilla, supra,* 41 Cal.4th at p. 342, citing *People v. Bell, supra,* 40 Cal.4th at p. 597 [emphasis in the original].)

The trial court applied the wrong standard in determining whether Mr. Cunningham made a prima facie case that the prosecution's peremptory challenges were improperly based on race. At the time of Mr. Cunningham's trial, a defendant in California could not establish a prima facie case of the prosecution's improper, race-based peremptory challenges by merely presenting *some evidence* which could lead to an inference of discrimination; instead, the defendant had to provide *strong*

evidence that made the prosecutor's discriminatory intent more likely than not. (See, e.g., *Johnson v. California, supra*, 546 U.S. at 166-68.)

The trial court actually misunderstood the standards for establishing a prima facie case of discrimination because, at the time of Mr. Cunningham's trial, California courts were still applying the unconstitutionally heightened standard of scrutiny established in *People v. Bernard* (1994) 27 Cal.App.4th 458, 465 (prima facie case of the prosecution's biased use of peremptory challenged required a showing that there was a strong likelihood the prosecution's challenges were discriminatory) which was rejected in *Johnson*. Therefore, Mr. Cunningham respectfully submits that this Court must now independently review the record of the prosecution's four challenges to African-American jurors to ensure that the these jurors were not improperly excluded from jury service, in violation of the state and federal constitution, solely because of their race.

2. There Was a Strong Inference that the Prosecutor's Four Challenges to African-Americans Were Discriminatory.

In deciding whether the defendant has adequately presented a prima facie case of a discriminatory purpose in the exercise of the prosecution's peremptory challenges this Court considers the entire record, "but certain types of evidence may be especially relevant." (*People v. Bonilla, supra,* 41 Cal.4th at p. 342.) For example, in *Batson* the United States Supreme Court held that a defendant can

establish a prima facie case of purposeful discrimination by presenting sufficient facts to show that there is an inference that the prosecutor exercised peremptory challenges based on race. (*Batson v. Kentucky, supra*, 476 U.S. at p. 86.) In *Johnson v. California*, the Supreme Court clarified that the burden at the prima facie stage is low, requiring only circumstances which raise a *suspicion* that discrimination has occurred–even where those circumstances are insufficient to indicate that it is more likely than not that the challenges were used to discriminate. (*Johnson v. California, supra,* 546 U.S. at pp. 166-168.)

An inference of discrimination may be established in a pattern of strikes against jurors of a particular race. (*Batson v. Kentucky, supra,* 476 U.S. at 97.) Such a pattern may be evident when a prosecutor uses peremptory challenges to eliminate all, or nearly all, of the members of a particular race. (*Miller-El v. Cockrell* (2003) 537 U.S. 332, 331.) In addition, a prima facie case may be established by a disproportionate number of peremptory challenges by the prosecution against members of a particular race. (*Ibid,* see also *Overton v. Newton* (2d Cir. 2002) 295 F.3d 270, 279; *Fernandez v. Roe* (9th Cir. 2002) 286 F.3d 1073, 1078.) Finally, a prima facie case of racial discrimination may be established by demonstrating that the stricken jurors share only one characteristic–their race–and that in all other respects "they are as heterogeneous as the community as a whole." (*People v. Wheeler, supra,* 22 Cal.3d at pp. 280-81.)

The trial court erred by concluding that Mr. Cunningham had not established a prima facie case of a discriminatory purpose in the prosecution's race-based peremptory challenges. By the fourth challenge to an Africa-American juror in a case where the prosecution used only six peremptory challenges to seat twelve jurors, Mr. Cunningham clearly established a prima facie case that the prosecution used almost all of its peremptory challenges to exclude most of the potential African-American jurors. In addition, it is clear that the prosecution used a disproportionate number of its peremptory challenges (66%) to exclude African-Americans. Finally, the record demonstrated a prima facie case of discrimination because the four African-Americans stricken by the prosecution shared only one common characteristic–their race; in all other respects these four excluded jurors had little in common. Therefore, the trial court erred under *Wheeler* and *Batson* by not requiring the prosecution to meet its burden to provide a valid, race neutral justification for the strikes.

i. An Inference of Discrimination Was Established by a Pattern of Disproportionate Peremptory Challenges Against Black Jurors.

Mr. Cunningham demonstrated that there was a reasonable inference that the prosecution used its peremptory challenges to systematically exclude African-Americans from the jury because four of its first six challenges (sixty-six percent) were directed at black jurors, while the remaining two challenges to the petit jurors

were directed at a veteran and a veteran's spouse. (See, RT Vol. 10, p. 2408-14, 2443A, 2524-29.) Clearly, the prosecution's four peremptory challenges of African-Americans represented the majority of the State's strikes. This clear pattern of excluding African-Americans created a strong inference that the prosecution improperly exercised its peremptory challenges on the basis of race and easily established a prima facie case of discrimination in the selection of the petit jury.

Where a significant percentage of the prosecution's peremptory challenges are directed at a single, identifiable group, an inference of discrimination is appropriate (despite the absence of any finding of a prima facie case). (*People v. Wheeler, supra,* 22 Cal.3d at 280.) Therefore, a defendant can make a prima facie showing that the prosecution exercised a peremptory challenge for a discriminatory purpose based on evidence of a statistical disparity alone. (*Williams v. Runnels* (9th Cir. 2006) 432 F.3d 1102, 1107, see also *United States v. Ocoha-Vasquez* (11th Cir. 2005) 428 F.3d 1015, 1044; *United States v. Stephens* (7th Cir. 2005) 421 F.3d 503, 512-13.)

The fact that the jury ultimately seated contained two African-Americans does not ameliorate the discriminatory purpose inherent in the prosecution's peremptory challenges. This is so because the fact that a prosecutor allowed some members of a challenged group to remain on the jury does not exclude the possibility that other peremptory challenges were improperly motivated. (*People v. Snow* (1987) 44 Cal.3d 216.) To allow such a practice "would provide an easy means of justifying

a pattern of unlawful discrimination which stops only slightly short of total exclusion." (*Id.* at p. 225, citing *People v. Motton* (1985) 39 Cal.3d 596, 607-608.)

The record of the jury selection during the penalty phase establishes a strong inference that the prosecution used its peremptory challenges on the basis of race. (See, *Cooper v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1046; *People v. Box* (2000) 23 Cal.4th 1153, 1188, fn. 7.) *Two-thirds* of the prosecutor's peremptory challenges during the selection of the first twelve jurors were aimed at African-Americans, even though only six African-Americans were called to serve on the petit jury; in contrast the prosecution excluded only two white potential jurors, even though white jurors made up the majority of the jury venire. As the United States Supreme Court has recognized, "[h]appenstance is unlikely to produce this disparity." (*Miller-El v. Cockrell, supra*, 537 U.S. at p. 342 [prosecutor's use of 10 of 14 strikes against African-Americans, resulting in only one African-American serving on the jury was evidence of race-based use of peremptory challenges].)

The trial court's finding that the defense failed to make a prima facie showing of racial discrimination is not supported by the available facts. (See, e.g., *People v. Turner* (1986) 42 Cal.3d 711, 720; see also *United States v. Battle* (8th Cir. 1987) 836 F.2d 1084, 1085-1086.) The trial court erred because the statistically significant pattern of the prosecution's excessive peremptory challenges against African-Americans raised a reasonable inference of discrimination.

ii. An Inference of Discrimination Was Present Because the Stricken Jurors Shared Only One Common Characteristic–Their Race.

The record of the jury *voir dire* demonstrates further that Mr. Cunningham established a prima facie case of discrimination because it appears that the four African-Americans removed by the prosecution shared only one characteristic in common, their race. A comparison between the *voir dire* responses of these four African-American jurors evinces that the exclusion of these jurors was not race neutral. Mr. Cunningham respectfully submits that the essential differences between the four excused African-American potential jurors show that they only reason all four were removed by the prosecution was simply because they were black.

During *voir dire,* juror A.C. agreed that she was "kind of" opposed to the death penalty but she indicated that she could still vote to impose the death penalty if the circumstances of the offense or the offender justified such a severe penalty. A.C. stated that she was not against the death penalty and was for it depending on the circumstances. (RT Vol. 8, pp. 2105-2106.) In response to a question from the prosecutor about why she left portions of her juror questionnaire blank, A.C. said "you only hear very few [reports] about the death penalty. And most of the time when you hear it, it mostly deals with massive killers and stuff like that." (RT Vol. 8, p. 2111.) Finally A.C. recalled that in 1968, during the Vietnam War, she was 18 years old and attended Los Angeles City College where she had many friends who

had served in Vietnam. (RT Vol. 9, p. 2329.)

Potential juror S.M-A. indicated during *voir dire* that she was a social worker for Los Angeles County with a caseload of fifty children who were wards of the court and that she regularly dealt with lawyers, judges, psychiatrists and counselors. (RT Vol. 10, pp. 2442-2443.) S.M-A. also disclosed that she would be reluctant to impose the death penalty in this case because she was generally opposed to capital punishment and she did not want to have the consequences of the decision weighing on her conscience; however, S.M-A. also acknowledged that, in an appropriate case, she could return a sentence of death if "the bad things about the defendant and about the crime substantially outweigh any of the good things the defense has put on." (RT Vol. 8, pp. 2121-23.) Finally, S.M-A. told the court and counsel that her step-mother's granddaughter was accidentally killed by members of the Los Angeles County Sheriff's Office while the granddaughter was a bystander during an armed robbery of a convenience store but that she did not believe that the Sheriff's Deputies who were involved should have been criminally prosecuted for murder. (RT Vol. 10, pp. 2441-42.)

In his responses during *voir dire*, juror A.L. was not asked to express his opinion about the death penalty but was questioned about how the pre-trial publicity from the O.J. Simpson case might affect him. In response, A.L. said that he primarily watched public television and that, other than the McNeil-Lehrer Report,

he was hardly ever around a television and only discussed the O.J. Simpson case with co-workers at his office. (RT Vol. 9, p. 2282-83.) A.L. also admitted that, as a relatively young man, he did not have that much experience in learning about the Vietnam War. (RT Vol. 9, pp. 2324-25.)

Still, none of the four excluded jurors was as extensively challenged during voir dire as D.W, who was also African-American. Indeed, no juror was questioned publicly by the prosecution more relentlessly than potential juror D.W. As the prosecutor acknowledged, he "picked on" D.W. during *voir dire* because she was a prison guard, because her father had been in the military, and because she was interested in sociology and psychological counseling (RT Vol. 9, pp. 2351-56; see also RT Vol. 9, pp. 2287-90, 2341-42.) The prosecution challenged D.W. in her statement in her juror questionnaire that she would be hesitant to impose the death penalty on an individual who suffered from mental health problems; in response D.W. assured the prosecutor that no single factor would be determinative for her in selecting an appropriate penalty and "I would definitely have to weigh everything out." (RT Vol. 9, pp. 2357-58.) D.W. also indicated that she completely disagreed with a juror who earlier in the *voir dire* proceedings expressed obvious contempt for psychologists and psychological testimony. (RT Vol. 9, p. 2360.)

The four African-Americans who were peremptorily excused by the prosecution were remarkably diverse and included an older woman who came of age

during the height of the Vietnam War, a middle aged prison guard, a social worker, and a younger office worker. Some of these four jurors had strong feelings against the death penalty, some did not. Some had not given much thought to the death penalty for years, others stayed regularly informed on current events by watching public television. Some had fixed positions about the role of psychological testimony in a criminal case or the effect of the Vietnam War on returning United States soldiers, others had never given these issues any serious thought.

It is sadly apparent that the only thing these four excused jurors had in common was that they were all African-Americans. Aside from this impermissible factor, none of the four potential jurors shared any common characteristics with the other African-Americans in the jury venire. Therefore, this single common characteristic demonstrated further that Mr. Cunningham adequately established a prima facie case that the prosecution improperly used its peremptory challenges to exclude African-Americans.

B. The Trial Court Abdicated its Duty to Determine Whether the Prosecution Purposefully Discriminated Against Potential Jurors.

A trial court commits reversible error when it fails to discharge its duty to conduct a meaningful three-step analysis under *Batson* and *Wheeler*. (*People v. Turner, supra,* 42 Cal.3d at p. 828; *People v. Hall* (1983) 35 Cal.3d 161, 169.) While the trial court is not required to make specific or detailed comments for the record

to justify every instance in which a prosecutor's reason for exercising a peremptory challenge is accepted by the trial court, the court must nonetheless conduct a sufficient inquiry to permit meaningful appellate review of the alleged violation. (*People v. Reynoso* (2003) 31 Cal.4th 903, 919.)

When the trial court does not make a sincere and reasoned effort to evaluate the genuineness of the prosecution's challenged use of its peremptory removal of potential jurors, and does not carefully evaluate any explanation offered by a prosecutor, the resulting error is reversible *per se*. (*People v. Turner, supra,* 42 Cal.3d at p. 728.) "Such abdication is inconsistent with the court's obligations under *Wheeler,* and . . . must be held to constitute error requiring reversal." (*People v. Hall, supra,* 35 Cal.3d at p. 169.)

In most cases it must be presumed that the prosecutor uses peremptory challenges in a constitutional manner; therefore, this Court generally defers to the trial court's ability to distinguish "bona fide reasons from sham excuses." (*People v. Lewis* (2006) 39 Cal.4th 970, 1009.) However, although the prosecution is given wide latitude in the exercise of peremptory challenges, the prosecution may not exclude a juror based only on the juror's race by relying on "implausible or fantastic justifications" to mask purposeful discrimination. (*Puckett v. Elem* (1995) 514 U.S. 765, 768.) When the prosecutor's stated reasons for removing a juror are either unsupported by the record, inherently implausible, or both, more is required of the

trial court than a global finding that the prosecutor's challenges appear to be legitimate. (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

Here, despite a pattern of race-based challenges, the prosecution was never *formally* called upon to explain its reasons for the four dismissals of African-Americans so the trial court could fairly evaluate if the prosecution's use of its peremptory challenges was legitimate. (See, e.g., *People v. Lewis, supra,* 39 Cal.4th at 1010.) Even though the trial court explicitly refused to find a prima facie case of discrimination in the exercise of the prosecution's peremptory challenges, the court nevertheless belatedly offered the prosecution an opportunity to memorialize a statement of reasons for three of its four peremptory challenges to African-Americans. However, the implausible explanations offered by the prosecution ultimately provided additional evidence to support an inference that the prosecution improperly exercised four race-based peremptory challenges to remove African-Americans.

The United States Supreme Court in *Miller-El v. Dretke* (2005) 545 U.S. 231 approved a comparative analysis of excluded juror's *voir dire* responses to the non-African-American panelists the prosecutor did not excuse. (*Id.* at 252.) The *Miller-El* court emphasized that *Batson* challenges were not designed to be an exercise in creating any ration basis to exclude a juror and emphasized that if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-

similar non-black who is permitted to serve, this comparative analysis is evidence tending to prove purposeful discrimination to be considered at Batson's third step." (*Ibid.*)

However, *Miller-El* does not mandate a comparative juror analysis in a "first stage" *Wheeler/Batson* challenge. (*People v. Bell, supra,* 40 Cal.4th at p. 601.) "Whatever use comparative analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications are pre-textual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales." (*People v. Bonilla, supra,* 41 Cal.4th at p. 350.) Nevertheless although a comparative analysis of juror responses may be largely useless in demonstrating a prima facie case of an improper racial motive in the exercise of peremptory challenges, in certain narrow circumstances a comparative analysis of juror responses may still be applied during a "first stage" *Batson* challenge solely to determine whether "the strikes are so clearly attributable to [an] apparent non-discriminatory reason that there is no longer any suspicion or inference of discrimination in those strikes." (*United States v. Stephens* (7th Cir. 2005) 421 F.3d 503, 516.) Under these narrow circumstances, if a court compares panelists' *voir dire* responses to determine whether the apparent non-discriminatory reason applies just as well to the un-excused White panelist, then there is a prima facie case which requires the prosecution to provide the *actual*, race-neutral explanation for the peremptory challenge. (*Id.* at

516-18.)

The prosecutor explained that he removed potential juror D.W. because during *voir dire* he perceived her to be "removed" and "argumentative" and he "felt she was on the defensive." (RT Vol. 10, p. 2526.) The prosecutor also commented that her occupation as a prison guard was a potential problem and that her views were "extremist." (RT Vol 10., p. 2526.) However other white male correctional officers, like R.H. , were not questioned nearly as vigorously as D.W. (see RT Vol. 10, pp. 2480-83, 2489-92), which might therefore legitimately explain D.W.'s perceived defensiveness.

As to potential juror A.C., the prosecution claimed that he struck her from the jury panel because she did not fill out many of the questions in the juror questionnaire concerning the death penalty, and yet he nevertheless determined she had severe reservations about capital punishment. (RT Vol. 10, p. 2528.) However, other white jurors–like R.H– indicated that he believed he could only vote for the death penalty if the case was proven beyond a shadow of a doubt (RT Vol. 10, p. 2490) and at least one other white juror, P.B., also failed to complete significant portions of the questionnaire but these similar failings did not likewise result in pointed questioning by the prosecutor. (RT Vol. 10, pp. 2460-61.)

Finally, the prosecutor explained that he struck S.A-M. because, based on her extensive responses to the questionnaire, he believed that she had serious

reservations about the use of the death penalty. (RT Vol. 10, p. 2528.) Yet, again, the prosecutor's vague suspicion only seemed to apply to potential African-American jurors because, for other non-black jurors who may have expressed reservations about the pending task, the prosecution was not nearly as concerned about the juror's attitude toward the death penalty. Instead, so long as the prosecutor exacted an assurance from these non-black potential jurors that they had the fortitude to vote for a sentence of death, the prosecutor's reservations were apparently assuaged. (See, e.g., RT Vol. 10, p. 2496 [prosecutor stopped questioning potential juror B.H. when he assured him that he had the moral fiber to vote for the death penalty]; see also RT Vol. 10, p. 2508 [juror B.A. could set aside his basic criticism of the criminal justice system and consider only the facts of the case].)

A comparison of the reasons offered by the prosecution to excuse the four African-American jurors with the responses of other, similarly situated non-black jurors who were seated for the penalty phase demonstrates that the prosecution's stated, race-neutral explanation for striking African-Americans was disingenuous. "[T]he more that comparative analysis of the objective reasons for the exercise of peremptory challenges against minority jurors points toward disparate treatment based on race or some other improper category, the less the court should credit [the prosecutor's] purely subjective reasons." (*People v. Jackson, supra,* 13 Cal.4th at p. 1250.)

Because the trial court made a specific finding that there was not a prima facie showing of an intentional exclusion of African-Americans before the prosecutor offered any of his allegedly race neutral reasons (RT Vol. 10, p. 2524), the prosecution's belated explanation of his peremptory challenges is largely irrelevant. Nonetheless, the prosecution's contrived rationalization for peremptorily striking three African-Americans, which often applied equally to many other Caucasian jurors who were seated as jurors in the penalty phase, demonstrate that the prosecution's allegedly race-neutral explanation for exercising his peremptory challenge was a pretext, thereby providing additional evidence in support of a prima facie case of an improper discriminatory purpose.

C. The Improper Removal of Potential Jurors Is Automatically Reversible.

"The right to a fair and impartial juror is one of the most sacred and important of the guarantees of the constitution. Where it has been infringed, no inquiry as to the sufficiency of evidence to show guilt is indulged and conviction by a jury so selected must be set aside." (*People v. Wheeler, supra,* 22 Cal.3d at p. 238.) Even the exclusion of a single prospective juror for an impermissible reason requires automatic reversal. (*People v. Silva* (2001) 25 Cal.4th 345, 386.)

The error in removing a juror because of the prosecution's improper discriminatory purpose is reversible *per se*. (*People v. Wheeler, supra,* 22 Cal.3d at p. 283.) When the challenged party fails to demonstrate that the jurors in the suspect

classification were not excluded because of group bias, the error is prejudicial *per se*. (*People v. Turner, supra,* 42 Cal.3d at p. 728.) In addition, if the trial court does not satisfy its *Batson/Wheeler* obligations by refusing to consider the challenge, or by accepting meaningless explanations to justify the removal of jurors because of their race, the resulting conviction must be reversed. (*People v. Allen* (2004) 115 Cal.App.4th 542, 553; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1125.)

This case does not involve the improper removal of a single prospective juror; instead, the *Wheeler/Batson* error in this case affected four potential jurors who each had an unqualified right to serve on the jury and to be free from discrimination based on race. Therefore, the improper removal of these four African-American potential jurors without an adequate, race-neutral justification must lead to the reversal of Mr. Cunningham's sentence of death.

X. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT A CONTINUANCE TO AVOID CONDUCTING VOIR DIRE IN AN UNDULY PREJUDICIAL ATMOSPHERE.

Mr. Cunningham contends that the trial court violated his state and federal constitutional right to due process and a fair trial with a reliable judgment of death in a capital murder prosecution when the court refused to continue the case to avoid conducting voir dire in this case in a period shortly after the bombing of the federal building in Oklahoma City by a veteran of the United States Army. (U.S. Const., Amend. V, VI, VIII, XIV, Cal. Const., art. I, § 15, 16.) Mr. Cunningham contends

that his convictions must be reversed because the trial court abused its discretion in denying a requested continuance of the penalty phase to his manifest prejudice.

The right to a fair trial is a fundamental liberty. (*People v. Houston* (2005) 130 Cal.App.4th 279, 311.) The state and federal constitutional guarantee of due process ensures that "a criminal defendant has the right to be tried in an atmosphere undisturbed by public passion." (*Ibid.*) That right was denied to Mr. Cunningham in this case.

Prior to jury selection during the penalty phase, counsel for Mr. Cunningham requested a continuance and asked that jury selection not begin until September. In support of the motion counsel alleged that the penalty phase jury selection should be continued past August 1995 because of the recent bombing of the Murrah Federal Building in Oklahoma City on April 19, 1995. (CT Vol. 6, p. 1494.) Counsel argued that there was good cause for a continuance because of the close "interconnection of some of the major issues in Mr. Cunningham's life, and of those persons accused of the bombing of the federal building in Oklahoma City." According to counsel, "the current climate of public opinion will make it particularly difficult to pick a jury in this case." (CT Vol. 6, p. 1493.) Consequently, counsel for Mr. Cunningham argued that good cause was present for a continuance so Mr. Cunningham would not be forced to conduct *voir dire* proceedings in an unduly prejudicial atmosphere. (CT Vol. 6, pp. 1485-1501.)

In support of the motion to continue, counsel for Mr. Cunningham submitted a declaration from Dr. Richard Hall, a licensed clinical psychologist. Dr. Hall had expertise in assessing unduly prejudicial judicial proceedings and opined that:

> "in order for Defendant Cunningham to receive a fair trial without bias and prejudice stemming from the nationwide horror in the wake of the events in Oklahoma City two weeks ago, and the linking of those events in highly publicized ways to the United States Army and its past and present members, a continuance of a minimum of three months should be granted. . . .Defendant Cunningham can then be assured of a jury pool with a more informed and measured perspective on this recent tragedy." (CT Vol. 6, p. 1501.)

The prosecution opposed the request to continue the voir dire of the jury in this case until September 1995. (RT Vol. 5, p. 1136.) Citing the third-year anniversary of the case and the remaining two-and-a-half months before the jury was to be empaneled following jury selection, the prosecution argued that there was sufficient time to ameliorate any prejudice caused by any potential comparison of this case with the Oklahoma City bombing. (RT Vol. 5, p. 1137.) The prosecution also argued against any continuance caused by the passions aroused following the Oklahoma City bombing by noting that it was uncertain that any continuance would be effective in reducing prejudice because there could always be other terrorist bombings in the future. (RT Vol. 5, p. 1137.) Finally, the prosecution objected to the continuance by arguing that their witnesses "just all want to get it over with. They want to have it done with." (RT Vol. 5, p. 1138.)

The trial court denied Mr. Cunningham's motion to continue. The court was

of the opinion that the events in Oklahoma City would not have any significant impact on the selection of the jury which would justify a continuance. (RT Vol. 5, p. 1142.)

A. The Trial Court Abused Its Discretion in Denying a Continuance.

Generally, 'the decision whether or not to grant a continuance of a matter rests in the sound discretion of the trial court after a fair consideration of the benefit to the moving party and the burden on the witnesses, the jurors and the court. (*People v. Panah* (2005) 35 Cal.4th 395, 423.) However, the action of the trial court in denying a motion to continue would be disturbed on appeal if the trial court abuses its discretion. (*People v. Parker* (1965) 235 Cal.App.2d 100, 104.)

In ruling on a motion for a continuance, the trial court must determine "whether substantial justice will be accomplished or defeated by granting the motion." (*People v. Panah, supra*, 35 Cal.4th at p. 423.) However, in considering the motion the court must also be mindful of the fact that "[a] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend . . . an empty formality." (*Ungar v. Sarafite* (1964) 376 U.S. 575, 589.)

Defendant bears the burden of establishing that the denial of a request for a continuance was an abuse of discretion. (*People v. Panah, supra,* 35 Cal.4th at 423.) "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process." (*Ungar v. Sarafite, supra,* 376 U.S. at p. 589.)

However, it is clear that a trial court abuses its discretion in failing to grant a reasonable continuance if the denial of the continuance deprives the defendant of a fair trial or otherwise affects the outcome of the judgment. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529-30; see also *People v. Crandell* (1988) 46 Cal.3d 833, 855.)

The trial court abused its discretion because the failure to grant a continuance subjected Mr. Cunningham to jury selection during a hostile period which effectively prevented him from receiving a fair and impartial jury. Instead, Mr. Cunningham contends that, because the trial court denied the motion to continue, he was subjected to jury selection procedures "in a community atmosphere which may have been pre-heated by unfavorable pre-trial publicity." (*People v. Parker, supra,* 235 Cal.App.2d at p. 104.)

The motion to continue the penalty phase was supported by good cause. Counsel alleged that good cause was present because of the difficulty of selecting a fair and impartial jury following the bombing of the federal building in Oklahoma City, and counsel therefore requested that the voir dire not begin until September 1995. (CT Vol. 6, pp. 1485, 1494.) Counsel was legitimately concerned that similarities between this case and the Oklahoma City bombing–which both presented cases of multiple murder by a troubled veteran of the United States Armed Forces–would prevent Mr. Cunningham from receiving a fair trial.

In addition, in support of the motion to continue Mr. Cunningham offered a declaration from an expert witness on pre-trial publicity and jury selection. This expert concluded that a continuance was necessary so that Mr. Cunningham's jury selection would not take place in a highly charged atmosphere which was likely to prejudice Mr. Cunningham. Therefore, good cause was present for the continuance.

B. Mr. Cunningham Was Entitled to a Continuance to Obtain a Fair and Impartial Jury.

"A criminal defendant has the right to be tried in an atmosphere undisturbed by public passion." (*People v. Houston* (2005) 130 Cal.App.4th 279, 311, citing *Norris v. Risley* (9th Cir. 1989) 878 F.2d 1178, 1181.) "The goal of a fair trial in the locality of the crime is practically unattainable when the jury panel has been bathed in streams of circumstantial incrimination flowing from the news media." (*Corona v. Superior Court* (1972) 24 Cal.App.3d 872, 877-78.) Consequently, a defendant's state and federal constitutional rights to due process and a fair trial are violated if he is forced to stand trial in an environment "so inherently prejudicial as to pose an unacceptable threat . . . of impermissible factors coming into play." (*Ibid.*)

The primary purpose of *voir dire* is to determine the competency and qualification of jurors to serve. (Penal Code, §§ 1066-1089.) The conduct of the voir dire and the qualification of jurors are matters within the wide discretion of the trial court. (*Odle v. Superior Court* (1983) 32 Cal.3d 932, 944.) However, a trial court is obligated to go to great lengths in order to select jurors who appear to be

impartial and the court must do all that it can to guard against allowing *voir dire* to take place in an atmosphere where public sentiment is poisoned against the defendant. (*Murphy v Florida* (1975) 421 U.S. 794, 802-803.)

The trial court erred in refusing to continue the commencement of the penalty phase voir dire for three months, because Mr. Cunningham was forced to conduct voir dire in an atmosphere which created a strong likelihood of a bias against him. For example, the voir dire in this case occurred near the end of the O.J. Simpson trial, which created an atmosphere in which jurors were suspicious of the effectiveness of the criminal justice system. (R.T. Vol. IX, pp. 2280-90; see, e.g., p. 2282 [potential juror described the Simpson trial as a "farce"].) More important, the bombing of the Oklahoma City federal building had the inevitable effect of engendering suspicion in criminal cases against ex-veterans of the Armed Forces, especially if those veterans relied on psychological defenses in challenging the charged criminal offense. Consequently, when the prosecution was questioning potential jurors about mental health defenses related to service in the military, many jurors expressed disbelief and some even demonstrated unmistakable hostility at the prospect of considering such psychological testimony. (RT Vol. 9, p. 2360.)

The accused, whose life hangs in the balance, should not be required to face the acute dangers of an partial jury selected during unfair voir dire proceedings where there was an overwhelming atmosphere of hostility to the defendant.

(*Martinez v. Superior Court* (1981) 29 Cal.3d 574, 577-78.) Therefore, under these circumstances, the failure to grant a continuance of the voir dire proceedings created an unduly prejudicial atmosphere which prejudiced Mr. Cunningham's state and federal constitutional right to due process and a fair trial before an impartial jury.

XI. THE TRIAL COURT ERRED BY FAILING, *SUA SPONTE*, TO APPOINT A SECOND ATTORNEY FOR MR. CUNNINGHAM IN THIS CAPITAL CASE.

Mr. Cunningham contends that the trial court violated its duty under the Sixth and Eighth Amendments of the United States Constitution and Article I, section 15 of the California Constitution by failing to appoint a second qualified counsel, *sua sponte*, to assist Mr. Cunningham in this death penalty case. (Cf., *Wheat v. United States* (1988) 486 U.S. 153; *People v. Ortiz* (1990) 51 Cal.3d 975.) The failure to appoint a second attorney *sua sponte* violated Mr. Cunningham's state and federal constitutional right to counsel and undermined the reliability of the sentence of death because, but for the failure to appoint a second attorney, the result of this proceeding may have been different.

A. Mr. Cunningham Was Entitled to Two Attorneys.

The right to counsel for any person charged with a crime is guaranteed by both the federal and state constitutions. (U.S. Const., Amend. VI; Cal. Const., art. I, § 15.) To meet this constitutional requirement, the defendant must be provided effective legal assistance in the preparation and trial of his capital case. (*Powell v.*

Alabama (1932) 287 U.S. 45, 71; *Keenan v. Superior Court* (1982) 31 Cal.3d 424.) If the accused is unable to employ private counsel, then the court must appoint counsel without charge. (*Gideon v. Wainwright* (1963) 372 U.S. 335.)

Generally, in California the appointment of a second counsel in a capital case has not been considered "an absolute right protected by either the state or the federal constitution." (*People v. Jackson* (1980) 28 Cal.3d 264, 286-88.) Nevertheless, both California law (Pen. Code, § 987) and the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel In Death Penalty Cases ("ABA Guidelines")[21] plainly recognize that the defendant in a capital case should receive two court-appointed lawyers in any capital case. Therefore, Mr. Cunningham contends that the failure of the trial court to appoint second counsel *sua sponte* was unreasonable and contrary to the prevailing professional norms of defending a death penalty case.

The demands of pre-trial preparation in a complex death penalty weigh heavily in favor of appointing an additional attorney for the accused. (*Keenan v. Superior Court, supra*, 31 Cal.3d at 430-32.) Consequently, the American Bar Association's Standards for the Appointment and Performance of Defense Counsel in Death Penalty Cases provide that, in designating counsel for the defendant a capital case, there should be a lead counsel and "one or more associate counsel."

---

[21] The American Bar Association Guidelines have long been considered "guides to determining what is reasonable." (*Wiggins v. Smith* (2003) 539 U.S. 510, 524.)

(ABA Guidelines, Guideline 10.4–The Defense Team, cited at 31 Hofstra L.Rev. 914, 999 (2003).)

At least two attorneys are essential in a capital case because "the provision of high quality legal representation in capital cases requires a team approach that combines the different skills, experience, and perspectives [of others, and] . . . enhances the quality of representation by expanding the knowledge base available." (ABA Guidelines, 31 Hofstra L.Rev. at 1002, Guideline 10.4, Commentary.) Moreover, the requirement of two appointed attorneys for the defendant in a capital case is the minimum which is necessary to comply with prevailing professional standards and, "in most cases, at least as trial approaches, the provision of high quality representation will require at least some contributions by additional lawyers–for example, a specialist to assist with motions practice." (*Id.* at 1004, Guideline 10.4 Commentary.) Together these Guidelines and state and federal statutes "reflect a special concern for the adequacy of legal services received by indigents who face the possibility of the death penalty . . . . [and] mandate appointment of assistant counsel 'in a timely manner' which ensures under the particular circumstances of the case that both attorneys representing the indigent defendant have time to effectively prepare for trial." (*State v. Hucks* (N.C. 1988) 323 N.C. 574, 577, 374 S.E.2d 240, 242-43.)

In certain circumstances, the trial court abuses its discretion by failing to

appoint second counsel in a capital case. (*Keenan v. Superior Court, supra*, 31 Cal.3d at 432, see also Cal. R. Ct. Rule 4.117[c](1); 18 U.S.C. § 3005, N.Y. Jud. Law § 35(b)(2) *State v. Hucks, supra,* 323 N.C. at 577, 374 S.E.2d at 243 [North Carolina General Statute § 7A-450(b)(1) gives a right to assistant counsel], but see *People v. Williams* (2006) 40 Cal.4th 287, 302, fn. 2 [this Court did not reach the question whether the trial court abused its discretion in refusing to appoint second counsel].) The trial court may also err if it fails to advise the defendant of the right to two attorneys in a capital case in order to ensure that "the defense would not suffer from insufficient manpower." (*Smith v. United States* (D.C.Cir. 1965) 353 F.2d 838, 845-846.) Finally, a trial court may abuse its discretion when it fails to conduct an adequate inquiry into the reasons for trial counsel acting alone in a death penalty case. (See, e.g., *People v. Jackson* (1980) 28 Cal.3d 264, 282, citing *Pierce v. United States* (D.C.App. 1979) 402 A.2d 1237, 1245.)

Mr. Cunningham's case was complex, requiring the use of a team of experts, including an investigator and a psychologist. Evidence offered in mitigation was located in Florida, Hawaii, South Dakota, and the archives of the United States Army in Washington, D.C., and this evidence raised significant questions about Mr. Cunningham's psychiatric condition. However, despite the mammoth responsibility inherent in subjecting the prosecution's case to meaningful adversarial review, Mr. Cunningham was consistently represented by only one attorney in this capital murder

prosecution.[22]

The trial court erred by failing to inquire *sua sponte* into the reasons for defense counsel acting alone in this capital murder prosecution without the assistance of second counsel. The trial court also erred in failing to advise Mr. Cunningham of his right to two attorneys or in failing to appoint second counsel *sua sponte*. The error is even more unreasonable in light of defense counsel's persistent representations that he could not timely attend to all of the responsibilities as lead counsel in a capital murder prosecution. (See, e.g., RT Vol. 2, p. 487; Vol. 3, p. 683; Vol. 3, pp. 707-708; Vol. 5, p. 1144.) Therefore, under the circumstances, Mr. Cunningham was denied his state and federal constitutional right to counsel in a death penalty case when the trial court failed, *sua sponte*, to appoint a second attorney to represent Mr. Cunningham in this capital murder case.

B. Mr. Cunningham Was Prejudiced By the Failure to Appoint A Second Attorney *Sua Sponte*.

This Court has rejected the claim that the failure to appoint a second attorney for the defendant in a capital case is structural error which is not subject to harmless error analysis. (*People v. Williams* (2006) 40 Cal.4th 287, 301.) Instead, this

---

22. Defense counsel acted alone at the guilt and penalty phases of the trial, without the assistance of second counsel. Defense counsel was only aided at times during the pre-trial portions of the case by a colleague from the San Bernardino County Public Defender's Office who presented evidence and argued the Motion to Strike the Jury Venire and who also assisted in the presentation of the defense requests for jury instructions during the penalty phase. (RT Vol. 5, pp. 1162-1169; 1179-1186; RT Vol. 18, pp. 5445-5495.)

Honorable Court has held that any error in the failure to appoint second counsel for the defendant in a capital murder case must be judged under the standard enunciated in *People v. Watson, supra,* 46 Cal.2d 818, 836, namely "whether it is 'reasonably probable' a result more favorable to the defendant would have been reached had the error not occurred." (*Ibid*, citing *People v. Clark* (1993) 5 Cal.4th 950, 997, fn. 22.)

Mr. Cunningham respectfully submits that he was prejudiced by the failure of the trial court to appoint second counsel, *sua sponte*, because it is reasonably probable that if second counsel had been appointed the result of the proceeding may have been different. In particular, Mr. Cunningham contends that if the trial court, *sua sponte*, appointed an associate counsel, his attorneys would have had a better opportunity to prepare his defense prior to the guilt and penalty phases of the trial.

Mr. Cunningham alleges that the lack of a second attorney on his defense team hampered his ability to mount a guilt penalty phase defense. Throughout the trial, defense counsel acknowledged that the demands of representing Mr. Cunningham were often overwhelming for one person. For example, counsel consistently explained that it was impossible for him to travel to the detention center and visit with Mr. Cunningham regarding each day's trial proceeding. (RT Vol. 2, pp. 365; 487; Vol. 4, p. 683; .)

Similarly, defense counsel consistently represented to the court that he was hampered in preparing for the guilt and penalty phases of the trial. (RT Vol. 4, p.

708; Vol. 5, p. 1144; Vol. 6, p. 1620.) Counsel told the court that because of an on-going investigation he was not fully prepared to describe Mr. Cunningham's background and personal history during the guilt phase (RT Vol. 3, p. 708) and consistently indicated that he could not provide expert witness reports because of staffing limitations. (RT Vol. 6, p. 1620.) Counsel for Mr. Cunningham explained that he was hampered in his ability to consult with expert witnesses because he lacked adequate support staff to transcribe tape recorded interviews of mitigation witnesses and that, as a result, he had been unable to review and summarize the results of numerous defense interviews in order to provide this information to the expert defense psychologists prior to the penalty phase. (RT Vol. 5, pp. 1143-1145.) This difficulty was simply one concrete example of many difficulties counsel encountered in defending the case alone.

The trial court erred in failing to appoint second counsel *sua sponte* and Mr. Cunningham was prejudiced by this error. Therefore, the judgment of death should be reversed because it is unfair and unreliable.

XII. THE TRIAL COURT ERRED IN FAILING TO EXCLUDE PHOTOGRAPHIC AND VIDEO TAPE EVIDENCE THAT WAS MORE PREJUDICIAL THAN PROBATIVE.

Mr. Cunningham contends that five exhibits which were graphic photographs of the crime scene at the Surplus Office Sales store (Exhibits 11, 19, 89, 90 and 91) and one video tape of the crime scene as it was on June 27, 1992, should have been

excluded because the evidence was irrelevant (see Evidence Code § 350) and because the pictures and the video tape were more prejudicial than probative (see Evidence Code § 352).[23] Mr. Cunningham submits that the admission of the photographs and the crime scene video tape was error and denied him due process of law under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, sections 7, 15, 17 and 24 of the California Constitution.

Prior to the penalty phase of the trial, Mr. Cunningham objected to the admission of five crime scene photographs and a crime scene videotape which depicted the positions of the three men who were killed at the Surplus Office Sales. (CT, Vol. 6 pp. 1517-22; RT Vol. 11, pp. 2823-25.) Mr. Cunningham argued that his offer to stipulate that the victims were alive before their death, along with other admissible evidence, rendered the photographs and the crime scene video tape ultimately irrelevant to any disputed material issues (or at least cumulative) and that all of the challenged photographs and the crime scene video were far more prejudicial than probative. (CT Vol. 6, pp. 1518-22.) Finally, Mr. Cunningham

---

23. The video tape of the crime scene at the Surplus Office Sales store on June 27, 1992 is to be distinguished from the video tape of the re-enactment of the crime scene made by Mr. Cunningham on August 2, 1992. The video tape of the crime scene depicts the bodies of the three men who were killed and includes close ups of the men's faces and the bloody duct tape which bound their hands. (RT Vol. 11, pp. 2823-2824.) In contrast, the video tape re-enactment depicted Mr. Cunningham walking through the Surplus Office Sales a month after the offense and recounting exactly what he did. (See, Section V, [C], *infra* at pp. 128-137.)

claimed that the improper admission of the photographs and video tape would render any resulting sentence of death unreliable, in violation of the Eighth Amendment of the United States Constitution and Article II, section 15 of the California Constitution. (See, RT Vol. 6, pp. 1584-86.)

The prosecution responded by arguing that the photographs and the crime scene video tape were admissible because they showed evidence of premeditation by depicting the assailant's vantage point at the time of the crime in a manner which was consistent with Mr. Cunningham's custodial statements to law enforcement. (RT Vol. 6, pp. 1584-85.) The prosecution also alleged that it had shown restraint in offering the photographs and the crime scene video tape because the State was "not using any autopsy photos." (RT Vol. 6, p. 1584.)

The trial court overruled Mr. Cunningham's objections and found that the disputed photographs "were highly probative on the circumstances surrounding the commission of the crimes" and that this probative value outweighed the prejudice caused by the graphic depiction of the crime scene. (RT Vol. 6, pp. 1585-87.) The court also found that the photographs were not duplicative of other evidence (RT Vol. 6, p. 1587.) Finally, after reviewing the video tape of the crime scene the trial court found that the close ups on the faces of the deceased and their bound and bloodied hands was probative to put the crime scene into perspective and concluded that the probative value of the crime scene video tape was outweighed by its

prejudicial effect. (RT Vol. 11, pp. 2824-2825.) Consequently, the trial court admitted both the challenged photographs as well as the video tape of the crime scene. (RT Vol. 6, p. 1587; Vol. 11, p. 2825.)

The trial court erred in permitting the admission of photographs which were more prejudicial than probative. The record demonstrates that the sole purpose of the photographs were to arouse the passions of the jury and impair the jury's fair and impartial consideration of the case. Mr. Cunningham contends that the admission of the photographs and the videotape of the crime scene violated his state and federal constitutional right to due process and a fair trial and a reliable judgment of death.

A. The Challenged Photographs Should Have Been Excluded.

An appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question. (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.) "The admission of photographs of a victim lies within the broad discretion of the trial court when a claim is made that they are unduly gruesome or inflammatory." (*Ibid.*) The court's exercise of that discretion will not be disturbed on appeal unless the probative value of the photographs clearly is outweighed by their prejudicial effect. (*Ibid*, citing *People v. Crittenden* (1994) 9 Cal.4th 83, 133-34.)

The rules pertaining to the admissibility of photographic evidence are well

settled: all relevant evidence is admissible unless it is excluded by the state or federal Constitution or by statute. (*People v. Carter* (2005) 36 Cal.4th 1114, 1167.) The admissibility of victim and crime scene photographs is governed by the same rules which govern the admissibility of evidence in general. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1170.) "Notably, however, the discretion to exclude photographs under Evidence Code section 352 is much narrower at the penalty phase than at the guilt phase. This is so because the prosecution has the right to establish the circumstances of the crime, including its gruesome consequences (§ 190.3, factor (a)) and because the risk of an improper guilt finding based on visceral reactions is no longer present." (*People v. Bonilla, supra,* 41 Cal.4th at pp. 353-54.)

1. The Photographs and Crime Scene Video Tape Were Not Relevant.

It is not enough for a prosecutor to merely espouse a theory of admissibility for proffered inflammatory evidence; there must be genuine relevance to the issues presented. (*People v. Turner* (1984) 37 Cal. 3d. 302, 321.) Consequently, each photograph or video must have probative value in proving contested issues at trial. (*People v. Scheid* (1997) 16 Cal.4th 1, 18.)

Here the State sought to admit the crime scene video tape and photographs in this case with the stated purpose of illustrating the prosecutor's theories regarding the sequence and timing of events. However, the photos did little to actually achieve that end. Instead, it appears that the prosecutor's articulated theories of relevance

were little more than a veiled attempt to justify the introduction of a maximum number of disturbing visual images, directed at exciting horror, pity or revulsion, rather than actually providing evidence to establish the circumstances surrounding the crimes.

Mr. Cunningham objected to the admission of the challenged photographs and video tape, claiming the photographs were designed to shock the jurors and therefore they would upset the balance of the penalty phase trial and undermine the reliability of any resulting death judgment. (RT Vol. 6, p. 1584.) This was particular true with respect to Exhibit 19, which was a blown-up photograph of the crime scene with a very graphic depiction of the manner in which the crimes were committed, and also applied to the video tape of the unaltered crime scene. (RT Vol. 6, pp. 1584-87; RT Vol. 11, 2824-2825; Vol. 13, pp. 4251-4256.)

Mr. Cunningham also argued that the photographs and the crime scene video tape had no probative value on any contested issues in the case because he conceded all of the essential, disputed facts in his custodial interrogation. For example, in his first confession Mr. Cunningham admitted shooting Wayne Sonke, David Smith, and Jose Silva during a robbery while the three men were lying on the floor of the Surplus Office Sales store with their hands bound with duct tape. Therefore, the cause and manner of death was not really a disputed issue in this case and the introduction of the gruesome crime scene photographs and video tape, which showed

the lifeless bodies of the three men, including close ups of their hands with blood flowing down the duct tape, was not necessary to establish that the victims all died as the result of gunshot wounds to the head. In addition, defense counsel's offer to stipulate to the fact that the three were murdered deprived the photographs and video tape of any significant probative value, apart from the shock value of showing the jury the ugly face of death. Finally, the deputy medical examiner testified in straightforward detail about the cause of death, the size, nature and locations of the wounds, the effect and meaning of the stippling observed on the victims' faces, and the presence of wounds which could be consistent with a struggle, thereby providing far more probative evidence of the manner of death than the photographs or video tape. (RT Vol. 12, pp. 3016-4122.) Therefore, under all of these circumstances it is apparent that the challenged photographs and crime scene video tape had little independent evidentiary value.

2. The Photographs and Video Tape Were More Prejudicial than Probative.

Evidence is substantially more prejudicial than probative if, broadly stated, "it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.'" (*Ibid*, citing *People v. Alvarez* (1996) 14 Cal.4th 155, 204, fn. 14.) The admission of relevant evidence will offend due process when the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.)

The prejudice which is proscribed by Evidence Code section 352 is any evidence which uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. (*People v. Garceau, supra,* 6 Cal.4th at p. 178.) Of course, all murder photographs are graphic and unpleasant, but that does not necessarily mean that the photographs are unduly prejudicial. (*People v. Carter, supra,* 36 Cal.4th at p. 1168.) However, a trial court's decision to admit crime scene photographs and video tapes will be reversed if the probative value of the photographs is clearly outweighed by their prejudicial effect. (*People v. Scheid, supra,* 16 Cal.4th at p. 18.)

The challenged photographs and the crime scene videotape should have been excluded because the evidence was far more prejudicial than probative. The probative value of each of the photographs was weak in comparison with its potential to prejudice the jury against Mr. Cunningham. For example, one of the photos, Exhibit 19, in particular was a blown-up photograph which graphically depicted three lifeless, bloody bodies. (R.T. Vol. 6, p. 1585.) Moreover, three of the other challenged crime scene photos were redundant of the positions of the body shown in other photographs. (RT Vol. 6, p. 1586.) Finally, the crime scene video tape unduly focused on the faces of the three men who were shot at the Surplus Office Sales and slowly zooms in on the gory details of the tape bound to the hands of the dead bodies. (RT Vol. 11, p. 2824.)

Mr. Cunningham objected to the admission of these photographs and crime scene video tape, claiming that the items were designed to shock the jurors, upset the balance of the penalty phase trial, and undermine the reliability of any resulting death judgment. (RT Vol. 6, p. 1584; RT Vol. 11, pp. 2822-24; RT Vol. 13, pp. 4251-56, 4263.) The trial court abused its discretion in admitting the prejudicial photographs and video tape because the photos and video seemed destined only for one particular, improper purpose–to inflame the passions and prejudices of the jury, not to enlighten them concerning any contested issue.

The challenged photographs ran a serious risk of undermining the fairness and reliability of the fact finding process. Accordingly, it was an abuse of discretion under Evidence Code section 352, for the jury to receive a multiplicity of graphically violent crime scene and autopsy photographs of each victim, over defense objection. (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1236-37; *People v. Anderson* (1987) 43 Cal.3d 1104, 1137.)

B. Mr. Cunningham was Prejudiced by the Improper Admission of the Photographic Evidence.

Mr. Cunningham contends that the erroneous admission of the challenged photographs and video tape in this case was not harmless. On the contrary, Mr. Cunningham alleges that, but for the improper admission of the challenged photographs in this case, it is reasonably probable that the jury would have reached a different result. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Under the *Watson* standard, the erroneous admission of a photograph or a crime scene video tape warrants reversal of a conviction if the appellate court concludes that it is reasonably probable the jury would have reached a different result had the photographs been excluded. (*People v. Carter, supra,* 36 Cal.4th at p. 1171.) An error in the admission of evidence is not harmless if it is reasonably probable that the admission of the evidence affected the jury's verdict. (*People v. Heard* (2003) 31 Cal.4th 946, 978.)

Mr. Cunningham believes that the photographic evidence in this case was unusually disturbing and unduly gruesome and was far more inflammatory than the testimony provided by the prosecution witnesses. Consequently, Mr. Cunningham's conviction should be reversed because it is reasonably probable the jury would have reached a different verdict if the photographs had been excluded.

XIII. THE TRIAL COURT ERRED IN FAILING TO DISCHARGE A JUROR WHO REPEATEDLY COMMITTED MISCONDUCT.

Mr. Cunningham contends that his state and federal constitutional rights to due process and a fair trial were violated when a juror, N.B., repeatedly committed misconduct by discussing the case with other jurors (despite the trial court's admonitions) and by expressing her opinion on the matter before the penalty phase decision was finally submitted to the jury. Mr. Cunningham contends that the sentence of death must be reversed because the persistent misconduct of juror N.B. deprived of him of his state and federal constitutional rights to due process and a fair

trail before an impartial jury and a reliable judgment of death.

The Due Process Clauses of the state and federal Constitutions ensure that the accused in a criminal case must receive a fair trial before an impartial jury, and a trial judge has a special duty to ensure the impartiality of the jury. (*Smith v. Phillips* (1982) 455 U.S. 209, 217.) An impartial juror is someone "capable and willing to decide the case solely on the evidence presented at trial." (*People v. Nesler* (1997) 16 Cal.4th 561, 581.)

If a juror is guilty of misconduct and if this failing prevents "a fair and due consideration of the case," then the defendant may be entitled to a new trial. (Section 1181, subd. (3), see also *In re Hamilton* (1999) 20 Cal.4th 273, 294.) In determining whether juror misconduct occurred which may justify a new trial, a court, in its discretion, may conduct an evidentiary hearing to resolve material conflicts in the facts which tend to show a possibility of prejudicial misconduct. (*People v. Duran* (1996) 50 Cal.App.4th 103, 113.) A defendant is entitled to a new trial if the admissible evidence presented at this hearing shows that a juror committed serious misconduct of a nature which was likely to have affected the verdict. (*People v. Will* (1992) 3 Cal.App.4th 16, 35, disapproved on other grounds in *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5.)

If a court determines that juror misconduct has occurred, it "must determine whether the misconduct was prejudicial." (*People v. Duran, supra,* 50 Cal.App.4th

at p. 113.) However, once juror misconduct has been established, prejudice is presumed and reversal is required "unless the reviewing court finds, upon examination of the entire record, there is no substantial likelihood that any juror was improperly influenced to the defendant's detriment." (*Ibid.*)

Mr. Cunningham's penalty phase trial was characterized by persistent juror misconduct. In particular, jurors in Mr. Cunningham's case–especially juror N.B.–committed misconduct by discussing the case amongst themselves and by forming an opinion on the case before it was finally submitted to the jury–despite the trial court's consistent admonitions to avoid this conduct.

During jury selection, the trial court learned that some potential jurors were discussing the case amongst themselves when the bailiff informed the court that Juror F.N. admitted that he had discussed some aspects of the case with other jurors. (RT Vol. 9, p. 2369.)[24] At the same time the court learned of the incident with F.N., the bailiff also told court that another juror, S.G., commented that two jurors, D.W. and N.B., may have discussed the case amongst themselves. (RT Vol. 9, p. 2372-

---

24. The court decided to question F.N. and asked him if he had discussed the case with other people and if so with whom. F.N. responded that he had discussed the case with other people, not jurors, but with a child of one of the men killed at the Surplus Office Sales. (RT Vol. IX, p. 2372.) F.N. acknowledged that it would be difficult for him to be fair and impartial after that conversation, and he was excused. (RT Vol IX, p. 2373.)

73.)[25]

Following this report, the court questioned Juror S.G. about the conduct of the other jurors. S.G. reported that juror N.B. and M.L. were talking about the case amongst themselves. (RT Vol. 9, p. 2375.) Although S.G. was not sure exactly what was being said, she did hear one of the jurors say that Mr. Cunningham looked cool and calculated, while the other said he did not look remorseful. (RT Vol. 9, p. 2376.)

The court then questioned Juror N.B., who denied discussing Mr. Cunningham's case with other jurors, and who told the court that she had not heard any other jurors discussing Mr. Cunningham's case. (RT Vol 9, pp. 2378-79.) However, when she was specifically asked if she heard any juror make any comment about Mr. Cunningham appearing cool and calculated, N.B. admitted that she did hear "someone" make a comment that Mr. Cunningham had cold eyes. (RT Vol. 9, pp. 2380-81.) When pressed further, N.B. disclosed that juror M.L. was the juror who made the comment and worried "I may have gotten her excused." (RT Vol. 9, p. 2380.)

---

25. At the same time the court learned of the potential juror's improper discussion amongst themselves, the court learned that the prosecutor approached juror D.W. during the recess in the voir dire proceeding and spoke with her about rolling her eyes when one potential juror expressed reservations about psychological testimony and, as the prosecutor related this conversation to the Court, D.W. purportedly explained to him that she was just blinking. (RT Vol. IX, p. 2370.) The trial court did not take any action in light of the prosecutor's contact with the potential juror.

Finally, the court asked juror M.L. if she was aware of any comments other jurors may have made about Mr. Cunningham and M.L. denied hearing anything. (RT Vol. 9, p. 2381.) When she was then specifically asked if she heard anyone say that Mr. Cunningham looked calm or cool, juror M.L. admitted that she heard some jurors make several "little comments," but none stood out in her mind. (RT Vol. 9, p. 2381.)

Following the court's inquiry, defense counsel moved to excuse juror M.L. (RT Vol. 9, p. 2382.) The prosecutor opposed the request. (RT Vol. 9, p. 2382-2383.) Initially, the trial court refused to remove juror M.L. (RT Vol. 9, p. 2386.) However, both defense counsel and the prosecutor subsequently agreed to stipulate that juror M.L. should be removed. (RT Vol. 9, p. 2389.)

Unfortunately, this initial act of misconduct was not the end of the jury's discussion of the case amongst themselves or the public expressions of an opinion about the case by some members of the jury before the matter was finally submitted to them. Instead, near the end of the penalty phase one of the attorneys in the Public Defender's Office overheard jurors S.F. and N.B. discussing the case amongst themselves, including a discussion about Vietnam. (RT Vol. 15, p. 4904.) According to the Assistant Public Defender, the conversation quickly turned to the topic of people lying in court and she heard Juror N.B. say that all lawyers lie and, although they act emotionally in their courtroom presentations, in fact the lawyers

do not have an emotional bone in their body. (RT Vol. 15, pp. 4904-4905.)

After receiving this report of additional juror misconduct, the trial court asked counsel if they wanted the court to conduct an inquiry. The prosecution indicated that it did not want an inquiry and insisted that a repeated admonition would be sufficient, but counsel for Mr. Cunningham indicated that he was "leaning towards" asking the court to inquire of the two jurors but he requested an opportunity to reflect on the need for a judicial inquiry. (R.T. Vol. 15, pp. 4906-4907.) The trial court then suggested an additional admonition, but delayed any action until counsel expressed their preference. (R.T. Vol. 15, p. 4906.)

The next day the trial court interviewed juror S.F. about the alleged misconduct. During the court's examination, S.F denied that he had discussed the case with other jurors but admitted that members of the jury constantly discussed the O.J. Simpson case. (RT Vol. 16, pp. 4909-4910.) S.F. also acknowledged that in the course of the discussion about the O.J. Simpson case there was "a lot of talk" about lawyers who lie and deceive and act emotionally when they are not. (RT Vol. 16, pp. 4910-11.)

The trial court then questioned juror N.B. about her conversations the previous day with juror S.F. (RT Vol. 16, p. 4911.) N.B. denied that she had discussed the case with her fellow jurors, indicated that she had not heard any jurors discussing Vietnam, and insisted that the jurors had simply been talking about the

O.J. Simpson case. (RT Vol. 16, pp. 4912-4913.) N.B. specifically denied that she had made any comment about lawyers lying in court and insisted that when her fellow jurors discussed the lawyers in the O.J. Simpson case she would "always say, well, they're in there doing a job." (RT Vol. 16, p. 4913.)

Mr. Cunningham contends that the trial court abused its discretion by failing to discharge juror N.B. in light of the evidence of her persistent juror misconduct. The trial court erred in failing to discharge juror N.B. after she repeatedly disregarded the trial court's instruction not to discuss the case with other jurors and not to form any opinion on the case before the matter was finally submitted to the jury. Mr. Cunningham contends that the failure to exclude juror N.B., despite the evidence of her actual bias before and during the penalty phase, violated his right to a fair and impartial jury in a capital murder prosecution as required by the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and article I, section 15 of the California Constitution and therefore his sentence of death must be reversed.

A. Mr. Cunningham Was Convicted by a Jury Which Included a Jury Member who Was Biased and Who Committed Misconduct.

The due process clauses of the state and federal constitutions demand that the jury be capable and willing to decide the case solely on the evidence before it. (*Smith v. Phillips* (1982) 455 U.S. 209, 217.) Although courts must be cautious in

discharging a juror solely on grounds of the juror's bias, a juror who has violated the express instructions of the court is viewed differently: "a juror's serious and willful misconduct is good cause to believe that the juror will not be able to perform his or her duty." (*People v. Daniels* (1991) 52 Cal.3d 815, 864.) It is particularly important to discharge a juror who has committed misconduct because:

> "Misconduct raises a presumption of prejudice [citations], which unless rebutted will nullify the verdict. The likelihood of the People rebutting the presumption is, of course, far less when the offending juror remains on the jury and participates in the verdict than when the juror is promptly removed. Consequently, substitution of an alternate juror upon a showing of good cause is desirable to maintain judicial efficiency. By means of substitution retrial of lengthy cases may be avoided." (*Ibid.*

The bias or prejudice of even a single juror is sufficient to deprive the defendant of his state and federal constitutional right to due process and a fair trial. (*Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973.) It is misconduct for a juror to pre-judge a case without hearing the evidence. (*People v. Nesler, supra,* 16 Cal.4th at p. 587.) For example, a juror violates his or her oath if the juror expresses a fixed conclusion about the facts of the case at the beginning of deliberations. (*People v. Cleveland* (2001) 25 Cal.4th 466, 485.) Pre-judgment of a case is misconduct because it defies the "constitutional right to trial by a jury consisting of twelve unbiased unprejudiced individuals." (*Clemens v. Regents of the University of California* (1971) 20 Cal.App.3d 356, 361.)

Moreover, it is misconduct for a juror to engage in conversations with anyone

(including fellow jurors) on a subject connected to the trial before the case is submitted to the jury for deliberation. (*People v. Jones* (1998) 17 Cal.4th 279, 310; Penal Code § 1122, subds. (a) and (b).) This misconduct is especially egregious if the juror's discussions with others violated the express instructions of the court. (*People v. Daniels, supra,* 52 Cal.3d at 864.)

Mr. Cunningham contends that juror N.B. committed misconduct in his case by pre-judging the penalty phase evidence before she was even selected as a juror. Prior to the selection of the penalty phase jury N.B. and a fellow juror discussed Mr. Cunningham's demeanor amongst themselves and concluded that he had "cold" eyes.

In addition, after the penalty phase jury was selected, juror N.B. continued to commit misconduct by discussing the case with her fellow jurors before the matter was finally submitted to the jury, including a discussion with a juror about defense attorneys who lie and fake an emotional response to the evidence. This serious misconduct was compounded by the fact that juror N.B.'s conversations and pre-judgment repeatedly violated the express admonitions which the court gave to the penalty phase jury at each recess.

A trial court's authority to discharge a juror is granted by Penal Code section 1089, which provides in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror . . . upon other good cause shown to the court is found to be unable to perform his duty . . . the court may order him to be

discharged." This Court reviews the trial court's determination not to discharge a juror for abuse of discretion and a juror's inability to perform as a juror must "appear in the record as a demonstrable reality." (*People v. Ramirez* (2006) 39 Cal.4th 398, 458.

The record in this case establishes as a demonstrable reality that juror N.B. had pre-judged the facts of the penalty phase prior to deliberations and repeatedly discussed the facts of the case with her fellow jurors outside of formal deliberations and even before the penalty phase of the case was finally submitted to the jury. These two breaches of juror N.B.'s oath justified her discharge. Therefore, the trial court erred in failing to remove juror N.B. because it was a demonstrable reality that juror N.B. was unable to fulfill her functions without bias.

In her first improper communication, juror N.B and another juror discussed their assessment that Mr. Cunningham had "cold eyes." The trial court learned of this misconduct from the bailiff and questioned N.B. in a proceeding where she was less than candid. (RT Vol. 9, pp. 2376-2381.) Nonetheless, despite the suggestion of misconduct, the trial court allowed N.B. to continue to serve in the jury venire and she was ultimately selected to serve on the penalty phase jury. (*Ibid.*)

Near the end of the case, juror N.B. was again discovered discussing certain facts of the case with a fellow juror, including the proclivity of defense lawyers to lie or be disingenuous. Thus, during a break in the penalty phase when counsel for

Mr. Cunningham was presenting evidence about the post traumatic stress of Vietnam War Veterans, a member of the San Bernardino County Public Defender's Office overheard juror N.B. and juror S.F. discussing the Vietnam war and the fact that lawyers were untruthful. (RT Vol. 15, p. 4828.) Once again, juror N.B. was less than truthful when she was confronted with this misconduct. (RT Vol. 16, pp. 4912-4913.)

In expressing concerns about juror N.B.'s subsequent comments, defense counsel objected in part that juror N.B. had been previously warned not to discuss the case and she deliberately violated the court's admonition. (RT Vol. 15, p. 4830.) Nonetheless, the trial court still refused to remove the juror after being confronted with a second discrete instance of misconduct.

Mr. Cunningham respectfully submits that the alpha and omega of juror N.B's improper conduct demonstrates that juror N.B. committed misconduct, was actually biased against Mr. Cunningham, and should have been removed. Consequently, the court erred by not removing juror N.B. because of her misconduct.

B. Mr. Cunningham Was Prejudiced by the Juror Bias and Misconduct.

Once misconduct is shown, prejudice is presumed and reversal is required. (*People v. Daniels, supra,* 52 Cal.3d at864.) Juror misconduct will nullify a verdict unless a review of the entire record reveals "there is no substantial likelihood that any juror was improperly influenced to the defendant's detriment." (*People v. Duran,*

supra, 50 Cal.App.4th at 113.) "Even one biased juror requires overturning the verdict" and a court must reverse the judgment even if "an unbiased jury would have reached the same result." (*In re Carpenter, supra,* 9 Cal.4th at p. 654.)

The question of whether juror misconduct was prejudicial is a mixed question of law and fact, and is subject to an appellate court's independent determination. (*In re Carpenter, supra,* 9 Cal.4th at pp. 658-59.) The court must determine independently whether the misconduct deprived the defendant of a fair trial. (*People v. Nesler, supra,* 16 Cal.4th at p. 582, fn. 5.)

To determine whether the defendant was prejudiced by alleged juror misconduct, the trial court must decide whether there is a substantial likelihood of actual bias. (*People v. Nesler, supra,* 16 Cal.4th 561, 578-79). Evidence of bias is present if the nature and surrounding circumstances attendant to the alleged misconduct indicate that it is substantially likely that a challenged juror was actually biased. (*People v. Ault* (2004) 33 Cal.4th 1250, 1258.) The judgment must be set aside if the court finds prejudice under this test. (*In re Carpenter, supra,* 9 Cal.4th at p. 653.)

The record shows with sufficient detail that Mr. Cunningham was prejudiced by the juror misconduct. The evidence of misconduct is sufficient to raise an un-rebutted presumption of prejudice and a substantial concern regarding the fairness of this trial. Mr. Cunningham was prejudiced by a juror who pre-judged the facts of

the case, who repeatedly discussed the case with fellow jurors before the matter was submitted, and who committed overt acts of misconduct by consistently disregarding the trial court's admonishments and instructions. During these discussions, this juror allegedly discussed Mr. Cunningham's cold eyes and calculating demeanor, the bogus claims of post-traumatic stress disorder by returning Vietnam Veterans, and the propensity of criminal defense lawyers to lie in court. The statements of juror N.B. plainly evince that she was biased against Mr. Cunningham and his defense. Therefore, it is clear that Mr. Cunningham was prejudiced by N.B.'s misconduct because there is a substantial likelihood that juror N.B. was biased against him.

XIV. THE TRIAL COURT ERRED IN FAILING TO MODIFY THE DEATH SENTENCE BECAUSE THERE IS INSUFFICIENT EVIDENCE TO SHOW THAT AGGRAVATING FACTORS OUTWEIGHED MITIGATING FACTORS TO JUSTIFY A SENTENCE OF DEATH.

The trial court denied Mr. Cunningham's automatic Motion for Modification of the death verdict pursuant to Penal Code section 190.4, subdivision (e), finding that evidence presented at the penalty phase was sufficient to justify a sentence of death. (RT Vol. 19, pp. 5746-5766/) However, Mr. Cunningham respectfully submits that the trial court erred in failing to modify the sentence of death because the evidence was insufficient to find that the aggravating circumstance outweighed the factors in mitigation beyond a reasonable doubt.

"Pursuant to section 190.4, in ruling upon an application for modification of a verdict imposing the death penalty, the trial court must re-weigh independently the evidence of aggravating and mitigating circumstances and then determine whether, in its independent judgment, the weight of the evidence supports the jury's verdict." (*People v. Crittenden* (1994) 9 Cal.4th 83, 150.) In other words, the statute requires the court to make an independent determination concerning the propriety of the death penalty and "to re-weigh the evidence in aggravation and mitigation and determine whether, in the court's own judgment, the weight of the evidence supports the jury verdict." (*People v. DePriest, supra,* 42 Cal.4th at 56.) The court must consider the aggravating and mitigating circumstances referred to in section 190.3 and state the reasons for its ruling on the record, but the court need not describe every detail supporting its ruling so long as the statement of reasons is sufficient to allow meaningful appellate review. (*People v. Lewis* (2006) 39 Cal.4th 970, 1064.)

On appeal, this Court independently reviews the trial court's determination after reviewing the record. (*People v. Mickey* (1991) 54 Cal.3d 612, 704.) However, this Court does not determine the penalty *de novo*. (*People v. Memro* (1995) 11 Cal.4th 786, 884.)

In ruling on the automatic motion for modification of sentence, the trial court recognized that the only evidence which the court could review was the evidence presented in the guilt and penalty phases. (RT Vol. 19, p. 5746.) The court also

acknowledged that it was obligated to independently determine the weight of the aggravating and mitigating evidence. (RT Vol. 19, p. 5747.)

In independently considering the evidence, the court concluded that there were several circumstances in aggravation. (RT Vol. 19, p. 5748.) The court found that the circumstances of the crime were particularly aggravating and concluded that the robbery of a place of business with which Mr. Cunningham was familiar reflected particular callousness and viciousness. The court also determined that the manner in which the crimes were carried out was especially cold-blooded. (RT Vol. 19, pp. 5749-5751.) Finally, the court recognized that Mr. Cunningham's prior criminal activity was a circumstance in aggravation. (RT Vol. 19, pp. 5751-5753.)

In mitigation of the offense, the trial court recognized that Mr. Cunningham's childhood was characterized by extreme physical, emotional and sexual abuse and ultimately abandonment. (RT Vol. 19, p. 5755.) The court acknowledged that Mr. Cunningham did not receive a traditional moral up-bringing, that his childhood consisted of a series of ongoing traumatic events, and that Mr. Cunningham's post-traumatic stress disorder from his childhood was compounded by additional violent events which Mr. Cunningham experienced in Vietnam. (RT Vol. 19, p. 5756.) The court recognized Mr. Cunningham's service to his country during war time, and acknowledged that, as a result of Mr. Cunningham's traumatic war experiences, his brain chemistry may have actually been altered. (RT Vol. 19, pp. 5758-5759.)

Finally, the court acknowledged that Mr. Cunningham was under stress and pressure at the time of the commission of the crimes, and indicated that psychiatric testimony suggested that Mr. Cunningham may have been in a dissociative state at the time of the offenses. (RT Vol. 19, p. 5760.)

Nonetheless, the trial court ultimately concluded that Mr. Cunningham was not mentally impaired at the time of the offense, that Mr. Cunningham never sought treatment for his post-traumatic stress disorder,[26] and that the totality of the mitigating circumstances did not sufficiently extenuate the aggravating circumstances. (RT Vol. 19, p. 5766.) The court concluded by independently determining that the aggravating circumstances in this case were so substantial in comparison to the mitigation evidence that it warrants a sentence of death. (RT Vol. 19, p. 5766.)

Mr. Cunningham contends that the trial court erred in denying his motion to modify the sentence of death because the evidence in mitigation outweighed the evidence in aggravation. Although the trial court recognized its duty to review the evidence independently and was not obligated to find that any particular evidence

---

26. The trial court was not correct in its factual conclusion that Mr. Cunningham never sought treatment or counseling for his post-traumatic stress disorder. In fact, the testimony of Diana Jamison during the guilt phase of the bench trial established that in May 1991 Mr. Cunningham went to a Veteran's Center because he had trouble sleeping. (RT Vol. 4, p. 835.) Diana also told the court that after the three and a half weeks after crimes, Mr. Cunningham telephoned her and asked her to call his counselor, Tom Kashen, at the Veteran's Center. (RT Vol. 4, p. 844.)

was mitigating, the trial court nonetheless erred because the mitigating aspects of Mr. Cunningham's personal characteristics, especially his difficult childhood, his service in Vietnam, and his serious mental health limitations caused by these tragic experiences, clearly outweighed the aggravating circumstances surrounding the crime and demonstrate that the penalty of death is not justified in this case. Therefore, the trial court erred in failing to modify the sentence of death.

The record discloses several mitigating factors which effectively outweighed the aggravating circumstances of the crime. First, as the trial court recognized, Mr. Cunningham's childhood was marked by relentless molestation, abandonment and severe abuse, his youth was spent in the Army during the Vietnam War experiencing new traumas to replace those of his childhood, his return to the United States was marked by drug addiction and post-traumatic stress disorder and at the time of the crimes he may have been suffering from serious mental health problems. These circumstances, when combined with Mr. Cunningham's confessions and acceptance of responsibility, counterbalance the effect of the factors in aggravation.

Moreover, the trial court erred in finding that Mr. Cunningham was not acting under the influence of serious mental health limitations at the time of the offense. First, as consistently expressed in his custodial confessions, Mr. Cunningham was in a dissociative state at the time of the murders. Second, and more important, the trial court was factually incorrect in its assessment that Mr. Cunningham never

sought treatment for his mental health problems.

The mitigating evidence clearly outweighed the aggravating circumstances in this case. Therefore, the trial court erred in denying the automatic motion for modification of sentence.

XV. A PENALTY OF DEATH IS DISPROPORTIONATE TO MR. CUNNINGHAM'S INDIVIDUAL CULPABILITY.

Mr. Cunningham contends that the death sentence in this case is cruel and unusual and therefore violates the Eighth and Fourteenth Amendments of the United States Constitution and article I, section 17 of the California Constitution. This Court should invalidate the sentence of death in this case because the penalty is grossly disproportionate to Mr. Cunningham's individual culpability.

"The cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution prohibits the imposition of a penalty that is disproportionate to the defendant's 'personal responsibility and moral guilt.'" (*People v. Marshall* (1990) 50 Cal.3d 907, 938.) Article I, section 17 of the California Constitution separately and independently establishes the same prohibition. (*Ibid.*)

This Court undertakes *intra-case* proportionality review to determine whether a penalty of death is disproportionate to the defendant's personal culpability. (*People v. Steele* (2002) 27 Cal.4th 1230, 1269.) If this proportionality review shows that the punishment "shocks the conscience or offends fundamental notions of human

dignity," then the resulting sentence of death is unconstitutional:

> "To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality and mental capabilities. [Citations.] If the court concludes that the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' . . . the court must invalidate the sentence." (*People v. Hines* (1997) 15 Cal.4th 997, 1078.)

"A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." (*Tison v. Arizona* (1987) 481 U.S. 137, 156.) Hence, if the state has been unable to prove beyond a reasonable doubt that a defendant's mental state was sufficiently culpable to warrant the death penalty, death would be disproportional punishment." (*Id.*, see also *Enmund v. Florida* (1982) 458 U.S. 782.)

Mr. Cunningham respectfully submits that there are many aspects of his character and personal history that would justify a sentence less than death. In particular, Mr. Cunningham insists that a sentence of death is disproportionate to his personal culpability in this case because of his diminished mental capacity at the time of the offense, his abusive childhood and his military service during wartime, as well as his remorse and cooperation in admitting his involvement in the charged offenses.

There was extensive evidence that at the time of the offenses Mr. Cunningham

was suffering from an impaired capacity and that he was acting in a dissociative state. Although Mr. Cunningham may have not met the legal definition for insanity at the time of the offense, this nonetheless does not prevent this Court from considering Mr. Cunningham's diminished mental capacity at the time of the crimes.

Similarly, Mr. Cunningham's abusive childhood and traumatic military service during the Vietnam War are profound mitigating factors in this case. First, Mr. Cunningham's abusive childhood mitigates his individual culpability and shows that Mr. Cunningham was virtually doomed from the start of his life. Mr. Cunningham was born to alcoholic parents who were abusive and neglectful, and who regularly subjected him to horrific situations and indeed it is difficult to imagine a more terrible, depraved and damaging childhood than that experienced by Mr. Cunningham. Then, after graduating high school, Mr. Cunningham entered the United States Army, served in a combat zone in Vietnam, and earned multiple awards and medals for his service. Finally, after returning from Vietnam, Mr. Cunningham suffered from the severe effects of post-traumatic stress disorder.

Other factors are present which mitigate Mr. Cunningham's individual culpability for these offenses. First, immediately after his arrest, Mr. Cunningham fully cooperated with the police. In his confessions, Mr. Cunningham also expressed remorse and insisted that he felt an overwhelming desire to make things right.

Perhaps nothing in Mr. Cunningham's life history, standing alone, would be

sufficient to prove that his history, character and background were so impaired and disadvantaged on the afternoon of July 27, 1992 as to outweigh the robbery and murder of three people. However, Mr. Cunningham nonetheless believes that all of this evidence, when viewed cumulatively, established the presence of compelling mitigating factors which together justify a sentence less than death.

A sentence of death in this case is disproportionate to Mr. Cunningham's individual culpability. Although Mr. Cunningham was convicted of a triple homicide, it is apparent that Mr. Cunningham likely committed this crime in a dissociative state brought on by years of trauma and disoriented flashbacks. Therefore, on this state of the evidence, a sentence of death is disproportionate to Mr. Cunningham's individual culpability.

XVI. THE DEATH PENALTY STATUTE AS APPLIED IN MR. CUNNINGHAM'S TRIAL VIOLATES THE UNITED STATES CONSTITUTION.

Mr. Cunningham contends that the California death penalty statute, Penal Code section 190.2, violates the United States Constitution. Because this Court has consistently rejected most of the challenges to the death penalty statute which are presented here, Mr. Cunningham will briefly state his objections in an attempt to provide a basis for the Court's reconsideration and to preserve the issues for further review. (*People v. Yeoman* (2003) 31 Cal.4th 93, 164-165.)

To date the Court has considered each of the defects identified below in

isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. As the United States Supreme Court has recently stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 126 S.Ct.2516, 2527, n.6; See also, *Pulley v. Harris* (1984) 465 U.S. 37, 51 (while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review).)[24]

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death, and so lacking in procedural safeguards, that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders who might be subjected to capital punishment within the law. Further, a particular procedural safeguard's absence, while perhaps not constitutionally fatal in the context of sentencing schemes that are narrower or have other safeguarding mechanisms, may render California's scheme unconstitutional in that it is a

---

24. In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of "the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction." (126 S.Ct. at 2527 .)

mechanism that might otherwise have enabled California's sentencing scheme to achieve a constitutionally acceptable level of reliability.

California's death penalty statute sweeps virtually every murderer into its grasp. It then allows any conceivable circumstance of a crime–even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home)–to justify the imposition of the death penalty. Judicial interpretations have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute–but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all, even as to the acts committed by a defendant. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question deals with foundational determinations for the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses, from among the thousands of murderers in

California, a few victims of the ultimate sanction.

A. Mr. Cunningham's Death Sentence is Invalid because Penal Code section 190.2 is Impermissibly Broad.

"To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (Citations omitted.)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-eight special circumstances[25] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so

---

25. This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three.

numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-15.) These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to achieving its goal of making every murderer eligible for death.

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty.

This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the U.S. Constitution and prevailing international law.[26] (See Argument Section E, *post*, of this argument and Argument III, *ante*.).

B. Mr. Cunningham's Death Sentence is Invalid because Penal Code section 190.3(a), as applied, Allows Arbitrary and Capricious Imposition of Death in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Mr. Cunningham contends that Penal Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with circumstances justifying death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime

---

26. In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage fo the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

itself.[27] The Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[28] or having had a "hatred of religion"[29] or threatened witnesses after his arrest,[30] or disposed of the victim's body in a manner that precluded its recovery.[31] It also is the basis for admitting evidence under the rubric of "victim impact" that is no more than an inflammatory presentation by the victim's relatives of the prosecution's theory of how the crime was committed. (See, e.g., *People v. Robinson* (2005) 37 Cal.4th 592, 644-52, 656-57.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that,

---

[27]*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (2006), par. 3.

[28]*People v. Walker* (1988) 47 Cal.3d 605, 639, n.10, *cert. den.*, 494 U.S. 1038 (1990).

[29]*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, *cert. den.*, 112 S. Ct. 3040 (1992).

[30]*People v. Hardy* (1992) 2 Cal.4th 86, 204, *cert. den.*, 113 S. Ct. 498.

[31]*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, n.35, *cert. den.*, 496 U.S. 931 (1990).

from case to case, reflect starkly opposite circumstances. (*Tuilaepa v. California, supra,* 512 U.S. at pp. 986-990 (dis. opn. of Blackmun, J.).) Factor (a) is used to embrace facts which are inevitably present in every homicide. (*Ibid.*) As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts–or facts that are inevitable variations of every homicide–into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder...were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) Viewing section 190.3 in context of how it is actually used, one sees that every fact without exception that is part of a murder can be an "aggravating circumstance," thus emptying that term of any meaning, and allowing arbitrary and capricious death sentences, in violation of the federal constitution.

C. California's Death Penalty Statute Contains no Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprived Mr. Cunningham of the Right to a Jury Determination of each factual prerequisite to a Sentence of Death, in Violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

As shown above, California's death penalty statute does nothing to narrow the

pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make–whether or not to condemn a fellow human to death.

1. Mr. Cunningham's Death Verdict was not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury that one or more Aggravating Factors Existed and that These Factors Outweighed Mitigating Factors; his Constitutional Right to a Jury Determination beyond a Reasonable Doubt of all facts Essential to the Imposition of a Death Penalty was Thereby Violated.

Mr. Cunningham contends that the death penalty jury instructions in this case violated the United States Constitution because the jurors were not instructed on any burden or standard of proof in selecting the penalty to be imposed and, in particular, were not instructed that the prosecution bears the burden of proving beyond a reasonable doubt that death is the appropriate punishment. In particular, the death penalty jury instructions in his case were deficient because the trial court never instructed the jury that the prosecution had to prove beyond a reasonable doubt to a unanimous jury: (1) the truth of every aggravating factor supporting a death verdict (aside from other crimes); (2) the truth of every fact in support of every aggravating factor; (3) that aggravation outweighs mitigation; and (4) that death is the appropriate punishment.

Mr. Cunningham plainly recognizes that this Court has previously rejected similar claims. (*People v. Boyer* (2006) 38 Cal.4th 412, 485; *People v. Stitely,* (2005) 35 Cal.4th 514, 573.) Thus, the Court has previously held that "because of the individual and normative nature of the jury's sentencing determination, the trial court need not instruct that the prosecution has the burden of persuasion on the issue of

penalty." (*People v. Combs, supra,* 34 Cal.4th at 868.) The Court has also determined that the jury need not be instructed on any burden or standard of proof in the penalty phase. (*People v. Hinton* (2006) 38 Cal.4th 71, 214, quoting *People v. Jenkins* (2000) 29 Cal.4th 515, 566.) Similarly, the Court has determined that jurors need not find beyond a reasonable doubt that a particular factor in aggravation exists, that the aggravating factors outweigh the mitigating factors, or that death was the appropriate punishment. (*Id.*, quoting *People v. Burgener* (2000) 29 Cal.4th 833, 885 and *People v. Bolden* (2002) 29 Cal.4th 515, 566.) Finally, this Court has held that the death penalty statute is not unconstitutional because it does not require unanimity as to the aggravating factors. (*People v. Sapp* (2003) 31 Cal.4th 240, 316.)

Mr. Cunningham believes that the decisions of this Court which have rejected the proper burden of proof in a death penalty case are contrary to the decisions of the United States Supreme Court in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584. (See, e.g., *People v. Monterroso* (2004) 34 Cal.4th 743, 796.) Mr. Cunningham respectfully submits that this Court's decisions cannot be reconciled with the recent decisions of the United States Supreme Court regarding the essential role played by the presumption of innocence in a criminal prosecution.

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting

an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 478.) The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, taken together, compelled this result. (*Id.* at pp. 477-78.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring v. Arizona, supra*, 536 U.S. at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life an death, and not elements of the offense. (*Id.* at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments then require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington* (2004) 542 U.S. 296, 299.) The state of Washington set forth

illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at p. 302, italics in original.)

This line of authority has been consistently reaffirmed by the high court. In *United States v. Booker* (2005) 543 U.S. 220, the nine justices split into different majorities. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates the Sixth and Fourteenth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved by a jury beyond a reasonable doubt." (*United States v. Booker, supra*, 543 U.S. at p. 244.)

Any doubt regarding the *unconstitutionality* of California's capital sentencing scheme has been put to rest by the U.S. Supreme Court's decision in *Cunningham v. California* (2007) 127 S.Ct. 856, which declared unconstitutional California's Determinate Sentencing Law [DSL]. Mr. Cunningham had been sentenced in state court to an upper term of 16 years for an offense punishable by a lower term sentence of 6 years, a middle term sentence of 12 years, or an upper term sentence of 16 years. In *Cunningham*, the upper term was imposed based on circumstances in aggravation found by the sentencing judge by a preponderance of the evidence. The U.S. Supreme Court held that by placing sentence-elevating factfinding within the judge's province, the DSL violated the defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. (*Cunningham v. California, supra*, 127 S.Ct. at p. 871.) By the same reasoning, California's death penalty sentencing scheme violates the Sixth and Fourteenth Amendments because it places sentence-elevating factfinding in the hands of jurors' without requiring jurors to agree that any single alleged aggravating factor is true beyond a reasonable doubt, much less that the aggravating factors outweigh mitigating factors beyond a reasonable doubt.

Prior to *Cunningham*, this Court had upheld the DSL against constitutional challenges based on the holdings in *Apprendi*, *Blakely*, and *Ring*. (*People v. Black* (2005) 35 Cal.4th 1238, 1246-63.) Under the DSL, an upper term sentence may be imposed if the judge finds true by a preponderance of the evidence one or more

circumstances in aggravation defined by California Rules of Court, rule 4.421. The aggravating circumstances enumerated in rule 4.421 are comparable in many respects to the aggravating circumstances listed in section 190.3. (Section 190.3(g) & (j).) For both sentencing schemes, enumerated aggravating circumstances include "facts relating to the crime" and "facts relating to the defendant." (California Rules of Court, rule 4.421(a) and (b); *People v. Black, supra,* 35 Cal.4th at pp. 1247-1248.) Under both schemes, for example, the sentencer can consider as aggravating factors the defendant's dominant role in the crime or prior criminal conduct.

In *Black*, this Court concluded that the provisions of the DSL, "simply authorize a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range. Therefore, the upper term is the 'statutory maximum' and a trial court's imposition of a an upper term sentence does not violate a defendant's right to a jury trial under the principles sent forth in *Apprendi*, *Blakely* and *Booker*."

The U.S. Supreme Court explicitly rejected this holding in *Cunningham*:

> "...[A]ggravating circumstances depend on facts found discretely and solely by the judge. In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum." (*Cunningham v. California, supra*, 127 S.Ct. at p. 868.)

Under California's death penalty law, the *maximum* sentence that can be

imposed is life imprisonment without parole, unless the sentencer finds (1) at least one aggravating factor true; and (2) that the aggravating circumstances outweigh any mitigating circumstances. (Section 190.3.) Fact-finding is a necessary prerequisite to imposition of the death penalty. Although California defendants have the right to a *jury* determination of aggravating factors, unanimity is not required, nor must aggravating factors–other than prior crimes–be proven beyond a reasonable doubt. This violates the principles of *Cunningham, Blakely, Apprendi* and *Ring*.

a. In the wake of *Ring* and *Cunningham*, Any Jury Finding Necessary to the Imposition of Death must be Found True Beyond a Reasonable Doubt.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance–and even in that context the required finding need not be unanimous. (*People v. Fairbank* (1997) 16 Cal.4th 1223; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and...not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor

(or factors) substantially outweigh any and all mitigating factors. As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (CT Vol. VII, pp. 1831-85; RT Vol. 18, pp. 5604-5605), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[32] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[33]

---

32. In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. Omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact–no matter how the State labels it–must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at 460)

33. This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222,

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death. (See section 190.2(a).) *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra*, 30 Cal.4th at 263.)

This holding is based on a truncated view of California law. As section 190, subd. (a)[34] indicates, the maximum penalty for any first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and *Ring* was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

34. This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen, supra,* 42 Cal.3d at 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

> "This argument overlooks *Apprendi*'s instruction that 'the relevant inquiry is one not of form, but of effect.' 530 U.S., at 494, 120 S.Ct. 2348. In effect, 'the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict.' *Ibid.;* see 200 Ariz. 267, 279, 25 P.3d 1139, 1151." (*Ring v. Arizona, supra,* 536 U.S. at 604.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring v. Arizona, supra,* 536 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (2006).)

It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88). This Court has recognized that a particular special

circumstance can even be argued to the jury as a mitigating circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 863-64.)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency (Ariz. Rev. Stat. Ann. Section 13-703(E)), while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances (section 190.3). There is no meaningful difference between the processes followed under each scheme.

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact–no matter how the State labels it–must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona, supra*, 530 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer complained in dissent, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that crime." (*Blakely v. Washington, supra*, 524 U.S. at p. 328; emphasis in original.) The issue of the Sixth Amendment's applicability of this fundamental Sixth and Fourteenth Amendment principle hinges on whether, as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California,

as in Arizona, the answer is "Yes."

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that the statutorily-specified finding as to the relative weightiness of aggravating and mitigating circumstances is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth and Fourteenth Amendments. (See *State v. Ring* (Az. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450; see also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-27.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring, supra,* 536 U.S. at 608-609:

> "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment...The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by

two years, but not the fact-finding necessary to put him to death."

The last step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to allow the findings that make one eligible for death to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to the death-eligibility components of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. The Requirements of Jury Agreement and Unanimity.

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *People v. Stanley* (2006) 39 Cal.4th 913, 963.) Consistent with this Court's holdings, in this case the jurors were instructed that there was *no* need to reach unanimous agreement regarding the truth of aggravating factors. (RT65:10113-10114.) The prosecutor emphasized this instruction in final argument. (RT65:10128.) The prosecution had presented evidence of six unadjudicated violent acts as circumstances in aggravation. Thus, each juror may have relied on different aggravating factors or unadjudicated crimes to impose a death judgment. It is entirely possible that only a slim minority of jurors was persuaded of the truth of any single aggravating factor.

On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty. With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor–including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[35] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. The United States Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decision of much less consequence. (*Ring,*

---

35. See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 166 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

supra; Blakely, supra.)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure...[its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.[36]) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at 731-32; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In an ordinary criminal case, non-unanimous findings of guilt beyond a reasonable doubt by fewer than six jurors contravenes the Sixth Amendment right to jury trial. (*Burch v. Louisiana* (1979) 441 U.S. 130, 138-39.) Similarly, non-unanimous findings of aggravating circumstances, based on proof less than "beyond a reasonable doubt" contravenes the Sixth Amendment right to jury trial, as well as the Eighth and Fourteenth Amendments.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a..) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital

---

36. In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (*Johnson v. Louisiana* (1972) 406 U.S. 356; *Apodaca v. Oregon* (1972) 406 U.S. 404.) Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

defendants (see *Monge v. California, supra,* 524 U.S. at 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less *Ring, supra*, 536 U.S. at 609.)[37] See Section D, *post.*

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[38] To apply the requirement to findings carrying a maximum punishment of one year in the county jail–but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764)–would by its inequity violate the equal protection clause (see Section D, *post*), and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury. (See *Richardson v. United States* (1999) 526 U.S. 813, 815-16.)

---

37. Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (K).)

38. The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitutions Require that the Jury in a Capital Case be Instructed that they may Impose a Sentence of Death only if they are Persuaded Beyond a Reasonable Doubt that the Aggravating Factors Exist and Outweigh Mitigating Factors and that Death is the appropriate penalty.

a. Factual Determinations:

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-21.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida, supra,* 430 U.S. at 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to

California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death.

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship, supra,* 397 U.S. at 363-64; see also *Addington v. Texas* (1979) 441 U.S. 418, 423; *Santosky v. Kramer* (1982) 455 U.S. 743, 755.)

It is impossible to conceive of an interest more significant than human life. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re Winship, supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard.

In *Santosky, supra,* the U.S. Supreme Court reasoned:

> "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the

> weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants... When the State brings a criminal action to deny a defendant liberty or life,...'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' [Citation omitted.] The stringency of the 'beyond reasonable doubt' standard bespeaks the "weight and gravity" of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.'" (455 U.S. at p. 755.)

The penalty proceedings, like the child neglect proceedings dealt with in *Santosky*, involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky, supra,* 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship, supra,* 397 U.S. at p. 363.)

Adoption of a reasonable doubt standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson, supra,* 428 U.S. at p. 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the

rest of his life without possibility of parole.

In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' (*Bullington v. Missouri* (1981) 451 U.S. 430, 441, quoting *Addington v. Texas* (1979) 441 US. 418, 423-24.)" (*Monge v. California, supra,* 524 U.S. at 732.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision true, but that death is the appropriate sentence.

3. California Law Violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution by Failing to Require that the Jury Base any Death Sentence on Written Findings Regarding Aggravating Evidence.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meanginful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank, supra*, 16

Cal.4th 1223), there can be no meaningful appellate review without written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-16.)

This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings.

A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularlity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefore." (*In re Sturm*, *supra*, 11 Cal.3d at 267.)[39] The same analysis applies to the far graver decision to put someone to death.

39, A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

In a *non-capital* case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Section 1170, subd. ©.) Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra,* 501 U.S. at p. 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir.1990) 897 F.2d 417, 421; *Ring v. Arizona, supra,* 536 U.S. 584; Section D, post), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, n.15.) Even where the decision to impose death is "normative" (*People v. Demetrulias* (2006) 39 Cal.4th 1, 41-42) and "moral" (*People v. Hawthorne, supra,* 4 Cal.4th at p. 79), its basis can be, and should be, articulated.

The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. (See Section C.1, ante.)

There are no other procedural protections in California's death penalty system

that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra*, 126 S.Ct. 2516 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

4. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-Case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Imposition of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review–a procedural safeguard this Court has eschewed. In *Pulley v. Harris, supra,* 465 U.S. at p. 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there

could be a capital sentencing scheme so *lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review*" (emphasis added).

California's 1978 death penalty statute as drafted, and as construed by this Court and applied in fact, has become just such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, fn. 14.) That number has continued to grow, and expansive judicial interpretations of section 190.2's lying-in-wait special circumstance have made first degree murders that can *not be charged* with a "special circumstance" a rarity.

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia, supra.* (See Section A of this Argument, *ante*.) The statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see Section C, *ante*), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see Section B, *ante*). Viewing the lack of comparative proportionality review in the context of the entire California sentencing scheme (see *Kansas v. Marsh, supra*), this absence renders that

scheme unconstitutional.

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants renders the California death penalty statute unconstitutional.

5. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra,* 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

6. The Failure to Instruct that Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not"–factors (d), (e), (f), (g), (h), and (j)–were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher, supra,* 47

Cal.3d at p. 1034). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Further, the jury was also left free to aggravate a sentence upon the basis of an affirmative answer to one of these questions, and thus, to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that a jury would apply factors meant to be only mitigating as aggravating factors weighing towards a sentence of death:

> "The trial court was not constitutionally required to inform the jury that certain sentencing factors were relevant only in mitigation, and the statutory instruction to the jury to consider 'whether or not' certain mitigating factors were present did not impermissibly invite the jury to aggravate the sentence upon the basis of nonexistent or irrational aggravating factors. (*People v. Kraft* [(2000)] 23 Cal.4th [978], 1078-1079 [parallel citations]; see *People v. Memro* (1995) 11 Cal.4th 786, 886-887 [parallel citations].) Indeed, 'no reasonable juror could be misled by the language of section 190.3 concerning the relative

aggravating or mitigating nature of the various factors.' (*People v. Arias, supra,* 13 Cal.4th at 188 [parallel citations].)"

(*People v. Morrison* (2004) 34 Cal.4th 698, 730.)

This assertion is demonstrably false. Within the *Morrison* case itself there lies evidence to the contrary. The trial judge mistakenly believed that section 190.3, factors (e) and (j) constituted aggravation instead of mitigation. (*Id.*, 34 Cal.4th at pp. 727-29.) This Court recognized that the trial court so erred, but found the error to be harmless. (*Ibid.*) If a seasoned judge could be misled by the language at issue, how can jurors be expected to avoid making this same mistake? Other trial judges and prosecutors have been misled in the same way. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-45; *People v. Carpenter* (1997)15 Cal.4th 312, 423-24.)[40]

The very real possibility that appellant's jury aggravated his sentence upon the basis of non-statutory aggravation deprived appellant of an important state-law generated procedural safeguard and liberty interest–the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-75)–and thereby violated appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma, supra,* 447 U.S. 343; *Fetterly v. Paskett* (9th Circ. 1993) 997 F.2d 1295, 1300 (holding that Idaho law specifying manner in which

---

40. There is one case now before this Court in which the record demonstrates that a juror gave substantial weight to a factor that can only be mitigating in order to *aggravate* the sentence. See *People* v. Cruz, No. S042224, Appellant's Supplemental Brief.

aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment); and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

The likelihood that the jury would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's statements during penalty phase closing argument.

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State–as represented by the trial court–had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon...illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. Different defendants, appearing before different juries, will be sentenced on the basis of different legal standards.

"Capital punishment [must] be imposed fairly, and with reasonable

consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

D. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants which are Afford to Non-Capital Defendants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California, supra,* 524 U.S. at pp. 731-32.) Despite this directive, California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. "Personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) If the interest is "fundamental", then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-85.) A state may not

create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra; Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. Equal protections guarantees must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

In *Prieto*,[41] as in *Snow*,[42] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. (See also, *People v. Demetrulias, supra,* 39 Cal.4th at p. 41.) However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property, or possessing cocaine.

---

41. "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose on prison sentence rather than another.*" (*Prieto, supra,* 30 Cal.4th at 275; emphasis added.)

42. "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow, supra,* 30 Cal.4th at 126, n.3;emphasis added.)

An enhancing allegation in a California non-capital case must be found true unanimously, and beyond a reasonable doubt. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence in appropriate in a non-capital case, the decision is governed by court rules. California Rules of Court, rule 4.42, subd.(e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."

In a capital sentencing context, however, there is no burden of proof except as to other-crime aggravators, and the jurors need not agree on what facts are true, or important, or what aggravating circumstances apply. (See Sections C.1-C.2, ante.) And unlike proceedings in most states where death is a sentencing option, or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See Section C.3, ante.) These discrepancies are skewed against persons subject to loss of life; they violate equal protection of the laws.[43] (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.)

---

43. Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment... The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring, supra,* 536 U.S. at 609.)

To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra,* 486 U.S. at 374; *Myers v. Ylst, supra,* 897 F.2d at 421; *Ring v. Arizona, supra.*)

E. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty now violates the Eighth and Fourteenth Amendments to the United States Constitution.

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (Donnelly, R., *Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 New. Eng. J. on Crim. & Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason"–as opposed to its use as regular punishment–is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. Opn. Of Brennan, J.]; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 [plur. Opn. Of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Jan. 1, 2007), Amnesty International website [www.amnesty.org/en/report/info/ACT50/001/2007].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [dis. Opn. Of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409.)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, 316, n.21, citing the Brief for the European Union as Amicus Curiae in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, 4.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes–as opposed to extraordinary punishment for extraordinary crimes–is. Nations in the Western world no longer accept it. The Eighth Amendment

does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra,* 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot, supra,* 159 U.S. at p. 277; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112; see also Argument III.)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, conspirators or others not directly involved in murder, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[44] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Thus the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Consequently, Mr. Cunningham's death sentence should be set aside.

---

44. See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res.L.Rev. 1, 30 (1995).

CONCLUSION

A state must assure reliability in the process by which a life is taken. (*Gregg v. Georgia* (1976) 428 U.S. 153, 196-206 (opn. of Stewart, Powell & Stevens, JJ).) In light of this increased need for reliability, death penalty trials must be policed at all stages for procedural fairness and honest fact finding. (*Satterwhite v. Texas, supra,* 486 U.S. at pp. 262-63.) A sentence of death must be reversed when the circumstances under which the sentence is imposed create an unacceptable risk that capital punishment has been meted out arbitrarily or capriciously. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 343.)

Wherefore, for all of the foregoing reasons, Appellant John Lee Cunningham respectfully requests that this Honorable Court reverse the judgments of guilt and the sentences of death and remand the case to the trial court to afford Mr. Cunningham the opportunity for any further relief supported by the law and evidence.

Dated: December 31, 2007

Respectfully Submitted,

By _____

Brian A. Pori
California Bar No. 135920
INOCENTE, P.C.
204 Bryn Mawr NE
Albuquerque, New Mexico 87106
(505) 255-9088

Attorney for John Lee Cunningham

CERTIFICATE OF SERVICE

I, hereby certify that I am a citizen of the United States, over the age of eighteen years, and not a party to the within cause; that I am employed in the City of Albuquerque, County of Bernalillo, State of New Mexico and my business address is 204 Bryn Mawr NE, Albuquerque, New Mexico 87106.

On this date I caused to be served on the interested parties hereto, a copy of:

APPELLANT'S OPENING BRIEF

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Albuquerque, New Mexico, addressed as set forth below:

Attorney General's Office
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

[Attorney for the People of
the State of California]

Morey Garelick, Esq.
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

John Cunningham, J-92425
San Quentin State Prison
San Quentin, CA 94974

Superior Court
San Bernardino Courthouse
351 N. Arrowhead Ave.
San Bernardino, CA 92415-6240

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 31ST day of December, 2007 at Albuquerque, New Mexico.

Brian A. Pori

WORD COUNT CERTIFICATE

[Rules 14(c) and 36(B)(1)(a)]

I certify that Appellant's Opening Brief uses 13-point Times New Roman font and contains the following number of words: 79,298. I arrived at this count by using the word count feature of my word processing program, WordPerfect 10.0.

Dated: January 7, 2008

Brian A. Pori
Attorney for Appellant
JOHN L. CUNNINGHAM

CORRECTED CERTIFICATE OF SERVICE

I, hereby certify that I am a citizen of the United States, over the age of eighteen years, and not a party to the within cause; that I am employed in the City of Albuquerque, County of Bernalillo, State of New Mexico and my business address is 204 Bryn Mawr NE, Albuquerque, New Mexico 87106.

On this date I caused to be served on the interested parties hereto, a copy of:

APPELLANT'S OPENING BRIEF
CORRECTED CERTIFICATE OF SERVICE
CORRECTED TABLE OF CONTENTS
CERTIFICATE OF WORD COUNT

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Albuquerque, New Mexico, addressed as set forth below:

Lora Martin, Esq.
Attorney General's Office
P.O. Box 85266
San Diego, CA 92186-5266

[Attorney for the People of
the State of California]

Morey Garelick, Esq.
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

John Cunningham, J-92425
San Quentin State Prison
San Quentin, CA 94974

Superior Court
San Bernardino Courthouse
351 N. Arrowhead Ave.
San Bernardino, CA 92415-6240

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed this 7th day of January, 2008 at Albuquerque, New Mexico.

Brian A. Pori