IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANIEL LEE WHALEN, Defendant and Appellant.	**S054569** **Automatic Appeal** **(Capital case)** **Stanislaus County** **Superior Court** **No. 25297**

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California for the County of Stanislaus

HONORABLE JOHN G. WHITESIDE, JUDGE

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death made directly to this Court pursuant to Penal Code section 1239.[1]

STATEMENT OF THE CASE

This case arises from a homicide that occurred on March 22, 1994 in Modesto, California, in which Mr. Sherman T. Robbins was shot in the course of an alleged residential burglary. On April 13, 1994, the Stanislaus County

[1] All statutory references are to the Penal Code unless otherwise indicated.

District Attorney charged Appellant Daniel Lee Whalen, along with co-defendants Michelle Joe and Melissa Fader, with a violation of Section 187 of the California Penal Code, murder. (CT 68-70.)[2] Appellant was also charged with an enhancement of using a firearm, in violation of Section 12022 (a)(1) of the California Penal Code; a robbery pursuant to Section 212.5 of the California Penal Code, with an enhancement charging use of a firearm; and a special circumstance allegation under Section 190.2(a)(17) of the California Penal Code, charging that the murder was committed during the course of a robbery. (*Id.*) On June 29, 1994 an amended complaint was filed adding allegations of prior serious felonies under Section 667(d) of the California Penal Code. (CT 71-73.)

On April 13, 1994, Mr. Whalen was found to be indigent and Modesto attorneys Howard Tangle and Ernest M. Spokes Jr. were appointed to represent him as lead and co-counsel respectively. (RT 2.)[3] On December 22, 1995, the defense moved to continue the trial because lead counsel Howard Tangle had died. (RT 137.) Mr. Spokes agreed to take the appointment as lead counsel but stated, "in the [month] that I have been involved in this case I have primarily concentrated on the penalty phase and I have not done

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[2] The Clerk's Transcript will be referred to as "CT."

[3] The Reporter's Transcript will be referred to as "RT."

anything to prepare for the guilt phase. That was Mr. Tangle's decision as lead counsel. I am going to need a brief continuance in order to be able to prepare for the guilt phase." (*Id.*) The case was continued to May 16, 1996 for pre-trial, and May 20, 1996 for trial. (RT 138.) Mr. Spokes stated he did not require appointment of *Keenan* counsel and handled the defense as the sole attorney for Appellant. (RT 169.)

The trial began on May 20, 1996 with jury selection. The final jury panel was sworn on May 30, 1996. (RT 268, 385, 576, 706, 865, 1056, 1195.) Opening statements were made on May 31, 1996. (RT 1234 *et seq.*) The prosecution's guilt phase case ended on June 11, 1996. (RT 2103.)

On June 13, 1996, after deliberating part of the previous day, the jury returned with verdicts of guilty on Count 1, murder in the first degree. The jury also found true the allegation that Appellant personally used a firearm (Penal Code Section 12022.5). The jury also found true the special circumstances allegation that the murder took place in the course of a robbery. (RT 2340.)

As the trial moved to the penalty phase, on June 14, 1996, the defense told the Court they would admit the prior felony conviction allegations. (RT 2349.) Stipulations as to Appellant's priors were read to the jury: a 1971 Tulare Co. robbery; a 1971 assault on a police officer; a 1976 Los Angeles Co.

robbery; a 1980 Santa Clara Co. charge of possession of a firearm; a 1986 Stanislaus Co. attempted robbery. (RT 2416-18.) Penalty phase presentation for both the prosecution and defense began and concluded on June 17, 1996. (RT 2356.)

On June 18, 1996, penalty phase arguments were heard and the jury was instructed and began penalty deliberations at 11:15 a.m. (RT 2524.) At 3:20 p.m. the jury reached its verdict that Appellant should be sentenced to death. (RT 2525.) The special circumstance 190.2(a)(17) was found true, that the offense was committed during a robbery. (RT 2539.) Appellant requested that he be sentenced immediately, waiving referral to probation, over the defense attorney's objection. (RT 2528-29.) Defense counsel made an oral motion for a new trial based on the Court's refusal to give certain jury instructions (RT 2534); the motion was denied. (RT 2535.) A motion to modify the sentence from death to life was denied. (RT 2535.) For the offense of robbery, Appellant was sentenced to 25 years to life, plus five years for the use of a firearm, plus one year for violation of probation. This sentence of 31 years to life was stayed pending punishment on the other count.

On January 17, 2001, undersigned counsel was appointed by the Supreme Court of California to represent Appellant in his direct appeal and related state habeas corpus/executive clemency proceedings. The certified

record on appeal was filed in this Court on August 23, 2002.

Appeal is automatic under section 1239.

STATEMENT OF FACTS

Guilt Phase Facts:

Sherman Robbins was a retired gentleman who lived by himself in an apartment off Robertson Road in Modesto, California. In March of 1994, Sherman was house-sitting his brother Bill's home at 519 Nebraska in Modesto while Bill Robbins was on a trip to Europe with his wife, Alvina. (RT 1270.) Bill's daughter-in-law, Shirley Robbins and her family, occasionally went by the Nebraska Ave. house during this time to visit with Sherman. (RT 1270-1272.) While Bill was on his trip, Shirley's son-in-law rented a dumpster to clean up the yard to surprise Bill and Alvina on their return. (RT 1271.)

Shirley and other family members were at Bill's house much of the weekend of March 16-17, 1994. (*Id.*) On Sunday March 17th, Shirley saw a man and a woman, later identified as co-defendants Johnny Long and Michelle Joe, talking with Sherman Robbins. Long and Joe were at the Nebraska Street house for about an hour-and-a-half and Long helped them move a pole. (RT 1273.) Joe's children were in a Ford Mustang parked in the driveway, and at one time she entered the house to take one of her children to

the bathroom. (RT 1274, 1289-90.)

On March 18 and March 19, 1994, Shirley Robbins spoke with Sherman on the phone a number of times. (RT 1274-76.) On Monday, March 18th, Shirley's daughter, Krista, drove Sherman from the Nebraska house to a doctor's appointment. (RT 1277.) At that time, Krista saw Michelle Joe going through the dumpster at the Nebraska house. (*Id.*) Krista also saw Johnny Long's Mustang parked in the Nebraska Ave. house driveway. (RT 1421.) Sherman Robbins told Krista that Michelle Joe was his cousin's girlfriend. (*Id.*)

Krista spoke with her mother and mentioned that Michelle Joe had been at the house. Shirley told Krista to go back and make sure the house was locked and also left a message on the phone saying that Michelle Joe shouldn't be at the house. (RT 1277-1278.) When Krista arrived at the house and secured it, Michelle had already left. (RT 1457.) When Krista was driving away, she saw Johnny Long and Michelle Joe returning to the house. (*Id.*) Krista then returned to the hospital, picked up Sherman and brought him back to the Nebraska Ave. house. (RT 1423, 1457.)

Shirley Robbins returned to the house at 519 Nebraska on Wednesday morning, March 20, 1994. (RT 1278-79.) She parked in the driveway and noticed two newspapers and the doors open. (RT 1278 *et. seq.*) Shirley went

into the house and found Sherman lying dead on the living room couch. (RT 1280-81.) Later that evening Shirley noticed that a microwave, a small TV and guns were missing. (RT 1283.) She told the police that she suspected Johnny Long and the girl with the long hair. (RT 1284.)

The coroner, Dr. Thomas Richard Beaver, estimated Sherman had been dead about 36 hours, plus or minus 12 hours. (RT 1483.) The victim was found face down on the couch with his hands tied behind him with a necktie, his face covered in dried blood. (RT 1281.) The cause of death was determined to be a shotgun wound to the head, in the right temporal area, with an exit wound on the left side. (RT 1472.) The gun was fired from only inches away. (RT 1523.) Sherman's hands were tied by a necktie, which left ligature twill patterns on the skin. (RT 1312; 1473, 1524.)[4] Shotgun pellets were scattered all around the room. (RT 1522.) The angle the weapon was fired at was about 30 degrees to the floor. (RT 1523.) The shotgun pellets went through Sherman's head, through the couch and down to the floor. (*Id.*) It appeared that Sherman was lying on the couch when he was shot. (RT 1526.) It was later determined that a 20-gauge shotgun shell had been loaded and fired from a 12-gauge shotgun which had a 12-gauge shell already

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[4] A ligature is a generic term for anything used to hold fast a portion of the human body.

chambered in it. (RT 1795.) The 20-gauge shell was fired through the 12-gauge shell. (RT 1795-1818.)

Giles New, an investigator with the Stanislaus Co. Sheriff's Department, participated in the investigation of the homicide at 519 Nebraska Ave. in March of 1994 (RT 1300 *et. seq.*), and he soon became the principal investigator on the case. At the Nebraska Avenue house, Detective New and the officers found that a screen from the master bedroom had been removed and placed on the ground outside the window. (RT 1320.) Shoe and tire tracks were located were on a dirt road outside the house, but could not be matched. (*Id.*) Investigator New identified a senior citizen's card belonging to the victim. (RT 1492.) It was found in a wallet lying on a bed in a room identified as bedroom no. 2. (*Id.*) Fingerprints later determined to be Melissa Fader's were taken from the back bedroom window of the house. (RT 1463; 1465.)

Outside the house, there were trails of tracks in the high grass area. (RT 1493.) The trails seemed to lead to a brush pile area (people's exhibit 45) (RT 1494.) Some tire tracks were found near the brush pile, on the dirt roadway directly south of 519 Nebraska to 30 to 40 feet north of the brush pile. (RT 1495.)

Appellant was arrested by Detective New on April 7, 1994.[5] (RT 1506.) At the time of his arrest, Appellant allegedly said to New: "I was expecting to get picked up sooner or later. Sometimes the best place to hide is under your noses." (RT 1507.) [6]

John Ritchie testified he first met Daniel Whalen about five years prior to the trial, in 1987 or 1988, at Butler's Camp, but had only known him by name for a short time. (RT 1332, 1369.) Ritchie was related to Sherman Robbins by marriage. (RT 1336-37.) A month or two before Appellant was arrested, Ritchie asked him to stay at his apartment at 620 Paradise in Modesto. (RT 1338.) Ritchie's daughters, his girlfriend, Cathy Sisk, and Appellant all lived at this apartment before the arrest. (RT 1339-40.)

On the morning of March 20th, 1994, Ritchie saw Michelle Joe. (RT 1341.) She came into the apartment and asked for Appellant. (RT 1342.) Joe talked to Appellant outside the apartment. Ritchie overheard Joe say she was

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[5] Appellant was arrested when police traced a car belonging to Johnny Long, which led them to Michelle Joe and Melissa Fader. Damon Podesto, who lived at 708 Pauline Ave., about 300 yards north of 519 Nebraska (RT 1754.), testified that on the night of March 21, 1994, a vehicle came into his yard. (RT 1756.) He saw a green Mustang do a u-turn in his yard. There were three people in the car. He spoke to a detective right after this happened, and told him it was a Mustang. (RT 1758.)

[6] New also testified that during the trial a letter was seized from Appellant to John Ritchie which said "the girls are telling on me." (RT 1510.)

looking for someone to help her with a burglary.[7] (RT 1343, 1382.) Appellant then returned to the apartment. (RT 1343.)[8] Ritchie told Appellant he had overheard the burglary conversation, and advised Appellant not to do it. (*Id.*; RT 1385-86.) Appellant told Ritchie he wasn't going to commit a burglary with Joe and he remained at the apartment the rest of the day. (RT 1344.)

Later that day, shortly before dark, Michelle Joe asked Ritchie to babysit her child. (RT 1344.) Ritchie agreed and thought Joe left with Appellant. (*Id.*)

When Ritchie returned to his apartment early the next morning, Melisa Fader, Joe and Appellant were there with items of property including a TV, microwave and some guns (a .22 rifle and a .410 shotgun which smelled of gunpowder), a typewriter, a stereo, and a large number of pennies being counted by Fader who said they were hers. (RT 1345 *et seq*; 1388.) Ritchie was not present during any bartering of the property for drugs. (RT 1389.)

Michelle Joe said she had urinated in her pants and asked to use the shower. (RT 1348.) Ritchie asked his wife to give her some clothes. (*Id.*)

Ritchie then went to get Rick Saso, a friend of Ritchie's who was

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[7] This hearsay was not objected to.

[8] Ritchie first testified they were gone for "at least an hour" (RT 1343) but he later admitted he didn't know whether Appellant was gone a half-hour or an hour. (RT 1384)

known to deal in stolen property and drugs, and shortly thereafter Saso returned to the apartment in his car. (RT 1349.) Saso later said he had given an "eightball" of methamphetamine for the items.[9] (RT 1350.) The property was loaded into Saso's car. When Saso left, Joe, Fader and Appellant stayed at the apartment and they all used the methamphetamine. (*Id.*)

In the next few days, Appellant watched the newspaper very closely and seemed very nervous, and he talked to Ritchie about the incident. (RT 1352.) A few days after the incident, Appellant came into Ritchie's room, asked Ritchie's wife to leave, and said that he had killed a man. (RT 1353.) Appellant said he had tied the man up, told him to get right with God, left the room then came back and shot him. (RT 1353-54.) Appellant also told Ritchie that he and Joe had argued about the way the victim was to die. Joe wanted him smothered with a pillow because it would be less noisy. (*Id.*; RT 1354, 1394-95.) Ritchie was shocked and suggested Appellant leave the apartment. (RT 1396; 1413.)[10]

Appellant did not explain why the victim was killed but said that wrestling with him until he died would have been more torture than shooting

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[9] There was no hearsay objection.

[10] This conversation may have occurred at the same time Appellant told him about the crime (RT 1397) but at RT 1355, lines 11-16, Ritchie testified that it was a few days later.

him. (RT 1355.)[11]

Ricky Saso testified he knew Appellant through John Ritchie. (RT 1426.) Saso first met him a couple of years ago at Ritchie's apartment at 620 Paradise. Saso made his living from drug dealing, and he was selling and using drugs at the time of the murder of Mr. Robbins. (RT 1427-28.)

The day Saso received the guns, Ritchie showed up at Saso's house in the afternoon.[12] (RT 1430.) Ritchie said he had some guns Saso would be interested in buying. (*Id.*) Saso then drove over to Ritchie's apartment, bringing with him a sixteenth of a ounce of methamphetamine. (RT 1430.) Saso intended to buy the guns and sell them for more drugs. (RT 1431.) Ritchie, his wife, his kids, Michelle Joe and another girl he had never seen were at the apartment. (RT 1432.) About an hour after he arrived, Saso saw Appellant come out of the bedroom. (RT 1434.)

During the first hour, before Appellant came out of the bedroom, there was talk about how much Saso was going to give for the guns and other

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[11] The next day, the Court appointed the same attorney who represented Mr. Ritchie, a Mr. Canant, to simultaneously represent Mr. Saso. (RT 1364.) The Court stated that although Mr. Saso was charged with receiving property from Ritchie, and there could thus be a conflict, they would both get immunity, so the conflict of interest was not a problem. (RT 1367.)

[12] Saso admitted he first told Detective Valdez that Ritchie had called him on the phone, but he didn't have a phone. (RT 1441-42.)

property. (RT 1434.) Ritchie did most of the negotiations. (RT 1445.) Saso had been involved in drug transactions with Joe and Ritchie before. (RT 1435.) He testified he had a previous sexual relationship with Michelle Joe and had previously given her drugs. (RT 1448.)

When Appellant came out of the bedroom, Saso said he would trade a sixteenth of an ounce of drugs for the guns, a .22 rifle and a .410 shotgun. (RT 1435, 1438.) Saso cheated a little, and gave Appellant a gram and a half for the guns, which was less than a sixteenth of an ounce. (RT 1436.) Saso then gave the drugs to Appellant.[13] (RT 1445-46.) Ritchie wrapped up the guns and put them in Saso's trunk. (RT 1436.) He did not notice any smell to the shotgun. (RT 1438.) The value of the drugs traded for the guns was about $70. (RT 1439.) Saso went home and put the guns on his wall. (RT 1437.) A week later, Saso sold the guns to another person for more drugs, partly because Ritchie told him the guns had been used in a homicide. (RT 1439.)

In March of 1994 Nellie Thompson rented a trailer to Melissa Fader who lived there with her boyfriend, Gerald Blitch. (RT 1514-15.) During this period Fader and Blitch argued a great deal. (RT 1518.) One afternoon, Fader came to Thompson's door crying and wanted to sell a metal meat grinder

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[13] Saso admitted he first told Detective Valdez he gave it to Ritchie. (RT 1446.)

for five dollars. (RT 1515.) Thompson did not want the grinder but gave Fader the five dollars. (*Id.*) Fader left the grinder with Thompson. Fader also told Thompson that she had been raped. (RT 1516.) A day earlier, she had come by Thompson's house with another woman who tried to drag Fader away, eventually succeeding. (RT 1518.) Thompson later gave the grinder to a policeman. (RT 1516.)

Melissa Diane Fader was the prosecution's key witness against Appellant. Fader testified pursuant to a plea agreement whereby homicide charges were dropped and she pled to robbery with a firearm for a state prison term of seven years. (RT 1529.) Fader admitted her involvement in the break-in at 519 Nebraska in March of 1994. (*Id.*)

Melissa saw Michelle Joe on March 21, 1994, around 10:30 or 11:00 a.m. (RT 1530.) Michelle pulled up in a green 1966 Mustang with Johnny Long, and Joe's daughter Crystal. (RT 1531.) Michelle said she and Long were going to the recycling center to cash in some cans they had found. (RT 1532.) Melissa hadn't seen Michelle Joe for awhile. Michelle stayed and talked with Melissa while Long took the cans to the recycling center. Long returned, picked up Michelle and her daughter and left. (RT 1532.) Later, around 1:00 p.m., Melissa saw Michelle and Crystal in the Mustang without Long. (RT 1533.) Michelle said she told Long she needed the car to take

Melissa to the hospital. (RT 1534.) Fader admitted that, at the time of the crime, she had been awake for 10 days without sleep. (RT 1635-36.)

Melissa Fader got in the car with Michelle Joe and they went cruising for an hour or two. (RT 1535.) There was no talk about a robbery, but they stopped at a friend's house to see if they could get some dope. (RT 1535.) They borrowed a couple of dollars from the friend to put gas in the car, got a beer and then went home. There had been no talk of a committing a crime. (*Id.*)

At about 11:00 p.m., Melissa had a loud fight with her boyfriend, Gerald Blitch. (RT 1538 *et. seq.*) Melissa had been awake for several days on crank and wanted to go to sleep but her boyfriend wanted her to get more dope. (RT 1539.) Blitch locked Melissa in her trailer by padlocking the front door. (*Id.*) Michelle Joe showed up while they were fighting. Michelle told Melissa she could come with her. (RT 1540-41.) As Melissa climbed out of a window, she hollered at Blitch, who told her that if she left, it would be all over between them and she would wind up in jail. (RT 1542.) Melissa took some clothes with her when she left in the car with Michelle. (*Id.*)

When Melissa got into the Mustang with Michelle Joe, Appellant was in the front passenger seat (RT 1544-45) and Michelle was driving. (RT 1545.) Both Appellant and Michelle had gloves on. (RT 1608.) Melissa had

met Appellant once previously. (RT 1545.) They went to the house at 519 Nebraska Street. (RT 1546.) Michelle said they were "gonna go out and rob this house." (*Id.*) Appellant did not say anything about a robbery (RT 1546.)

Michelle had mentioned that Ritchie's uncle was at the Nebraska Street house when she first came over that morning after Ritchie dropped her off on the way to recycling. (RT 1648-49.) As they drove up to the Nebraska house, Melissa knew Ritchie's uncle was staying there. Melissa thought they were going to go into the house, steal property and leave. (RT 1546.)

After they pulled up in the driveway, Michelle Joe went up to the house. (RT 1548.) She came back shortly, got in the car and said there was someone inside sleeping. (RT 1548, 1552.) Appellant got out of the car, Michelle pulled out of the driveway, and then Appellant got back in the car. Either Appellant or Michelle said "let's find a back way in." (RT 1549.)

They went to the next street, down a dirt road, and then went back to the house and parked the car at the end of the driveway. (RT 1549.) Appellant got out of the car. (RT 1550.) When they made the first trip around the block, Melissa suggested they just leave, but Michelle said she had a plan. (RT 1552.) Michelle suggested they could go up to the door and say the car broke down. (RT 1552.) When they returned to the house, they parked down by the brush pile. (RT 1553.)

Michelle Joe said she was going to wake the old man up and say the car broke down. (RT 1553.) Michelle was going to tell Sherman that Melissa was her cousin, and then pretend to call Ritchie and pretend that they couldn't reach him as a ruse to spend the night with Sherman. (RT 1553-54.) Appellant did not participate in this conversation. (RT 1553.)

Michelle Joe got out of the car and went toward a field and the sheds in the back of the house. (RT 1554-55.) Appellant walked out to the same area separately from Michelle. (RT 1555.) Melissa heard dogs barking while Michelle was looking for a back way into the house. (RT 1647.) While Melissa waited in the car, Appellant returned and put some sort of tool into the trunk. (RT 1556.) They were in the car for five minutes, when Michelle returned, and said: "Come on, let's go."(RT 1557.)

Michelle told them that they could stay overnight in the house. (RT 1558.) She told Appellant to wait about 15 minutes and then he could come into the house. (*Id.*) Appellant was still in the car when Fader and Michelle left. (RT 1558.)

The women entered the house and Michelle told Sherman she wanted to use the phone. (RT 1558.) Sherman said to make themselves at home and asked if they wanted anything to drink. (RT 1559.) Melissa got a beer for herself and Sherman and sat down on the sofa. (RT 1559-60.) Sherman sat

down on the long sofa and Melissa sat on the short one. (RT 1560.) Michelle Joe was in the kitchen and then she sat down next to Melissa. (RT 1561.)

Michelle told Sherman their car wouldn't start. (RT 1561.) Sherman wanted to look at the car, but Michelle said it was too dark. (RT 1562.) Sherman agreed they could stay the night and sleep in one of the bedrooms. (RT 1562.)

After about five or ten minutes Michelle and Melissa went to one of the bedrooms which had a big bed in it. (RT 1563.) They were there a couple of minutes. (RT 1564.) Michelle told Melissa to go out and talk to Sherman, who was on the sofa. (RT 1564.) Melissa got herself and Sherman another beer. (RT 1565.)

Sherman said if Melissa was hungry, she could fix a sandwich. (RT 1565.) Melissa first took a hot bath, then made a sandwich, and lay down on the sofa. (RT 1566.) Michelle came into the bathroom and told Melissa that as soon as Sherman fell asleep, they were going to rob the place. (RT 1566.) Melissa returned to the living room with Sherman and fell asleep on the sofa. (RT 1567.) Michelle came out to the living room a couple of times and asked if she wanted to come back to the bedroom, but Melissa said she would sleep on the sofa. (*Id.*)

Melissa was abruptly awakened at 3:30 a.m. (RT 1567.) Appellant was

standing in the living room by a gun cabinet holding a gun and yelling at Sherman, demanding to know where he kept his wallet. (RT 1568-70.) Sherman told him it was in a box in the bedroom. (RT 1570.)

Appellant told Melissa to tie up Robbins. (RT 1571.) When Melissa refused, Appellant pointed the gun at her and said "You're gonna do it." (RT 1571.) He threw or handed a necktie to Melissa (*Id.*) who tied Sherman's hands behind his back with it. (RT 1573.) Melissa tried to tie Sherman's hands loosely, but Appellant told her to make it tighter. (RT 1574.)

Melissa wanted to leave the house, but Appellant said "You ain't going nowhere." (RT 1574.) He told her to grab a typewriter and a microwave. (RT 1574.) Melissa got the items and took them to the car. (RT 1575-77.) She went out by the sliding glass door and saw the Mustang in the driveway. (RT 1576.) Melissa put the property in the trunk and went back to the house to get Michelle. (RT 1577.)

Sherman was lying on his stomach on the sofa with Appellant standing nearby. (RT 1578.) Melissa found Michele in the other bedroom going through Sherman's wallet. (RT 1579.) Michelle said there wasn't any money in the wallet, but Melissa later found out there was. (RT 1580.)

Melissa said she wanted to get out of the house, so Michelle told her to go out the window. (RT 1580.) Michelle handed Melissa a stereo and a jar

full of pennies through the window. (RT 1580-81.) Melissa then put the property in the Mustang. (RT 1582.) Melissa made another trip to the back of the house where there was some items piled outside under the bedroom window. (RT 1583.) Melissa did not see Appellant during this time. (RT 1584.)

Michelle came out of the sliding glass door and said that they had to go around the house and get the rest of the stolen property. (RT 1584.) They brought the remaining property to the car and got in. (RT 1585.) Michelle was in the driver's seat. About five minutes after they got back in the car they heard a gun shot inside the house.[14] (RT 1585-86, 1588.)

After hearing the gunshot, Melissa saw Appellant emerge from the house with a shotgun. (RT 1587-88.) He put it in the trunk. (RT 1589.) Appellant got in the car and said "Let's get out of here." (*Id.*) Michelle Joe mentioned that there was another gun in the house, and Appellant went back in and came out with another shotgun. (RT 1589-91.) Melissa never saw a handgun that night. (RT 1591.) Appellant also put the second gun in the trunk (RT 1592.)

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[14] Melissa Fader changed her testimony couple of times on the question of whether she heard a gunshot . (RT 1671-1672.)

They drove away from the Nebraska Avenue house at about 3:30 or 4:00 a.m. (RT 1592.) They stopped for gas and then drove to Prescott Estates where Appellant said he had a friend who might want to buy the stolen property. (RT 1593, 1595.) When they arrived at Prescott Estates, Appellant got out but soon returned saying either that no one was home or that his friend did not want to buy the stolen property. (RT 1596.) Appellant said "Let's go back to the apartment." (RT 1597.) They returned to Ritchie's apartment at 620 Paradise. (RT 1598.)

Melissa Fader testified that at first Appellant and Michelle Joe seemed to be behaving normally that night. (RT 1599.) Appellant's attitude seemed to change when he woke Melissa up in the house. (RT 1600.) Earlier in the evening, Appellant had seemed civil, but he was angry when he was in the house. (RT 1600.) Appellant seemed to want to hurry up and get away from the house. (*Id.*) Michelle too began to behave a little oddly later that night and she urinated in her pants and had to change clothes. (RT 1601.)

When they returned to the apartment, Appellant and Michelle went in and Melissa stayed in the car. (RT 1601,1681.) Michelle later came out and told her to go into the apartment and together they carried in some of the stolen property. (RT 1602, 1681.)

When Melissa entered the apartment, she saw Crystal and other children

asleep on the floor. (RT 1681.) Another unknown man was in the apartment who Melissa assumed was Kathy Sisk's husband or boyfriend. (RT 1681.) Melissa then injected methamphetamine with Appellant in the bathroom. (RT 1603) She then went into the bedroom to count pennies. (RT 1604, 1682.)

Melissa never saw the guns in the apartment. (RT 1602-03.) Two men soon showed up to possibly buy some of the stolen property. (RT 1605-06.) While Melissa was in the bedroom counting pennies, Michelle came in to change clothes and take a shower. (RT 1605.) When Michelle finished, she told Melissa they had traded the stolen property for drugs and were dividing it up. (RT 1606-07.) Michelle told her they received an eight ball for all the property. (RT 1606.) Melissa got half a gram or a gram of the methamphetamine. (RT 1607.) Melissa and Appellant went into the bathroom a second time to again inject drugs. (RT 1609.) Melissa then went into the bedroom to continue to count pennies. (RT 1610.)

Appellant came in and forced her to have sex. (RT 1610.) Melissa did not want to do it, but Appellant said "You're gonna." (RT 1611.)[15] She had only met Appellant this one time. (RT 1611.) After the forced sex, Appellant left the bedroom, and Michelle took her home. (*Id.*)

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[15] Fader testified she had never told anyone the details about this incident before. (RT 1610.)

On the way home they stopped and Michelle bought Melissa a beer. They did not talk about what happened at 620 Paradise or about what had happened with Appellant in the bedroom. (RT 1612.) When Melissa went home, she had her share of the dope, about four dollars worth of pennies, the grinder, and a clock radio. (RT 1613, 1686.)

About a week later, Melissa later told Nellie Thompson about being raped. (RT 1615.)[16] At first she asked Nellie Thompson's son if he wanted to buy the grinder, but he didn't. (RT 1614.) Then she went to talk with Thompson to see if she wanted it. Thompson said she couldn't use it, but gave Melissa five dollars. (RT 1615.) At that time, Melissa was emotional, but not crying. (*Id.*)

Michelle had told Melissa not to mention the events of the robbery to anyone. (RT 1616.) About two weeks after the crime, Melissa was arrested. (RT 1617.) After that, she did not have contact with Appellant or Michelle Joe. (RT 1617.)

Michelle Joe testified pursuant to a plea agreement where the prosecution agreed to drop first degree murder charges in exchange for her plea to second degree murder, admitting a gun use charge, and one count

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[16] Fader later claimed to have told her about the rape that morning, not a week later as she testified to earlier. (RT 1687.)

residential robbery and her testimony against Appellant. (RT 1821, 1988.) The agreement was for a term of 16 years to life. (RT 1821.) Part of her agreement was that she could not refuse to testify. (RT 1991.)

Michelle testified she had known Melissa Fader for five and a half to six years, as she was the cousin of one of Michelle's ex-boyfriends. (RT 1822.) Michelle first met Appellant in March 1994, at John Ritchie's apartment at 620 Paradise. (RT 1825-1826.) She had known John Ritchie for about one month. (RT 1826.) Leah Yarbrough introduced Joe and Ritchie. Johnny Long was Michelle's boyfriend and owned a green 1960's Mustang. (RT 1826-1827.)

Prior to the theft, Michelle had been to 519 Nebraska about four times. (RT 1827.) The first time was about a week before the robbery and murder. (*Id.*) In the week prior to the murder, she was at the house about every other day. (*Id.*)

Michelle testified she had been inside the house once or twice before the murder. (RT 1829.) When she went there for the theft, there was nothing in particular she wanted to steal. (RT 1829-30.) On her previous visits, Michelle had gone through the sliding glass door in the back of the house. (RT 1830.) She had seen a typewriter and guns in a gun cabinet. (RT 1830-31.) Once Michelle had taken her daughter inside to use the bathroom. (RT 1831.) She also saw a big screen TV when one of her daughters walked into a

bedroom. (RT 1832.) The time she took her daughter to the bathroom, she was inside for 15 to 20 minutes. (RT 1833.)

On the day Michelle got the Mustang from Johnny Long she arose about 8 or 9 a.m. (RT 1834.) At that time, she was living at Johnny Long's house on Barbary Street in Modesto. (*Id.*) They went to 519 Nebraska because Johnny Long wanted to go through the dumpster to get the things the Robbins were throwing away. (RT 1835.) Michelle's three kids were with her at that time. (RT 1835.) They spent an hour or two retrieving things from the dumpster. (RT 1835.) Johnny Long found some aluminum cans and went to the recycling center with Michelle. (*Id.*) They made several trips, then left about 10 or 11 a.m.

They made a final stop at the recycling center and then went to Melissa Fader's trailer where one of Michelle's daughters used the bathroom. (RT 1836.) Fader was not locked in her trailer that morning. (*Id.*) Michelle and Johnny Long were in Melissa's trailer for 5 to 15 minutes and then left to return to Johnny's house. (RT 1837.)

Michelle asked Long if she could use the car to see Melissa again. (RT 1838.) She lied and told him that Melissa had a miscarriage and was in the hospital. (*Id.*) Michelle wanted to use the car and get away from Long, but she testified she had no intent to rob the Nebraska Avenue house at that point.

(RT 1838.)

Michelle returned to Melissa's trailer at about 12 or 1 p.m. with her daughter Crystal (RT 1839.) but Fader wasn't there. (RT 1839.) Michelle talked to a Mexican male named Juan at the trailer and then took him to his parent's house. Then she went back to Melissa's trailer with the Mexican, who gave her some methamphetamine, which Joe snorted. (RT 1841.)

Michelle then went to the apartments on Paradise to see if a friend, Leah Yarbrough, would watch Crystal. (RT 1842-43.) Yarbourgh agreed and Michelle left. Michelle then walked over to John Ritchie's apartment. (RT 1843.) Ritchie was there with his wife Kathy. (*Id.*) Michelle was looking for Rick Saso to see if he could give her more methamphetamine, but he wasn't there. (RT 1844.) Michelle stayed at Ritchie's apartment for 20 minutes and then left to return to Melissa's trailer. (RT 1844.)

Michelle picked up Melissa at the trailer and they drove around looking for Rick Saso. (RT 1844.) She stopped for gas twice and put in two dollars worth each time. (RT 1845.) They drove around for more than three hours. (RT 1846.) They drove back to Ritchie's apartment and picked up Kathy Sisk to help find Saso. (RT 1848.)

They dropped Kathy off across the street from Saso's place and told her to have Rick meet Michelle in the park. (RT 1849.) Michelle was being

supplied with methamphetamine from Saso as well as having sexual relations with him at that time. (RT 1849.) Michelle went back to Melissa's place. They did not go to the park because they got "sidetracked." (*Id.*)

Michelle finally met Saso at Ritchie's apartment without Melissa. (RT 1850.) Kathy and John Ritchie were also at the apartment. Michelle injected some more methamphetamine. (RT 1850.) While this was going on, Melissa was at Michelle's place.

Michelle was at Ritchie's for a half hour. (RT 1853.) Michelle then walked back to Leah Yarbrough's to get Crystal, and then returned to Ritchie's apartment. (RT 1854.) Kathy and Michelle walked to a store to buy a soda while one of Kathy's daughters watched Crystal. (RT 1855.) When they returned to Ritchie's apartment, Appellant was there. (RT 1858.)

Michelle admitted she thought up the plan to burglarize the Nebraska Avenue house. (RT 2003-04.) After meeting Appellant in the apartment, she asked him if he would help her with her burglary plan. (RT 1860.) Appellant agreed and asked if anyone was at the house and Michelle said that she didn't think so. (RT 1861.)

During this period Michelle was using about a gram and a half of methamphetamine per day. (RT 2000.) At the time she asked Appellant to help her with the burglary she had been without sleep for two days. (RT 2001.)

Michelle suggested that they pick up Melissa Fader to help with the burglary. (RT 1861.) Michelle and Appellant went to get Melissa. (RT 1862.) At Melissa's trailer they found a padlock on the trailer door. (RT 1866.) Melissa and Michelle spoke through a window. (*Id.*) Melissa handed Michelle a key to the lock which Michelle opened, allowing Melissa get out of the trailer. (RT 1867.) Melissa brought a tote bag with her. She was upset. (RT 1867.) She sat in the back seat of the Mustang where Michelle introduced her to Appellant. (RT 1868.) The three then drove to 519 Nebraska.

Michelle parked the car on the dirt road. (RT 1869.) Michelle and Appellant wore gloves. (*Id.*) Joe told Appellant there were some things in the back of the house, and he got out of the car and walked toward it. (RT 1870.) He walked near the cars in the back of the house. (*Id.*.) Michelle followed him along with Fader. Appellant picked up a chain saw and put it back in the Mustang. (RT 1871, 1873; 2009.) Michelle then went back to the Mustang. (RT 1872.)

Michelle walked up to the door to see if anyone was home. (RT 1873.) She didn't see anyone at first, but realized later someone was there. (RT 1874.) To get in the house Michelle was going to pretend she had car trouble. (RT 1874; 2010.) Michelle and Melissa walked to the house, and saw

Sherman standing in the kitchen. (RT 1874.) Michelle knocked on the glass door, and Sherman answered. (*Id.*) Michelle told Sherman they were having car trouble and asked if they could use his phone. (RT 1876-77.) Sherman let Michelle and Melissa inside. (RT 1877-78.) The plan was that Appellant would later climb through a window. (RT 1877.)

Once inside, as a ruse Michelle dialed a number on the phone and then hung up. (RT 1878.) She told Sherman that she was trying to reach Johnny Long but no one was home. (RT 1878; 2011.) Michelle asked if they could stay the night and Sherman agreed. (RT 1878.) They then went into the living room where the TV was located. (RT 1879.) They talked about ten minutes, then Michelle asked if she could have something to drink. (RT 1879.) Sherman told her to get some beer and water in a refrigerator outside. (RT 1880.)

After about ten minutes, Sherman told Michelle she could sleep in one of the bedrooms. (RT 1881.) At this time, Michelle still had her gloves on. (*Id.*) Michelle went into the bedroom and Melissa stayed in the living room with Sherman. (RT 1882, 2011-12.)

In the living room, Melissa sat on the love seat and Sherman was on the couch. (RT 1883.) Michelle came out and got a cigarette from Sherman and returned to the bedroom and smoked it. (RT 1883-84.) She went back out

again to get a glass of water and saw Melissa and Sherman in the kitchen. (RT 1884.) Melissa was fixing something to eat. (*Id.*) Later, Melissa said she was going to take a bath and gave Michelle more cigarettes from Sherman. (RT 1885-86.) Michelle went back to the bedroom and signaled Appellant by turning on a light. (RT 1887.) Appellant then came to the bedroom window. (RT 1887.)

Michelle checked the living room and saw Sherman and Melissa asleep. (RT 1888.) Appellant then entered the house through the bedroom window. (RT 1888-92; 2013.) He asked what was going on, and Michelle told him the others were asleep. (RT 1889; 2014.) Appellant and Michelle started going through drawers looking for valuables. (RT 1890.) They gathered up a TV and a CD player from the bedroom. (RT 1890-91.)

Appellant walked out of the bedroom and into the living room. (RT 1893.) Michelle heard some noise in the living room and went to check. (RT 1983.) She saw Appellant standing in front of Sherman with a long gun, either a rifle or a shotgun. (RT 1893-94.) The room was dark, but the outside light reflected into the living room. (RT 1895.) The TV was off. (*Id.*) Michelle could not tell whether Robbins was awake. (RT 1896.) Michelle walked around the house looking for property to steal. (RT 1896-97.) Melissa came to her and said that Appellant wanted her to find something to tie Sherman up

with. (RT 1897.) Michelle gave Melissa a neck tie to use. (*Id.*)

Michelle heard Appellant ask Sherman for his wallet and he said it was the bedroom. (RT 1898.) Michelle found the wallet there and handed it to Melissa. (RT 1899.) Appellant was still holding the gun on Sherman. (RT 1900.) Appellant told Michelle to get the car while Melissa stayed in the house (RT 1901.) Michelle drove the car into the driveway and parked. (*Id.*) She got out, opened the car trunk and then went back inside the house. Sherman was still on the couch. (RT 1902.)

Michelle and Melissa went into the bedroom and opened the window. (RT 1902-03.) For some unknown reason, Appellant told Michelle and Melissa to put the property out the bedroom window and into the car. (RT 1903.) He also wanted them to go out the window themselves, but they didn't. (*Id.*) Appellant was in an angry mood, and seemed to be mad at both Michelle and Melissa. (RT 1904-05.) They put two boom boxes, a microwave oven and a typewriter into the Mustang. (RT 1905-06.)

Michelle told Appellant she was scared and didn't want to go through with the burglary. (RT 1907.) Appellant yelled at her and told her to put the property in the car. Michelle asked Appellant if he was going to kill Sherman,

and he said he would not. (RT 1909-1910.)[17] Michelle went outside and joined Melissa standing by the car. (RT 1910.) Melissa asked where Appellant was. (RT 1911.) As they were getting into the car, they heard the gunshot. (*Id.*)

Melissa asked "What was that?" (*Id.*) Michelle then told her to get into the car. (RT 1912.) After hearing the gun shot Michelle was scared. (RT 1912.) Appellant then came out of the house carrying a gun. (*Id.*) Appellant then returned to the house, and came back out with another gun. (RT 1913.) He got into the car and the three left the Nebraska Avenue house. (RT 1914.)

They drove to Prescott Estates where a friend of Appellant's lived. (RT 1914-15.) When asked, Appellant denied he had killed Sherman. (RT 1915.) At Prescott Estates Appellant got out of the car and went to an upstairs apartment and was there about five minutes. (RT 1916.) When he returned to the car, he said to go to a different place on the next street. (RT 1917.) They may have stopped at another place and then they returned to the Paradise Apartments. (RT 1918.)

They then drove to John Ritchie's apartment. (RT 1920.) Ritchie, Kathy Sisk and the kids were there. (RT 1920-21.) Appellant and Ritchie

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[17] Ms. Joe denied suggesting that Sherman should be smothered as opposed to shooting him. (RT 1909-10.)

later went out and brought the stolen property into the apartment from the car. (RT 1921.) Michelle asked Cathy if she could take a shower, because she had urinated in her pants after she heard the gunshot at the Nebraska Avenue house. (RT 1921-22.)

After the shower, she put on fresh clothes, and went into the bedroom with Kathy and Melissa Fader. (RT 1923.) Melissa was counting pennies. (*Id.*) When she left the bedroom, John Ritchie, Rick Saso and Appellant were in the house, talking at the kitchen table. (RT 1924.) Methamphetamine was spread out on the table along with stolen property: a microwave, a television, and two boom boxes, a chainsaw and a typewriter. (RT 1925.) The guns were also in the kitchen. (*Id.*)

Rick Saso supplied the methamphetamine. (*Id.*) Michelle got about a gram of the drugs herself and Melissa also got some of the drugs. (RT 1926.) Michelle took the drugs in the bedroom and when she came out, Rick Saso was there but she did not see Appellant or Melissa. (RT 1927.) Michelle sat next to Saso and told him that Appellant might have killed someone. (RT 2017.) Saso got up, kissed her and left. (RT 1928.)

Melissa came out of Kathy Sisk's room and asked Michelle to take her home. (RT 1929; 2019.) Michelle left with some of the drugs but none of the stolen property. (RT 1929-30.)

It was light outside when they got back to Melissa's trailer. (RT 1930.) They both went inside the trailer and Gerald Blitch, Melissa's boyfriend, was there. (RT 1930.) Melissa had a tote bag and a grinder with her. (RT 1931.) Michelle stayed at the trailer for about 15 or 20 minutes and then left. (RT 1932.) She then returned to the apartment at 620 Paradise. (RT 1933.)

As she was walking toward John Ritchie's apartment, she saw Gary Long, Johnny Long's brother. (*Id.*) Gary Long said his brother told him that she had stolen Johnny's car, and demanded she give him the keys. (RT 1934.) Gary pushed Michelle around to try and get the keys. After a struggle, Gary Long got the keys and drove away in the car. (RT 1935.)

Michelle then went back to John Ritchie's apartment where she saw Kathy Sisk, John Ritchie and Michelle's daughter. She was in the apartment about 20 minutes. (RT 1936.) Johnny Long came to the door looking for Michelle. She initially hid in the bedroom, but then came out and left with Johnny Long and returned to his apartment. Michelle did not tell Long about the events of that evening. (RT 1937.)

On March 31st, more than a week after the murder, Detective Viohl turned up and asked Michelle Joe to come in for more questioning. Michelle Joe admitted that she lied to Detective Viohl about her activities leading up to Sherman's death. (RT 2022.) Detective Viohl asked about the first time she

was at Sherman Robbins' house and she told him that Robbins was outside mowing the lawn. (RT 2023.) There was some dispute about whether she believed the house belonged to Sherman Robbins or Bill Robbins, as she told the detective she thought another person owned it. (RT 2023-24.) Michelle did not tell the detective she took the children to the house the first time she was there. (RT 2028.) The second trip was in the afternoon. She told the detective there were other people present at that visit. Michelle admitted she told the detective she had never gone into the house that day. (RT 2029.) She also told them that on March 21st, she went to the house with Johnny Long about 4 or 5 p.m., which was not true. (RT 2029.) Michelle also admitted she lied to the detective when she told him she had only used the bathroom once; she had used it twice. (RT 2032.) She also told the detective that the first time on March 21st they arrived at the house at 7 or 8 a.m., when they actually got there about 9 or 10 a.m. (RT 2032.) Michelle also admitted lying to the detective about where she spent the night of March 21st, having told him she got into a fight with her boyfriend. (RT 2035.)

Michelle admitted lying to the detective about her having to call Melissa, as she did not have a telephone. (RT 2038.) Michelle also lied about seeing Melissa more than once on the 21st of March. (*Id.*) and she told the detective she had driven the Mexican man to his residence and dropped him

off, which was also a lie. (RT 2039.) Michelle also lied about a visit to Roy Bingle's house so he could visit with his daughter Crystal. (RT 2040.) Michelle also visited with her sister and uncle that day but didn't mention this to police. (RT 2040.)

Michelle also admitted she lied when she told the detective she took Crystal to Sutter Park where she played for two and a half hours. (RT 2042.) Michelle told the detective she drove to Kathy Sisk's apartment and slept in the car until 7:30 a.m. when she was confronted by Gary Long. (RT 2043.) When the detective told Michelle that her statements were not consistent and that she could get into a lot of trouble, she then admitted she didn't sleep in the vehicle that night. (RT 2043-44.)

Detective Viohl told Michelle that the Mustang had been seen at 519 Nebraska on the night of the murder. (RT 2045.) Michelle falsely told the detective that Appellant had borrowed the car that evening and showed up at Kathy's apartment about 1:30 or 2 a.m. suggesting that they "go do a job. (RT 2046.) She also told the detectives that she was using about a gram and a half of methamphetamine a day at this time, which was true. (RT 2048.)

Michelle told Detective Viohl she used Melissa in the robbery because she was a prostitute. (RT 2049.) Additionally, Michelle told the detective she was the one who traded the guns for the dope, but that was not true. (RT

2051.) She denied shooting Sherman Robbins herself. (RT 2057.)

Michelle admitted that one of the effects of her use of methamphetamine was that she hallucinated and would see things that were not there. (RT 2065.)[18]

Detective Giles New testified that he assisted in the arrest of Appellant on April 7, 1994 at 620 Paradise, apt. P101. (RT 2079.) Appellant stated that he expected to get picked up sooner or later, and "sometimes the best place to hide is right under your noses." (RT 2080.)

Bill Robbins, brother of the victim Sherman Robbins, testified that he owned the house at 519 Nebraska Avenue in Modesto. (RT 2081.) The house had exterior lighting, directly over the family room, and a dusk-to-dawn light which was fairly bright. (RT 2085.) An observer standing outside could see into the house with that light even if the house lights were off. (*Id.*)

In March of 1994, Bill Robbins went to Ireland on vacation. (RT 2086.) When he returned, some property had been stolen: a typewriter, a microwave, a 13 inch color television set, and two firearms, a 12 gauge shotgun and a .22. caliber rifle. However, a .32 automatic pistol wrapped in

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[18] There were no efforts by the defense to challenge the competency of this witness to testify, either because of her impairments at the time and admitted hallucinations, or her ability to accurately recollect these events later at trial.

a T-shirt was not stolen. (RT 2086.) He identified the grinder as his. (RT 2086.) A jar of pennies was also taken along with a CD player and a tape player. (RT 2088.)

The defense case at guilt/innocence:

Only two witnesses were called by the defense at the guilt phase. Nellie Thompson was recalled and testified she helped Melissa Fader obtain SSI payments for disability, partly due to Melissa's drug addiction. (RT 2140.) Thompson thought Melissa had the mental age of a 12-year old. (RT 2141.)

Melissa had previously told Thompson about a prior burglary of a deserted house. (RT 2142.) Melissa told Thompson she went there with Michelle Joe and she cut her leg jumping into a car. (*Id.*) Melissa mentioned the burglary of this house in September or October, before the murder of Sherman Robbins. Thompson recalled seeing a newspaper story that mentioned a man being killed. (RT 2141.) Melissa was not sure somebody had been shot in that incident, only that they went to a house, she cut her leg and a dog was shot. (RT 2145.) Melissa did tell Thompson she had been raped by Appellant. (RT 2143.)

Alan V. Peacock, a licensed private investigator employed by the defense in this case, testified that when he interviewed Thompson, she did not mention anything about Melissa Fader telling her she had been raped. (RT

2151.) The first time it was mentioned by her was in the hallway when Thompson showed up to testify. (*Id.*)

State's rebuttal case at guilt/innocence:

Giles New, testified that there was no report on an incident where an old man was killed in the country, as related by Thompson. (RT 2155.)

The State's Case at the Penalty Phase:

Sharon Kennedy, a Bank of America employee, testified that on May 26, 1988 she was working in the Ceres, California branch. (RT 2375.) A man came in, went to another window and tried to rob the bank. It was a small branch, and there were only two tellers working, who were very busy that day. (RT 2376.) The man first looked in, said something and left. Perhaps a half hour later, he returned and went to another window. Kennedy told the other teller to be careful. (RT 2377.) Kennedy saw the man hand a note to the other teller which said "This is a robbery" and she pushed the panic button. (*Id.*) The man then ran out and bumped into a lady entering the bank. (RT 2378.) Kennedy identified the bank robber as Appellant. (RT 2378-79.) She did not see a gun and no one was shot or injured in the robbery attempt. (RT 2379.)

Francis Passalaqua was also a Bank of America employee at the Ceres branch on May 26, 1988 during this incident. He testified he was robbed by a man who passed a note, but could not identify the robber in court. (RT 2382.)

Passalaqua did not see the robber with a gun. (RT 2383.)

Defense penalty phase evidence:.

Appellant's penalty phase presentation began with a statement from his defense attorney that Appellant wanted the jury to impose the death penalty. (RT 2419-20.)

Alan Peacock testified that he conducted a penalty phase investigation for the defense. Peacock's investigation essentially came up empty. There was no information available on Appellant's family, all of whom were apparently dead or disappeared. (RT 2388.) Appellant did have a girlfriend and a daughter but he did not want them involved in the trial. (*Id.*) Virtually all of Appellant's social history, such as could be determined, came from records of the California Department of Corrections beginning when he was 14 years old. (RT 2391.) Peacock found substantial evidence of drug abuse in this history. (RT 2391-92.) The longest period Appellant had been free from custody since adolescence was 18 months. (RT 2392.)

The defense also called an expert on prison conditions. James Park, a retired California Department of Corrections officer, was the former chief of classification for the Department. (RT 2420.) He has also consulted with the legislature regarding prisons. Park testified there are four levels of security, with level 4 being what used to be called maximum security. (RT 2423-24.)

Only about two percent of the total prisoners end up in the security housing unit. (RT 2425.) A person who is sentenced to life without the possibility of parole would pretty much automatically go to a level 4 prison. (RT 2426.) The length of the sentence is the biggest factor in determining where a prisoner is sent. (*Id.*)

In a level 4 prison, such as Pelican Bay or New Folsom or New Tehachapi, they are in an eight by ten foot cell with someone else. (RT 2427.) All death row inmates are single-celled. (RT 2430.) Some privileges can be earned through good behavior, as an incentive. (RT 2428.) Prisoners can have their own television sets if they have the money, and they buy them through the prison through authorized vendors. (RT 2428.) Death row is in old San Quentin. (RT 2429.) Prisoners usually work and produce products that save the state a lot of money. (RT 2432.)

Park reviewed Appellant's jail records going back to 1963 and talked to him. In looking at the records, he considered discipline and useful work. If Appellant were given a sentence of life without parole, he would settle down and return to being a good useful prisoner. (RT 2432.) Appellant had done good work in the past, and been a leader in many of the areas where he has worked. (RT 2433.) But on a couple of occasions, Appellant had refused to work. (RT 2433.)

Very early on at Vacaville Medical Facility, Appellant received a commendation for helping two officers who were confronted by an inmate with a razor blade. (RT 2434.) Appellant was also helpful in training other prisoners. (*Id.*) Appellant volunteered to keep working during a strike at Soledad. (RT 2435.) An associate of Appellant's was charged with murder in 1971 or 1972, but Appellant was never charged with that crime. (RT 2436.) Appellant did well in classes and at prison work.

In the early 1970's, Appellant was tagged as a racist and a biker and a spokesman for the biker and prison Nazis. (RT 2434.) The staff said "Well he looked like a racist and biker and Nazi to us." (RT 2435.) Appellant also got into trouble for making wine and an attempted suicide at Vacaville. (RT 2438.) There was one incident when Appellant wouldn't remove a towel from a window, but there was no violence. Once Appellant was found with an Allen wrench, and once he had a knife. (RT 2438-39.) In 1980 at San Quentin, Appellant received a commendation for working during a strike. (RT 2440.)

Park testified that "lifers and LWOPs" are often seen as a stabilizing force in prisons because they often do not want their ordered lives destabilized. (RT 2441.) There are about 1500 people serving LWOP sentences and 6496 are serving sentences for first degree murder. (RT 2442-

43.) Of 16,795 prisoners who are serving time for murder or manslaughter, only about 400 are on death row. (RT 2442.)

Park performed many classifications when he was in the prison system. (RT 2445.) He would run tests on the prisoners, but did not run any on Appellant. (RT 2448.) The witness testified that there were some "glitches" in Appellant's record but no violence. (RT 2451.)

Mr. Park admitted that he spent less than five minutes talking to Appellant. (RT 2450.) Park was contacted in February and appointed in May, but admitted he first talked with Appellant on the day he testified (RT 2450.) He did not make any written report and there were no objective tests administered. (RT 2255.)

The defense then rested. (RT 2456.)

Over defense objections, the Court struck the third, fourth, and fifth paragraphs of an instruction, despite defense argument that the jury should be allowed to consider any mitigating evidence, no matter how weak. The proposed instruction read, in part, "Any other circumstance which extenuates the gravity of the crime, even though it's not a legal excuse for the crime, and any sympathetic or other aspect of the defendant's character..." (RT 2476.) The court also refused a defense-proposed instruction that would allow consideration of a co-defendant's sentence at the penalty phase. (RT 2478.)

The defense argued that it violated federal law in that the jury was not allowed to consider all possibly mitigating factors in determining a sentence. The Court read a list of aggravating factors and the jury retired to deliberate at 11:15 a.m. (RT 2520.) At 3:20 p.m. they reached a verdict and found that death was the appropriate penalty. (RT 2525.) The jury was polled. (RT 2526.) The jury was informed that they did not have to talk with any representative of the defense or the prosecution if they did not wish to do so. (RT 2526.) The verdict of death was returned on June 18, 1996.

Appellant asked to be sentenced immediately and the sentencing was put over to June 24, 1996. (RT 2526-2528.) Appellant waived his right to have the matter referred to the probation department. (RT 2533.) The defense made an oral motion for a new trial based on the refusal of the Court to give certain jury instructions; insufficiency of the evidence on the issue of corroboration; and the failure to give discovery of, among other things, the alleged rape and a palm print of Melissa Fader. (RT 2534.) The defense motion for a new trial was denied. (RT 2535.) There was an automatic motion for reduction of the sentence from death to life, pursuant to Sec. 190.4(e) of the Penal Code. (RT 2535.) The Court made an independent review of the weight of the evidence and stated that considering all factors, including that Appellant has spent almost his entire life in jail; that he did not

chose to involve his daughter and a friend in the trial; and that he has conducted himself well and properly during the trial, that the mitigating circumstances are so outweighed by the aggravating ones that the death penalty is justified. (RT 2535-2538.)

Special circumstance 190.2(a)(17) was found true, that the offense was committed during a robbery. (RT 2539.) For the offense of robbery, Appellant was given 25 years to life, plus five years for use of firearm, plus one year for violation of probation. The sentence of 31 years to life was stayed pending punishment on the other count. (RT 2540-2541.)

ARGUMENT

I.

THE TRIAL COURT ERRED IN REPEATEDLY 'REHABILITATING' DEATH-PRONE JURORS BY ASKING LEADING AND SUGGESTIVE QUESTIONS ON VOIR DIRE, WHICH STACKED THE JURY IN FAVOR OF A DEATH SENTENCE, THEREBY DEPRIVING APPELLANT OF A FAIR AND IMPARTIAL JURY.

(a) Introduction.

The jury selection procedure in appellant's case was accomplished through individual juror questionnaires, signed under penalty of perjury, and

then individual questioning of the prospective jurors.[19] The trial court frequently intervened in *voir dire* questioning of the jury panel to "rehabilitate" jurors that, on the basis of their answers to their juror questionnaires, would otherwise have been subject to challenges for cause by the defense. The Court's interventions on behalf of pro-death jurors was designed to have them change their questionnaire answers. These interventions, through leading and suggestive questions, were objected to repeatedly by the defense, and were so numerous and the "rehabilitations" so frequent and "skillful" that they had the inevitable effect of stacking Appellant's jury pool with pro-death-penalty jurors.

The Court's questioning was so suggestive and leading that it allowed many pro-death-penalty jurors to conceal their disqualifying biases and basically led them to completely change their answers on the basis of the Court's "guidance." In contrast, prospective anti-death penalty jurors were peremptorily excused without any corresponding rehabilitative efforts by the Court or questioning by the attorneys.[20]

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[19] It was agreed in pre-trial motions that the jury room was to be filled with prospective jurors and they were to be brought out individually for *voir dire* questioning. (RT 74-75.)

[20] *See* Appendix A for a summary of the treatment of the jury panel. This summary highlights the disparate treatment of the pro-and-anti-death penalty jurors.

Appellant was prejudiced by these actions as he had to use peremptory challenges against these biased jurors who should have been excused for cause. More seriously, the cumulative effect of the improper rehabilitation was to skew the panel lopsidedly in favor of the State and in favor of a death verdict.

No matter how many peremptory challenges the defense had at their disposal, a biased jury would still have resulted due to the Court's ability and demonstrated inclination to "seed" the panel with an unlimited number of pro-death-biased prospective jurors in a quantity sufficient to overwhelm defense peremptory challenges. The Court's rehabilitative efforts also inhibited and prejudiced the exercise of defense peremptory challenges, as it would have been futile to challenge too many of the randomly-chosen objectionable jurors, beyond the extremely biased, if the remaining eligibles pool had an equal or possibly higher proportion of objectionable jurors, which it plainly did.[21] Additionally, the presence in the pool of so many "rehabilitated" jurors with extreme pro-death biases was another prejudicial factor for the defense, as challenging the moderately-biased risked their substitution with the extremely-biased. Thus, the fact that the defense did not exercise all its peremptory challenges is of no moment, but rather actually illustrates the chilling effect of

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[21] *See* Appendix A.

the Court's *voir dire* questioning procedure.

No less than 23 prospective jurors who should have been excluded by challenges for cause were improperly "rehabilitated," and all are discussed in detail herein. Several of these otherwise excludable jurors made their way onto Appellant's jury. (See Appendix A.)

The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." (U.S. Const., Amend. VI.) The Fourteenth Amendment extended the right to an impartial jury to criminal defendants in all state criminal cases. (*Duncan v. Louisiana* (1968) 391 U.S. 145.) In addition, the Due Process Clause of the Fourteenth Amendment independently requires the impartiality of any jury empaneled to try a cause. (*Morgan v. Illinois* (1992) 504 U.S. 719, 726.)

The Court's actions deprived Mr. Whalen of his right to a fair and impartial jury and a fair trial under the California Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 15 and 16 of the California Constitution, as well as his Eighth and Fourteenth Amendment rights not to be condemned to death except on the basis of unbiased and reliable procedures. (*United States v. Baldwin* (9th

Cir. 1983), 607 F.2d 1295, 1298; *People v. Chapman* (1993), 15 Cal.App.4th 136, 141. *See also United States v. Saimiento-Rozo* (5th Cir. 1982), 676 F.2d 146, 148.)

"The conduct of voir dire is left to the broad discretion of the trial judge. The exercise of that discretion, however, is limited by 'the essential demands of fairness.'" (*Knox v. Collins* (5th Cir. 1991), 928 F.2d 657, 666 citing *Aldridge v. United States* (1931) 283 U.S. 308, 310.)

(b) Facts in Support.

Appellant's trial was presided over by Judge John G. Whiteside of the Stanislaus County Superior Court. In pre-trial proceedings, it was agreed that all prospective jurors would compete a 30-page "juror questionnaire" which inquired about their personal characteristics, attitudes toward the death penalty, ability to listen to mitigating evidence, prior experiences with the criminal justice system, and the like. The questionnaires were all signed under penalty of perjury. Some of the relevant death penalty inquiries on the questionnaire were as follows:

> Question No. 6: This case involves the alleged murder of an elderly man. He was allegedly shot and robbed while staying at his brother's home. Is there any experience that you, a family member or close friend has had which may affect your ability, or cause you to have any concern about your ability, or cause you to have any concern about your ability to serve fairly as a juror in this case?
> Yes_____ No_____
> The Court is interested in your opinions about the death penalty. The

defendant is charged with murder, alleged to have been committed with a special circumstance. In such a case, the procedure used would be as follows: The jury would decide if the defendant was guilty or not guilty, as in any other criminal trial. If the jury found the defendant guilty, rather than not guilty, and, if his guilt was decided to be of murder in the first degree, rather than any other lesser crime (such as second degree murder, manslaughter, etc.) the jury would then consider the alleged special circumstance. If the jury found the defendant guilty of murder in the first degree, it would have to decide if the alleged special circumstance is proved or not proved. If the jury found the alleged special circumstance proved, a second "penalty" phase would be held. At the penalty phase additional evidence may be presented to aid the jury in determining which penalty should be imposed, death or life without possibility of parole, the only penalties available under these circumstance. (sic).
By asking these questions, the Court is not suggesting that a penalty phase will be reached because the Court does not know what guilty phase verdicts or special circumstance verdict you will reach.
...
Question No. 9: Check the entry which best describes your feeling about the death penalty:
Would always impose regardless of the evidence_____
Strongly support _____
Support_____
Will consider_____
Oppose_____
Strongly oppose_____
Will never under any circumstances impose death penalty, regardless of the evidence_____

Question No. 10: Please explain your views on the death penalty.

Question No. 11: In what ways, if any, have your views about the death penalty changed over time?

Question No. 12: In this case, the defendant is charged with murder for killing an elderly man with a shotgun. Do you think everyone convicted of such a murder committed during a robbery should receive the death penalty, regardless of the evidence regarding penalty which is introduced by the People and the defendant?

Yes_____ No_____ Please explain:

Question No. 13: If you were selected as a juror in this case and if the jury got to a penalty phase, would you agree to listen openly to any evidence submitted about the penalty, and base your decision about the penalty solely on such evidence and instructions?
Yes_____ No_____ Please explain:

Question No. 14: Do you feel that the death penalty is used too seldom or too often? Please explain:

Question No. 15: Do you feel that the death penalty should be mandatory for any particular type of crime? Please explain:

Question No. 16: Do you feel that the death penalty should be a possible sentence for any crime other than first degree murder with special circumstances? Please explain:

Question No. 17: Under what circumstances, if any, do you feel that the death penalty is appropriate?

Question No. 18: Under what circumstances, if any, do you feel that the death penalty is inappropriate?

Question No. 19: If a defendant was convicted of first degree murder with a special circumstance, do you feel that you would automatically vote for the death penalty and against life imprisonment without possibility of parole? Please explain:

Question No. 20: Do you feel that if a defendant was convicted of first degree murder and a special circumstance, that you would automatically vote against the death penalty and for life without possibility of parole? Please explain:

Question No. 21: What would you want to know about the defendant before deciding whether to impose the death penalty or life imprisonment without possibility of parole? Please explain:

Question No. 22: Do you believe in the adage: "An eye for an eye"?
Yes____ No_____

What does the adage "An eye for an eye" mean to you?
Is your belief in this adage based upon a religious conviction?
Yes_____ No_____

Question No. 23: California law has not adopted the "eye for an eye" principle. Will you be able to put the 'eye for an eye" concept out of your mind and apply the principles the Court gives you?
Yes_____ No_____

Question No. 24: Have you had any religious or moral training regarding the death penalty?
Yes_____ No_____ Source:

Question No. 25: Could you set aside any such training and decide this case according to the law which the Court will give to you?
Yes_____ No____ Please explain:

Question No. 26: Do you belong to any organization that either advocates for the death penalty or the abolition of the death penalty?
Yes_____ No____ If yes, what organization(s):

Question No. 27: Could you set aside your own personal feelings regarding what you think the law should be regarding the death penalty, and follow the law as the Court instructs you?
Yes___ No____ Please comment:

Question No. 28: If you are selected as a juror in this case and if the jury got to a penalty phase, would you agree to accept the court's representation that life without the possibility of parole means exactly that, that the sentence would be life without the possibility of parole?
Yes____ No____ Please explain:

Question No. 29: In deciding penalty—that is, life without the possibility of parole or death—would the costs of keeping someone in jail for life be a consideration for you?
Yes_____ No____ Please explain:
Would the costs of providing the appellate process be a consideration?
Yes____ No_____ Please explain:

Question No. 30: Knowing that a first degree murder verdict, with a

special circumstance found true, could cause the jury to enter a second "penalty" phase, and cause the jury to have to consider life without the possibility of parole, or death, would you, for any reason, hesitate to vote for first degree murder, or for a special circumstance, if the evidence proved either such thing true, beyond any reasonable doubt, just to avoid the task of deciding the penalty?
Yes_____ No_____ Please explain:

Question No. 31: If you found the defendant guilty of first degree murder and found the special circumstance to be true, would you, regardless of the evidence, because of your feelings about the death penalty, in every case automatically vote against the death penalty?
Yes_____ No_____ Please explain:

Question No. 32: Are your feelings about the death penalty such, that if there was a penalty phase of a trial, you would in every case automatically vote <u>for</u> the death penalty rather than life in prison without the possibility of parole?
Yes____ No_____ Please explain:

Question No. 87: Will you be able to set aside any feelings of pity or sympathy that you might feel for the victim or the defendant and decide this case solely on the evidence?
Yes____ No_____ If no, please explain:

Other questions related to family history, work experience, reading, media exposure and the like. All juror questionnaires were signed by the prospective jurors under penalty of perjury.

At *voir dire*, which was conducted individually, the Court first questioned the prospective jurors, and then the prosecution and defense were allowed to pose additional questions. The Court's questioning was based on the answers in the juror questionnaire, but it often took the form of an attempt to "rehabilitate" prospective jurors by having them change questionnaire

answers that would otherwise have disqualified them from sitting on Appellant's jury. It was evident from the first panel members questioned by the Court that this "rehabilitation" went well beyond the normal bounds of clarifying their answers and informing the jurors regarding the law, but instead took the form of a leading and suggestive forced march toward "acceptable" answers that were virtually force-fed by the Court.

Significantly, this leading and suggestive questioning by the Court was objected to *by both the defense and the prosecution*:

> MR SPOKES: My second objection is that the court's using leading questions in [an] attempt to lead the jurors down the path towards rehabilitation. I mean, if it's this particular juror and in particular is a clear cut case where you can take someone who initially answering the questionnaire with no pressure on them will set out some very strong preconceived notions concerning the death penalty and the course of trial and through skillful leading questions have them in effect do a 180 degrees turn while standing before the court. I think that basically causes the juror to hide their true biases and [prevents] a reasonable exercise of challenges for cause.
>
> THE COURT: Thanks for the "skillful phraseology."
>
> MR SPOKES: Nothing but skillful. There is nothing about that. You were skillful as a lawyer. You are skillful as a judge.
>
> MR PALMISANO: Your Honor, except as to different areas of questioning, I think I need to join Mr. Spokes' objection.
>
> THE COURT: You think I'm, skillful in those areas too, Mr. Palmisano?
>
> MR. PALMISANO: Yes, your Honor. I think you are very skillful. That's the problem.

THE COURT: Thank you. Well, thank you for your praise. But I don't think I have done anything improper.

MR. PALMISANO: Your Honor, my objection didn't rise to the level of it being improper, but I wish your Honor would be less skillful.

THE COURT: Well, Mr. Palmisano, I just have to call it the way I see it.

MR. PALMISANO: I expected that would ultimately be the result. (RT 564-565.)

Thus, even the prosecutor objected to the Court's leading questions to the prospective jury members, quite rightly fearing it would taint their verdict, as it ultimately did. Although both parties objected to the systemic leading questioning of the venire members, the Court did not alter its inquiry or mode of questioning, and the leading questions continued to taint the jury selection process, resulting in a biased, pro-death jury panel.

Both before and after the objection, prospective jurors were asked these leading and suggestive questions which, coming from the authority of the trial judge, had a persuasive effect on their answers. As we will see in the individual errors discussed below, the Court's treatment of this issue did not ever veer away from the objectionably leading and suggestive rehabilitation that even the prosecution saw as dangerous and impermissible.

Of central importance for this issue is the fact that the Court accepted the prosecution's rationale that the juror's questionnaires represented their

personal opinions *in general*, but the object of the questioning was to see if they held these opinions in Appellant's case *in particular*:

> "MR PALMISANO: Your Honor, the problem with the questions is not for all of the respondent's (sic) to the questionnaire but obviously....For Ms. Evans, that the questions are phrased in a way that they are asking for the personal opinions of the jurors, which is fine, but you need to indicate to the jurors that how they feel isn't necessarily the law, and if they are indicating that they can put aside their personal feelings and follow the law and I don't think that the challenge for cause exists just because in a general sense they feel that the law should be something different than it is.
>
> THE COURT: All right."
> (RT 691-692.)

Crucial to the rationale was this request that the Court convey to the potential jurors that, whatever their personal opinions may be, the law compelled impartial consideration of all evidence. However, the Court failed in many instances to make this distinction clear, and even had it done so, the coercive effect of the Court's questioning rendered the opinions-in-general/opinion-in-this-case distinction meaningless.[22] Equally importantly,

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[22] Additionally, the rationale that the questionnaire represented only the general opinions of the panel is directly contravened by the specific nature of many of the questions, as detailed *supra*. For instance, Questions 6 and 12 recited the specific allegations of Appellant's charges; Questions 13, 25 and 28 specifically asked for jurors' opinions in "this case;" and Questions 21, 31, 85 and 87 referred to "the defendant" which could only mean Appellant. Even more telling were the written answers to these and other questions, which the jurors overwhelmingly interpreted to refer to this specific case, as will be shown in the discussion *infra*.

the Court did not apply this rationale and standard to rehabilitate prospective jurors with a propensity to *oppose* the death penalty. The opinions-in-general (questionnaire) versus opinions-in-this-case (*voir dire*) rationale was employed only for pro-death-penalty jurors, as will be shown *infra*. Anti-death-penalty jurors were not given the chance to see whether they could likewise be rehabilitated and were peremptorily excused. As will be seen in the discussion of the individual panel members *infra,* the distinction between general and specific opinions was largely a *post facto* invention which was fictitious, having no basis in law or fact.

The prejudicial nature of the Court's questioning, and the shifting standards to excuse pro-and anti-death-penalty jurors resulted in a jury panel lopsidedly predisposed to vote for death. This can clearly be seen when viewing the panel as a whole. (*See* Appendix A for a summary of the entire panel). The absence of corresponding efforts by the Court to rehabilitate jurors who would have been defense-oriented or predisposed to a life sentence also contributed, causing their immediate removal, also contributed to the pro-death skewing of the panel. While none of the anti-death-penalty prospective jurors were excused *solely* because of their answers on the questionnaire, the Court's questioning of these prospective jurors was so perfunctory, lasting only one or two pages of transcript, that in actuality they were disqualified

based on their questionnaire answers. There was no corresponding efforts by the Court to see if they could follow the law in this particular case, as with the pro-death-penalty prospective jurors. The anti-death-penalty prospective jurors who were swiftly excused were:

1) John Layman (RT 219.)

2) Johann Broussard (RT 406.)

3) Matthew Figures (RT 524.)

4) Beatrice Hampton (RT 668.)

5) Gale Fordmellow (RT 685.)

6) Neva Clark (RT 698.)

7) Oliver Bauman (RT 719.)

8) Carmen Zamora (RT 964.)

9) Antonina Mendes (RT 1070.)

10) Rose Rodriguez (RT 1141.)

11) Billie Costa (RT 1154.)

Other prospective jurors harboring views inimical to the prosecution were also summarily dismissed. For instance, prospective juror Douglas Smith was excused on the basis of only one answer on the jury questionnaire, that under certain circumstances he would tend to not believe the testimony of a law enforcement officer and in certain circumstances it would be difficult for

him to fairly evaluate that testimony. (RT 634-635.)[23]

Despite the Court's rehabilitation of multiply-objectionable pro-death jurors, who harbored many views that would have justified defense challenges for cause, these 13 were excused with minimal or virtually no effort to see if they too could put aside their "opinions-in-general" and follow the law in this particular case. The questionnaires of these prospective jurors were in many cases far less disqualifying than those of any of the pro-death jurors "rehabilitated" by the Court.

I(a): The Court improperly rehabilitated prospective juror Juanita Edwards.

The answers of prospective juror Juanita Edwards in her questionnaire and at *voir dire* should have given the Court notice that she was subject to a challenge for cause by the defense.

In her questionnaire, as to Question 9, Ms. Edwards wrote that she "strongly supported" the death penalty. (CT 1470.) Asked to explain these views in Question 10, she added "If you intentionally take someone's life you should pay with your own." (CT 1471.) Over time, these views had not changed. (Question 11) *Id.* As to Question 12, she was "not sure" whether everyone convicted of a crime such as charged against Mr. Whalen should

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[23] *See* Appendix A for a summary of the questioning of the panel.

automatically receive the death penalty "regardless of the evidence regarding penalty which is introduced by the People and the defendant." (CT 1471.) Asked in Question 14 whether she thought the death penalty was used too often or too seldom, she wrote "Too seldom. I believe it would be a deterrant (sic) if used more often." (CT 1472.) She expressed her unwillingness to listen to any evidence presented at the punishment phase when, in response to Question 15, whether the death penalty should be mandatory for any crime, she wrote "Yes. For intentional and premeditated murder." (CT 1472.) Ms. Edwards even felt the death penalty should be mandatory for non-homicide crimes "if the crime was viscious." (sic)(Question 16) (CT 1472.) In contrast, as to Question 18, she felt the death penalty inappropriate only for "accidental death" which of course might not even be a crime. (CT 1472.)

Even more disqualifying was her "yes" answer to Question 19, "[i]f a defendant was convicted of first degree murder with a special circumstance, do you feel that you would automatically vote for the death penalty and against life imprisonment without possibility of parole?" (CT 1472-1473.) Her unwillingness to consider any mitigating evidence at all was revealed when she was asked in Question 21 "[w]hat would you want to know about the defendant before deciding whether to impose the death penalty or life imprisonment without possibility of parole?" Ms. Edwards answered "I don't

know. I don't really think personal circumstances is (sic) an excuse." (CT 1473.) She believed in the adage "an eye for an eye" (Question 22) explaining that "what harm you do to someone else should be done to you," and this belief was based on "a religious conviction." (CT 1473.) This religious conviction was based on her "own study of the bible" (Question 24). (CT 1474.) Ms. Edwards, further indicating that she had a closed mind as to mitigating evidence, wrote that "I would not have a problem deciding the penalty if I had found him guilty" in response to a question that asked whether she would hesitate to vote for first-degree murder knowing that the consequences could be a death sentence (Question 30). (CT 1475.)

Additional causes of concern for the defense were the fact that Ms. Edward's brother-in law was murdered "35 or 40 years ago" (CT 1482); shortly before the trial, her "$11,000 tractor was stolen and not recovered" (CT 1482); and several years prior to the trial she had contacted the Sheriff when "three-wheelers were trespassing on our property" in an incident in which she was said to have wielded a knife. (CT 1483.) Her husband owned two rifles and a shotgun for "hunting." (CT 1485.) Ms. Edwards' opinion about alcoholics or drug users was that "they don't want to face facts as they really are." (CT 1486.) Her reading material was "Forbes," "Reader's Digest," the "Modesto Bee" and "Investor's Business Daily." (CT 1488.) Ms.

Edwards' favorite programs included "Rush Limbaugh," a very conservative, pro-death-penalty radio commentator. (CT 1489.) She was involved in a neighborhood watch group. (CT 1489.) Regarding the O.J. Simpson case, Ms. Edwards felt that "the verdict was wrong. I don't think the jury deliberated—they had made up their mind already." (CT 1492.)

Further evidence of Ms. Edwards' having a closed mind as to mitigating evidence was also revealed at the *voir dire*, but this prospective juror was led through a series of leading questions designed to force changes to her questionnaire answers. The cumulative effect of this was to stack the jury pool with pro-death, otherwise excusable potential jurors, thus providing a fundamentally unfair jury which ultimately sentenced Appellant to death.

The Court first took up Ms. Edwards' questionnaire answers that indicated she would automatically vote for the death penalty if the defendant was found guilty. She was asked the following:

> Q. Okay. If you found the defendant guilty under the circumstances of this particular case and found the special circumstances to be true, is there any feeling in your mind that you would automatically vote for the death penalty without listening to the evidence in aggravation and mitigation?"
> (RT 422.)

Not surprisingly, Ms. Edwards answered in the negative. *Id.* This directly contradicted her answer in the questionnaire.

The defense then questioned her about mitigating evidence, and she was still inclined to ignore it:

> Q. For example, suppose it was presented that the defendant was abused as a child. Is that something you'd disregard and vote for the death penalty because...
>
> A. Probably.
>
> Q. So you believe that as you sit there right now, any evidence of the defendant's personal history or personal events that occurred to him during his life which might be considered by other jurors as a circumstance in mitigation, that you would automatically disregard that evidence if it was about his person?
>
> A. It's hard to answer. I can't say I would automatically do it. I would probably lean that way.
>
> Q. As you sit there today, you're more inclined to vote for the death penalty than you would be to vote for life without possibility of parole if the defendant were convicted of murder, robbery, and the special circumstance of having committed the murder in the course of the robbery?
>
> A. I think so.
>
> Q. Can you think of any circumstances under which you would not vote for the death penalty if the defendant were convicted of those charges?
>
> A. I don't...I don't know.
>
> Q. Can you think of anything that would cause you to believe that the penalty of life without possibility of parole would be appropriate if the defendant were convicted of those charges?
>
> A. Not really.
>
> Q. So, in other words, there's no evidence that would cause you to vote

for life without possibility of parole?

A. I don't know. But I'm saying I would lean toward that. I really don't know what the evidence could be to make me vote one way or the other.
I mean I know that's not what you want, but I don't know how to answer it, because I don't know what I would do. I'm just saying what I think, that I would lean that way.

Q. That's not what I'm...I appreciate that answer. But I think the real question that I'm trying to find out from you is can you think of any evidence that could be presented by a person who's been convicted of murder in the course of a robbery and special circumstances, can you think of any evidence that might cause you to vote for life without possibility of parole?

A. Well, right now, no.

MR. SPOKES: Challenge for cause, Your Honor.
(RT 426-427.)

These answers alone, even without those in the questionnaire, should have caused this juror to be excused for cause by the Court, but coupled with her questionnaire answers, it was not even a close call. Yet the prosecutor was then allowed to ask a long hypothetical question that did not relate to the facts of this case at all, with details such as the defendant "sav[ing] children from a burning orphanage, or he is a decorated war hero. His problems didn't start until after the war and after his war experiences." (RT 428.) Then Ms. Edwards stated she could consider this evidence. (RT 428-429.) She was then asked whether she could "listen open mindedly" to all evidence, and she replied affirmatively. (RT 430.) In response to a question from Mr. Spokes,

Ms. Edwards stated she could vote for life if there were no aggravating and no mitigating evidence and if the Court instructed that a vote for death was proper only when the circumstances in aggravation outweighed those in mitigation. (CT 430.) Based on these changes to her questionnaire answers, the defense did not renew its challenge and the juror was not excused. (RT 430.) Appellant was prejudiced as he had to use a peremptory challenge to excuse her. More importantly, as the panel was seeded with multiply-objectionable potential jurors, the exercise of defense peremptory challenges was rendered both futile and dangerous.

I(b): The Court improperly rehabilitated prospective juror Julie O'Kelly.

The answers of prospective juror Julie O'Kelly on her questionnaire (CT 1588- 1617) indicated that she would be subject to a challenge for cause by the defense. In that questionnaire, she wrote in response to Question 15 that she supported the death penalty for any crime that was "voluntary."[24] She believed in "an eye for an eye." (CT 1591, 1593.) Asked in Question 11 to explain how her views about the death penalty have changed over time, Ms. O'Kelly wrote "the way the world is going, if you just kill someone because they are in your way they deserve the same." (CT 1591.) A disqualifying

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[24] "If it proves to be voluntary I suppose it should be an eye for an eye." (CT 1591.)

answer was given to Question 12, whether anyone who was convicted of a murder committed during a robbery should receive the death penalty, regardless of the evidence introduced by the defense at the penalty phase. (CT 1591.) Ms. O'Kelly wrote that death should be mandatory, explaining "if they kill someone just because they are there it should be considered for them." (CT 1591.) Asked in Question 14 about her feelings about whether the death penalty was used too seldom or too frequently, she wrote "[too] seldom. There are people sitting on death row that we are paying for as taxpayers that aren't going anywhere." (CT 1592.) Ms. O'Kelly did not feel that the death penalty should be mandatory for any crimes other than first degree murder (Question 16), writing that "I am not a hard person" but "if it were a relative I might feel differently." (CT 1592.)

Another disqualifying factor was this prospective juror's attitude toward mitigating evidence. Asked in Question 21 "[w]hat would you want to know about the defendant before deciding whether to impose the death penalty or life imprisonment without possibility of parole," she wrote "I don't think I would want to know anything about him." (CT 1593.)

As to her belief in the adage "an eye for an eye," she wrote in answer to Question 22 that "whatever that person has done to another person, it should be done to them." (CT 1593.) Ms. O'Kelly wrote that the costs of keeping

someone in prison without the possibility of parole would be a consideration for her (Question 29). (CT 1595.)

Additionally, she was the victim of a mugging in 1992, which figured in several of her answers, and it had affected her to the extent that after the incident, she "looked at everyone like they were going to attack me and take what I have." (CT 1601-1602, 1604.) Just from reading the questionnaire, she had formed an opinion on the case, that "alcohol and drugs were a factor." (CT 1613.)

Despite these disqualifying answers, the Court attempted, through leading and suggestive questioning, to rehabilitate this prospective juror by coaxing her to change her answers. The Court first questioned Ms. O'Kelly about her belief that anyone convicted of a murder committed during a robbery should receive the death penalty:

> Q. Okay. Now by this answer do you mean that in this particular case if you found the defendant guilty of the crime that he's charged with and that it was committed during the robbery, that you would automatically vote for the death penalty regardless of what other evidence there was?
>
> A. I'd have to say no. It depends.
>
> Q. Depends on the circumstances?
>
> A. Correct.
>
> Q. All right. So you would be able to listen then to the evidence in aggravation, which means the factors that make the defendant or his

crime worse, and the circumstances in mitigation, which make the defendant or his crime look better, and decide whether the one set of circumstances outweighed the other?

A. I would be able to listen to that, yes.

Q. Okay. And you would not automatically vote for the death penalty in every...in this case just because the defendant had been convicted; is that correct?

A. That's correct.

Q. And you would not automatically vote for life without possibility of parole without hearing the circumstances; is that correct?

A. That's correct.

Q. If you found the defendant guilty and if you found that the circumstances in aggravation outweighed the circumstances in mitigation, would you have any problem in returning a verdict calling for the death penalty?

A. No.

Q. If, on the other hand, you found the circumstances in mitigation outweighed the circumstances in aggravation, would you have any problem in returning a verdict of life without possibility of parole under the circumstances?

A. No.

Q. Okay. In answer to question 21 there was a...said, "What would you want to know about the defendant before deciding whether to impose the death penalty or life?" You said. "I don't think I'd want to know anything about it." (sic).
Do you understand that if the...that the circumstances in mitigation in this case, if we get that far, among those things that are commonly presented will be things about the defendant's background, where he came from, what kind of a person he is, what kind of factors have shaped his life up to this point. Do you believe that you would be able

to listen to those factors and consider them in deciding whether or not to impose the death penalty or grant life without possibility of parole?

A. I would be able to listen to that.

Q. In other words, you're not going to disregard those factors?

A. No, sir.

Q. In this particular case, are you?

A. No.

Q. Okay. I think in answering question 29 you said, "In deciding between...deciding penalty would the costs of keeping somebody in jail for life be a consideration for you" and you said yes.
Does that mean you're more likely to favor the death penalty because you want to save the state a few bucks or do you want him to keep a person in jail?

A.. Not necessarily. It would depend.

Q. That's not one of the factors...I'm telling you right now that that's not one of the factors that you would be allowed to consider in determining whether to impose the death penalty or grant life without possibility of parole. Do you understand that?

A. Yes.

Q. Would you follow that instruction?

A. Yes.

Q. And would you not get into the jury room and say, "Let's save the state some money here and let's put this guy to death"?

A. No.
(RT 443-445.)

Thus virtually all of the "questioning" of Ms. O'Kelly was not an

inquiry but actually a series of admonitions and statements which demanded rather than suggested the "answers." Further leading and conclusory questions were asked regarding Ms. O'Kelly's attitude toward plea agreements and her fear because of a prior mugging:

> Q. I think that plea agreement that they're referring to are agreements between a witness who is getting a deal, quote, unquote, in exchange for his testimony in this case. Do you under stand the question now?
>
> A. Now I do.
>
> Q. Okay. So you just misunderstood what that question was talking about; is that correct?
>
> A. Correct.
>
> Q. Okay. And so what you really meant by that is if someone were to enter a guilty plea and express remorse for his crime that that might be a factor that you would consider?
>
> A. Yes.
> (RT 446.)
> ...
>
> Q. All right. In answer to question 72...you said something about, you're 'fearful after being mugged. I looked at everyone like they were going to attack me and take what I have." Nonetheless, regardless of the fact that you are fearful of that situation, that's not going to influence you in deciding this case?
>
> A. No. That was at the time it happened.

The defense asked only one question of this prospective juror, and she was then passed for cause. (RT 450). Appellant was prejudiced as this prospective juror, along with many others discussed herein, remained in the

potential juror panel at the conclusion of jury selection, thus inhibiting and rendering futile the further exercise of defense peremptory challenges.

Without the Court's rehabilitative efforts, achieved through leading and suggestive questioning that left no doubt as to the answer being sought, this juror would have been subject to a challenge for cause by the defense.

I(c): The Court improperly rehabilitated prospective juror Isabelle Williams.

Prospective juror Isabelle Williams gave many disqualifying answers in her juror questionnaire that should have alerted the Court that she could not be fair to the defense. She wrote in answer to Question 9 that she "strongly supports" the death penalty, adding that she "support(s) this form of punishment in special cases." (CT 2940). She believed that everyone convicted of murdering an elderly man with a shotgun during a robbery should automatically receive the death penalty, regardless of any mitigating evidence introduced by the defense, writing that "this is one special situation that requires extra punishment" (Question 12). (CT 2941.) As to Question 14, she felt that the death penalty is used too seldom and "there are too many avenues of appeal." (CT 2942.) Ms. Williams also felt that the death penalty should be a possible sentence for other crimes not amounting to murder, such as "sedition, for treason and for repeated acts of terrorism where no death occurred" (Question 16). (CT 2942.) She felt the death penalty was

appropriate for "murder, terrorism, anarchy" (Question 17). (*Id.*). She felt it inappropriate only for "death due to negligence, not intent." (Question 18). (*Id.*). In Question 19, Ms. Williams was "unsure at this time" whether she would automatically vote for the death penalty if the defendant was convicted of first degree murder with a special circumstance. (*Id.*). In contrast, her answer to the flip side of this question (Question 20), whether she would automatically vote for a life sentence, was an emphatic "No!" (CT 2943.) The only facts about the defendant she would want to know in deciding whether to impose the death penalty was "prior criminal activity" (Question 21). (*Id.*)

She believed in the adage "an eye for an eye," adding for emphasis "he who lives by the sword shall die by the sword!" (Question 22) (*Id.*) Significantly, as to Question 28, Ms. Williams wrote that she would not agree to accept the court's representation that life without the possibility of parole meant exactly that. She added in explanation that "history does not prove this to be so. A new governor or legislature could alter this law. Archie Fain comes to mind." (CT 2945.) Additionally disqualifying was her view that the costs of keeping someone in jail for life would be a consideration for her in deciding the appropriate punishment (Question 29). (CT 2945.) She also felt that the costs of providing appellate process for Appellant would also be a

consideration for her in voting for life or death. (Question 29). (CT 2945.) Ms. Williams knew former Judge Jerry Underwood as well as David Sunday, recently retired chief of police in Oakdale, whose sons were on the Modesto Police Department. (CT 2951.) She was also the victim of a home robbery. (CT 2952.) Ms. Williams felt that jury service was "an inconvenience and a very demeaning process." (CT 2962.)

Despite, or perhaps because of these questionnaire answers, the road to rehabilitation for this prospective juror was a tortuous one. After explaining the guilt and punishment phases of the trial, the court asked these questions:

> Q. Okay. Understanding these things, do you feel that regardless of the evidence that was introduced in aggravation and mitigation, that if you had found the defendant guilty of the crime, you were going to vote for the death penalty in this particular case?
>
> A. I would still have to listen to the evidence. Probably I would be leaning to the death penalty.
>
> Q. Do you understand that in this case, death is a penalty which is authorized by the law, but it's not mandated?
>
> A. Yes.
>
> Q. If the—if you listen to the evidence in the penalty phase of the trial, and if the evidence in mitigation, in your opinion, outweighed the evidence in aggravation that was introduced, do you believe that you would be able to—would you have any hesitancy in voting for life without possibility of parole?
>
> A. Yes.
>
> Q. You would have hesitancy in doing so?

A. Oh. I didn't hear the hesitancy part. I would be able to weigh the factors.

Q. Well, if you felt—let me state it again.
If you felt that the factors in mitigation, which means those factors tending to indicate that the death penalty should not be imposed, outweighed the factors in aggravation, after having listened to all the evidence, would you have any hesitancy in voting for the sentence of life without possibility of parole?

A. Would I have any hesitancy? You know, I'm not there. I'm not sure—you know, it's not an easy answer.

Q. Well, I know it's not an easy answer, but I'm asking you to assume a certain set of facts.

A. Yes. Right.

Q. Assume that—
A. Would I have any hesitancy in voting for—

Q. Life without the possibility of parole if you believed that the factors in mitigation which were shown to you in the penalty phase outweighed the factors in aggravation?

A. I wouldn't have—the hesitancy would not be there.

Q. You could do that?

A. (Nods head.)

Q. On the other hand, if the factors in aggravation outweighed the factors in mitigation, do you believe that you would have any problem in voting for the death penalty?

A. No problem.
(RT 648-649.)

The multiple coaching, the leading questions, and the suggestive

questions still left this prospective juror with scruples against a life sentence but having "no problems" with a sentence of death. Appellant again was prejudiced because of this biased prospective juror's presence in the panel.

I(d): The Court improperly rehabilitated prospective juror Diane Oliver.

The answers of prospective juror Diane Oliver on her questionnaire (CT 1618-1647) were potentially disqualifying and should have alerted the Court that she was subject to a defense challenge for cause. In answer to Question 9, Ms. Oliver stated that she "strongly support[ed]" the death penalty, explaining that "I feel that if a person commits a crime he should have to pay for his actions." (CT 1621.) She also thought that if a person was found guilty of a crime such as that alleged here, they should automatically receive the death penalty, regardless of any evidence introduced by the defense at the penalty phase. (Question 12). (CT 1621.) In Question 14, Ms. Oliver felt the death penalty was used too seldom and it should be mandatory "only for someone that takes another persons life." (CT 1622.) As to Question 17, she felt the death penalty was appropriate "only if it was a planned crime & someone was killed" which would cover all first-degree murders. (CT 1622.) As to Question 19, she was "not sure" whether she would automatically vote for the death penalty if the defendant was convicted of first degree murder. (CT 1622.) She was unsure whether she could accept the Court's instruction

that life without the possibility of parole meant exactly that. (Question 28). (CT 1625.)

Despite these answers, the Court again went to great lengths to have this prospective juror change these answers through leading and suggestive questioning. The Court first led Ms. Oliver to change her answer regarding an automatic death penalty by leading her through a series of suggestive explanations, then asking:

> Q. That's not what you meant?
>
> A. Right.
>
> Q. Okay. If, on the other hand, the defendant were found guilty of the crimes that he's charged with, would you automatically vote to grant life without possibility of parole regardless of any of the evidence?
>
> A. No, not necessarily.
>
> Q. You mean that you would have to listen to the evidence?
>
> A. Right.
>
> Q. That would be presented in making a determination based on that; is that correct?
>
> A. (Nods head.)
>
> Q. You wouldn't make a decision until you heard that; is that correct?
>
> A. Right.
> (RT 451-452.)

Even after all of this coaching, this prospective juror was still unsure:

Q. And do you believe that if you felt that the circumstances in mitigation, you could impose the death penalty if that was the circumstance, if that was the case?

A. Yeah, I guess.
(RT 452.)
...

Q....would you for any reason hesitate to vote for first-degree murder or special circumstances if the evidence proved that either thing were true beyond a reasonable doubt just to avoid the penalty" And you said, 'Not sure."
Is that because you didn't understand the question?

A. Right.

Q. Okay. Do you understand the question now?

A. Yeah.

Q. After having talked to me. And what is your answer to that question now?

A. No.

Q. In other words, you would find the defendant guilty or not guilty based on the evidence regardless of what would happen the next phase of the trial; is that correct?

A. Yeah, I guess.
(RT 453.)

Thus, even after extensive coaching and leading questions, Ms. Oliver was still unsure of her ability to render a fair verdict. Again, Appellant was prejudiced by the Court's failure to have her excused and her presence in the panel.

I(e): The Court improperly rehabilitated prospective juror Yvonne Caselli.

The answers of prospective juror Yvonne Caselli on her juror questionnaire (CT 1859-1885) should have given the Court notice that she was subject to a defense challenge for cause. In response to Question 9, she wrote that she "strongly supports" the death penalty. (CT 1860.) Asked in Question 10 for an explanation of her views, she wrote "If 'you' think life is inconsequential–prepare to pay the ultimate penalty!–if you decide to take that person's life." (CT 1861.) Question 12 gave some details of the allegations and asked "[d]o you think everyone convicted of such a murder committed during a robbery should receive the death penalty, regardless of the evidence regarding penalty which is introduced by the People and the defendant?" Ms. Caselli answered "Yes. The murder was probably not necessary." (CT 1861.)

As to Question 14 which asked whether the death penalty is used too frequently or too seldom, Ms. Caselli answered "Too seldom—death row is overcrowded with convicted and sentenced criminals way overdoing the appeal time—to much money spent supporting these folks!" (CT 1862.) Her answer to Question 15 indicated that she felt that the death penalty should be imposed for any murder. (CT 1862.) The next question asked whether the death penalty should be a possible sentence for any crime other than first degree murder, and Ms. Caselli answered "Yes. Any murder." (CT 1862).

Question 21 asked "[w]hat would you want to know about the defendant before deciding whether to impose the death penalty or life imprisonment without possibility of parole?" Indicating a disregard for mitigating evidence, Ms. Caselli wrote "Why he had such little disregard for another human life." (CT 1863.) The answer to Question 22 showed that Ms. Caselli believed in the adage "an eye for an eye" with her explanation that "if you sin against another and take their life prepare to lay down your own." (CT 1863.) Even more revealingly, Ms. Caselli admitted that she would not be able to put the "eye for an eye" principle out of her mind and apply the Court's principles, even though it was explained that California had not adopted the "eye for an eye" principle. (Question 23). (CT 1864.) Ms. Caselli, in Question 24, stated that she had religious or moral training regarding the death penalty and she did not know whether she could set aside this training and decide the case according to the law. (CT 1864.) In a similar vein, as to Question 27 which asked "Could you set aside your own personal feelings regarding what you think the law should be regarding the death penalty, and follow the law as the Court instructs you?" the answer was "no." (CT 1864.)

Ms. Caselli, as to Question 28, did not know whether she could accept the Court's instruction that life without the possibility of parole meant exactly that (CT 1865); and she admitted in Question 29 that the costs of keeping

someone in prison for life would be a consideration in deciding the penalty. (CT 1865.) Question 32 asked "Are your feelings about the death penalty such, that if there was a penalty phase of a trial, you would in every case automatically vote for the death penalty rather than life in prison without the possibility of parole?" Ms. Caselli answered "Yes."[25]

Ms. Caselli was formerly employed by a sheriff's department in Wyoming (CT 1871); had been mugged in 1981 (CT 1871); had been the victim of a residential burglary (CT 1872); and admitted that she felt fearful of violent crime on a daily basis. (CT 1874.) She thought that "high-priced 'bought' experts" should not be allowed to testify at trial. (CT 1876.)

These answers to the questionnaire clearly indicated that Ms. Caselli could not follow California law and be fair to Appellant, and she should have been excused for cause. A juror with equally-extreme attitudes opposing the death penalty would have been immediately excused, as several were. Yet when she was questioned at *voir dire*, the Court went to extraordinary lengths to rehabilitate Ms. Caselli, leading her to contradict everything she answered in the questionnaire:

---

[25] Given her answers in the entire questionnaire as well as this question, her answer to the previous question, which stated the same question in terms of automatically voting against the death penalty, her "yes" answer to that question is an obvious error. (CT 1866.)

In its questioning of prospective juror Yvonne Caselli the following exchange took place:

> "THE COURT: Okay. Just a few questions off your questionnaire here and after we're through with that you'll be all done...
> With reference to question 12..."in this case the defendant is charged with murder for killing an elderly man with a shotgun. Do you think everyone convicted of such a murder during the commission of the robbery should receive the death penalty regardless of the evidence regarding penalty which is introduced by the people and the defendant"? You answered, "Yes. The murder was probably not necessary."
> (RT 553-554.)

The Court then attempted to rehabilitate this prospective juror by explaining the two phases of the trial, but her answers still revealed a strong predisposition towards death:

> "THE COURT: Understanding that would you be able to listen to the evidence and if the evidence in aggravation outweighed the evidence in mitigation, would you be able to vote for the death penalty?
>
> CASELLI: I believe I could.
>
> THE COURT: Yes?
>
> CASELLI: Yes.
>
> THE COURT: And on the other hand, if you listen to the evidence and you believe that the factors in mitigation outweigh the factors in aggravation, could you vote for the sentence of life without possibility of parole?
>
> CASELLI: I really don't, I really don't know at this point, your Honor."
> (RT 555-556.)

Thus, she still a strong predisposition towards a death sentence even

after the Court had explained the two phases of the trial and strongly urged the elementary proposition that the verdict should be arrived at by listening to all the evidence. The Court had to continue to coax forth the correct answers from this juror:

> THE COURT: Well, you...
>
> CASELLI: I could. Okay. You know. I just.
>
> THE COURT: You have to hear the evidence?
>
> CASELLI: That's right. I'd have to hear something before I can say.
>
> THE COURT: So in other words, you couldn't make that decision until you'd listen to both sides?
>
> CASELLI: That's right.
>
> THE COURT: And determine whether in your mind there were more factors indicating that the death penalty should be imposed than factors indicating that they should not?
>
> CASELLI: Yes.
>
> THE COURT: Or vice versa?
>
> CASELLI: Yes.
> (RT 556.)

However, prospective juror Caselli had to be further rehabilitated based on her answers to juror questionnaire number 22:

> THE COURT: Okay. You indicated that in answer to question 22 you believe in the adage an eye for an eye. You said if you yes (sic), you said what does it mean. You said, "If you sin against another and take the life then prepare to lay down your own." And you said, "Is that

based on religious conviction?" You said yes. And then you said, "California law has not adopted an eye for an eye principle."
"Would you be able to put that concept out of the mind and apply the principle that the court gives you," and the answer to that said no.
(RT 557.)

This prospective juror's questionnaire answers were so strong that they clearly precluded her from following the law. The Court then virtually lead Ms. Caselli by the hand through her answers:

THE COURT: Based on the answer that you've given me to the previous questions do you want to change that answer?

CASELLI: Yes.

THE COURT: Okay. And your answer to that is now yes that you would be able to follow the court's instructions and base your decision on what you hear in court?

CASELLI: Yes, sir. At the time of the day and people in the jury assembly room it was a little hard to concentrate on the questions.
(RT 557.)

This prospective juror was led through more troubling questionnaire answers:

THE COURT: Okay. In a couple of places here you indicated that in deciding, well, actually the question 28 you said, "If selected as a juror in the case and the jury got to the penalty phase would you agree to accept the court's representation that life without possibility of parole means exactly that the sentence would be life without the possibility of parole?" And you said "Don't know."
Are you willing to accept right now...if you get in there as a juror that you would—will conduct yourself as if life without possibility of parole means exactly that the defendant, if he's entenced to life in prison and will stay there without parole. Are you willing to accept that concept?

CASELLI: Yes, sir.
(RT 557-558.)

Still more answers to the jury questionnaire caused problems for the Court:

THE COURT: And [questions] 29 and 30. You said, "In deciding penalty that it's life in prison without possibility of parole or death would the cost of keeping someone in jail for life be a consideration?" You said "Yes."
"And would the cost of providing appellate process be a consideration?" You said "Yes."
Did you mean that by that that you would—when you got back there and you were thinking about whether this case if you got to that point deserved the death penalty or life without possibility of parole that you would tend to vote for the death penalty because that way you would save some dollars for the state because the defendant wouldn't have to be warehoused?...

CASELLI: That was my reasoning behind my answer, yes.

THE COURT: Well, are you going to let that influence you in deciding which penalty to decide on?

CASELLI: No, I don't think so.

THE COURT: In other words, you're not going to put dollars and cents either way before any other consideration?

CASELLI: No, sir. This is important. Not something I take lightly.

THE COURT: And on the other hand, with regard to the appellate process if you were to vote for the death penalty would you be swayed to vote the other way because of the cost of an appeal if that is the situation?

CASELLI: No.
(RT 559.)

The Court then virtually dictated to the prospective juror the correct answer to still another question:

> THE COURT: Then on answer to [question] 31 you said, "If you found the defendant guilty of first-degree murder and found special circumstances to be true, would you regardless of the evidence because of your feelings about the death penalty automatically vote against the death penalty." And you said yes. Is that a wrong answer?
>
> CASELLI: I believe so.
>
> THE COURT: So your answer to that question is actually no?
>
> CASELLI: Would be a no.
>
> THE COURT: Correct?
>
> CASELLI: Yes, correct.
>
> THE COURT And with respect to question...32 you said, "Are your feelings about the death penalty such that if there was a penalty phase you would in every case vote automatically for the death penalty?" You answered that one "Yes," and based on your answers to the questions I previously answered would that be no also?
>
> CASELLI: I believe so. Those questions are rather tricky.
>
> THE COURT: Kind of confusing?
>
> CASELLI: Yes. Get you thinking one way.
>
> THE COURT: All right.
>
> CASELLI: Just change everything.
> (RT 559-560.)

The Court also attempted to deal with this prospective juror's answers that she would reject testimony resulting from a plea bargain. (RT 560.) Ms.

Caselli wrote that this alone would cause her to reject the testimony because "plea bargaining is crap." (*Id.*)

The defense challenged Ms. Caselli for cause based on her answers to questions 12, 19, 23, 28, 29 and 32. (RT 563.) The Court denied this challenge for cause. (*Id.*) Without the Court's leading and suggestive rehabilitation of this prospective juror, her answers on the juror questionnaire would have caused her to be successfully challenged.

The "rehabilitation" of this prospective juror led both the defense and the prosecution to object to the Court's methods, as discussed above in the introductory section of this argument. (RT 563-564.) Appellant was prejudiced because this prospective juror remained in the prospective juror pool at the end of jury selection. Along with many other multiply-objectionable prospective jurors discussed herein, their presence inhibited and rendered futile further defense exercises of peremptory challenges, as their potential replacements were equally objectionable.

I(f): The Court improperly rehabilitated prospective juror Mozella Evans by asking her leading and suggestive questions designed to allow her to sit on Appellant's jury.

In her juror questionnaire (CT 2878-2907), prospective juror Mozella Evans gave several answers that would have caused her to be subject to a challenge for cause by the defense. Ms. Evans supported the death penalty

(Question 9) and elaborated that "if they deliberately, with forethought, killed someone then they're (sic) life should be forfeit." (Question 10). (CT 2880-2881.) Asked in Question 11 to describe how her views about the death penalty have changed over time, she wrote that "I have become more supportive." (CT 2881.) In Question 14, she thought the death penalty was used "too seldom—too many horrendous murders with torture done—death penalty should have been invoked." (CT 2882.) She thought the death penalty should be mandatory for "certain types of murder" as well as for "terrorism" (Question 15). (CT 2882.) Ms. Evans went so far as to think that the death penalty was appropriate "if the defendant is guilty of deliberately planning to murder someone" which would not even be murder. (Question 17) (CT 2882.) This prospective juror believed the death penalty would be inappropriate only in cases of "accidental death, mentally incompetent." (Question 18) (CT 2882.) When asked in Question 19 whether she would automatically vote for the death and against life without the possibility of parole if the defendant was convicted of first degree murder, she was uncertain, writing "I don't know." (CT 2883.) In contrast, in Question 20 she was very certain she would not automatically vote for life, writing "no—I believe in the death penalty therefore I wouldn't automatically vote against it." (CT 2883.) She reiterated her support for the death penalty in a similar later

question. (CT 2886.) When asked in Question 29 if the costs of keeping a person in prison for life would be a factor in her decision, she wrote "yes. Not just monetary cost—but the cost in the quality of life for the defendant." (CT 2885.)

Significantly for a case involving a robbery-murder, her home had been robbed twice. (CT 2892.) Additionally, her brother's car had been stolen, her cousin-in-law had been murdered and her son witnessed a shooting (CT 2891-2892.)

Despite many answers that should have disqualified this potential juror, the Court asked a number of leading questions designed to have her change her opinions, but without success:

> Q. First of all, in answer to question 15 you indicated that you thought —well, the question was, "Do you feel that the death penalty should be mandatory for certain types of crimes? Please explain." You said, "Yes. Certain types of murder."
> You understand—did you understand by the term "mandatory" that any person who is convicted of that crime would automatically be put to death?
>
> A. Yes, sir.
>
> Q. Okay. What kind of murder did you have in mind exactly?
>
> A. When he murders somebody deliberately. You set out to kill him.
>
> Q. Okay.
>
> A. I think you should be put to death.

Q. Okay. Do you feel—you understand that in this particular case there are two phases. Right?

A. Um-hmm.

Q. First phase is the guilt phase where evidence would be brought in to show that the whether (sic) the defendant did or did not commit the crime?

A. Um-hmm.

Q. Okay. And whether the special circumstances are true, and in this case the special circumstances is (sic) that the defendant committed the crime during a robbery, you understand that?

A. Um-hmm.

Q. Okay. And if the jury found the defendant did commit the crime and that it was during a robbery as a special circumstance, you would then get to the penalty phase where you would have to decide whether the punishment for that crime would be life without possibility of parole or the death penalty. You understand that?

A. Yes.

Q. Okay. Are your feelings about the particular crime that's alleged here, that is a murder that was committed during a burglary or robbery, I should say as you understand it, are your feelings such that you believe that the death penalty should be mandatory? In other words, that you would automatically vote for it?

A. I would need to know a little bit more about it. You know, did he bring the gun with him. Did he know the guy was going to be there. Was it accidental. Were they fighting over the gun. You know. I just need to know a little bit more.

Q. Well, assume for the moment that you found that the defendant brought the gun with him—well, in any event, do you feel—do you feel that if the evidence showed that the crime was premeditated that you would automatically vote for the death penalty?

A. Yes, sir.

Q. And that would be regardless of whatever evidence was introduced during the penalty phase? That is, factors in aggravation and mitigation. Aggravation being those things that tend to indicate that the penalty should be imposed, and mitigation, tend to indicate that it should not be imposed. In other words, you feel—you feel that regardless of those factors if you believe that the crime was premeditated you would vote for the death penalty?

A. I think—yeah, if it was premeditated it would be the death penalty, yes.

Q. And that's regardless of these other factors?

A. I don't know what other factors you would be referring to.

Q. Well, things about the defendant's background?

A. No. Would have no bearing on it.

Q. Nothing about the defendant's background would have any bearing at all?

A. No.

Q. So he could bring in any kind of evidence that he wanted about how tough life he's had and so forth and so on and you would not take that into consideration?

A. No.
(RT 687-689.)

The defense then challenged this prospective juror for cause. (RT 689.)

The prosecution then attempted to rehabilitate Ms. Evans by asking her whether she could follow the law. (RT 690.)

The defense then questioned her:

MR. SPOKES: As you sit there right now is it your belief that premeditated, deliberate first-degree murder should be punished by death?

A. Yes.

Q. The law says that deliberate, premeditated first-degree murder by itself isn't punishable by death. It takes what's called special circumstances. And one of the special circumstances which allows the death penalty is the murder which is committed during the course of a robbery.

A. Um-hmm.

Q. If you found the defendant guilty of premeditated, deliberated first-degree murder and found it true the special circumstances of robbery, would you believe that the death penalty should be automatic in that case?

A. If I understood it correctly that made it special circumstances, yes.

MR SPOKES: Renew the challenge, your Honor.
(RT 690-691.)

The prosecution's rationale, accepted by the Court, was as follows:

MR PALMISANO: Your Honor, the problem with the questions is not for all of the respondent's (sic) to the questionnaire but obviously....For Ms. Evans, that the questions are phrased in a way that they are asking for the personal opinions of the jurors, which is fine, but you need to indicate to the jurors that how they feel isn't necessarily the law, and if they are indicating that they can put aside their personal feelings and follow the law and I don't think that the challenge for cause exists just because in a general sense they feel that the law should be something different than it is."
(RT 691-692.)

The Court, agreeing, stated "All right."

Even with this prospective juror multiply disqualified because of her

answers to the questionnaire and at *voir dire*, the Court still attempted to rehabilitate her by asking her whether she would be able to follow his instructions "regardless of the fact, if I understand you correctly, that it is your belief that it automatically should be imposed." (RT 692.) Even then, the best that Ms. Evans could promise was "I would tend to follow your instructions." (RT 693.) The defense challenge was then denied. (RT 693.) Appellant was prejudiced because they had to exercise a peremptory challenge to excuse her and, more importantly, she constituted a part of an unfairly biased pro-death panel from which the defense should not have been forced to choose had she and many others been properly excluded. The exercise of the peremptory challenge only resulted in other equally-biased and equally-objectionable jurors replacing her and actually sitting on Appellant's jury.

I(g): The Court improperly rehabilitated prospective juror Jessica Jones by asking her leading and suggestive questions designed to allow her to sit on Appellant's jury.

In her juror questionnaire (CT 2368-2395), prospective juror Jessica Jones gave answers that would have caused her to be subject to a defense challenge for cause. As to Question 9, Ms. Jones indicated that she strongly supported the death penalty (CT 2370) and that these views have grown stronger over time (Question 11). (CT 2371.) She felt the death penalty is used "too seldom, because if a defendant is found guilty and sentenced to

death or to life without parole then why should taxpayers pay to feed and shelter them until they die anyway?" (Question 14). (CT 2372.) In Question 17, Ms. Jones thought the death penalty appropriate for child molesters (CT 2372) and that it was never an inappropriate punishment. (Question 18) (CT 2372.) As to Question 19, she wrote that she would automatically vote for the death penalty if the defendant was convicted of first degree murder "probably because I don't understand if they are going to die in prison why should taxpayer[s] pay to feed them 3 times a day, house them, etc." (CT 2373.) In Question 22, Ms. Jones wrote that she believed in the adage "an eye for an eye" because "if you do something to someone the punishment should be the same as what you did first." (CT 2373.) She also indicated, in Question 29, that the costs of keeping a person in prison for life would be a consideration in deciding on the penalty because "why keep someone in prison for the next 30-40 years when they are going to die in there anyway?" (CT 2375.) In the same question Ms. Jones objected to the cost of providing appellate process for the defendant, as "when I'm a tax-paying citizen I look at the most cost effective." (CT 2375.)

These answers should have alerted the Court that this prospective juror was subject to a defense challenge for cause. However, in the questioning of prospective juror Jessica Jones the Court followed a familiar pattern of asking

leading questions which suggested the answer, designed to rehabilitate a juror that otherwise would have been successfully challenged for cause on the basis of her predisposition to vote in favor of death.

The following exchange took place with this prospective juror:

> THE COURT: Do you feel that if you were to find the defendant guilty and to find the special circumstances true that you would, when you got into the penalty phase, that you would automatically vote for the death penalty or would you have to listen to the evidence that would be presented during the penalty phase at first?
>
> JONES: I would listen to the evidence but more than likely for the death penalty.
>
> THE COURT: Okay. All right. You understand that during the penalty phase evidence would be introduced in what's called aggravation, which would mean evidence which the prosecution believes would indicate that the death penalty should be imposed, and evidence would be introduced in what's called mitigation, which means that evidence or factors which the defense believes the jury should consider in which would tend to indicate that the sentence should be life without the possibility of parole. Do you understand those?
>
> JONES: Yeah.
>
> THE COURT: Do you believe that you would be able to listen to those various factors that are presented and determine whether the factors in aggravation outweigh the factors in mitigation?
>
> JONES: I'd listen to it, but like I said, I'd probably pick the death penalty.
>
> THE COURT: Okay. Well, I'm going to ask you one more thing. You understand that this is a crime which the death penalty is authorized but it is not mandatory. Do you have a problem with that?
>
> JONES: No.

THE COURT: Okay. You understand that if the defendant's found guilty and if the special circumstances are found true, then he would be put to death only if the factors in aggravation were found to outweigh the factors in mitigation and the jury so found?

JONES: Yeah.

THE COURT: You understand that?

JONES : UM-hmm.

THE COURT: You believe you'd be able to objectively weigh those factors, or do you believe that you would tend, because of the way you feel about it, to weigh the factors in aggravation more and vote towards the death penalty?

JONES: I think I could be objective, do it, whatever.

THE COURT: In other words, are you saying, so I'm clear about this, you understand that the death penalty is not mandatory in this case?

JONES: Right.

THE COURT: It would be imposed only if you found, as a juror and the rest of the jurors, found that the factors in aggravation outweigh the factors in mitigation?

JONES: Um-hmm.

THE COURT: You understand that?

JONES: Um-hmm.

THE COURT: Now once again, I'm going to ask you do you feel that you would be objective about it? Given the way you've answered previously, do you feel you could be objective about it, listen to those factors, weigh them and see whether those factors weigh more heavily than the factors in mitigation that you would be told about?

JONES: Yeah, I would be objective.

(RT 593-595.)

...

THE COURT: In answer to question 29 you said, "In deciding penalty, that is life in prison without possibility of parole or death, would the cost of keeping someone in jail for life be a consideration for you?" And you said, "Yes. Why keep someone in prison for the next 30 to 40 years when they're going to die in there anyway."
We need to know whether that's—or I need to know whether that's a consideration that you'd exercise or whether that is something—a simple—simply a general feeling that you have about such matters?

JONES: It's just a general opinion.

THE COURT: In other words, in deciding this case are you telling me that if you go to that point you would dismiss from your mind any thoughts about the cost of keeping the defendant incarcerated?

JONES: Pretty much, if I was instructed to do so. I mean, I would be objective.

THE COURT: And you believe that you could do that?

JONES: Um-hmm, yes.

THE COURT: Likewise you answered: "Would the cost of providing appellate process be a consideration?" And you said, "Yes. I'm a tax paying citizen. I look at most cost effective." Is that a statement have something that you consider in this case or is this again a general statement?

JONES: Again just a general.

THE COURT: Okay. Is it your representation to the court that you would not let that factor enter into your deliberations in deciding what the appropriate penalty is in this case?

JONES: No.

THE COURT: You would not?

JONES: No, it would be just.

THE COURT: You would just consider it on solely on the aggravating and mitigating factors and not on the question of...

JONES: Right.
(RT 596-597.)

Prospective juror Jones was then challenged for cause by the defense on the basis of her answers to questions 10, 12, 15, 19, 22, and 29. (RT 597.) The Court ruled that "based on the court's examination of the juror [it] is of the opinion that the juror would fairly consider the evidence. The challenge is denied." (RT 597.)

Here too, this prospective juror's answers on the juror questionnaire meant she would have been successfully challenged for cause by the defense, but for the Court's improper "rehabilitation." Even on *voir dire*, her predisposition toward the death penalty without hearing any mitigating evidence was clearly evident, and only after a series of leading and suggestive questions in which the Court virtually ordered her to be objective, were the desired answers forthcoming.

Appellant was prejudiced because he had to exercise a peremptory challenge to excuse her and, more importantly, she constituted a part of an unfairly biased pro-death panel from which the defense should not have been forced to choose had she and others been properly excluded. The exercise of

peremptory challenges against Ms. Jones and other biased panel members only resulted in their replacement with other equally-biased jurors, some of whom actually sat on Appellant's jury.

I(h): The Court improperly rehabilitated juror L. G.-H., who sat on Appellant's jury.

Juror L. G.-H.,[26] although she had extreme pro-death answers that should have caused her to be successfully challenged for cause by the defense. However, she was improperly rehabilitated through the use of leading questions by the Court, with the result that she ended up sitting on Appellant's jury.

Ms. G.-H. wrote, as to Question 9, that she "will consider" the death penalty (CT 5758) and explained in the next question that she "would support the death penalty if the factual evidence proved to me beyond a shadow of a doubt a malicious crime & murder was committed." (CT 5759.) She further wrote that "[c]riminals w-ho would present a great threat to society such as persons who have a history of violent crime in some cases deserve such sentences. It is our human and civic duty to protect those who cannot protect themselves." (CT 5759.) This juror also wrote that the death penalty should be mandatory for any "brutal murder." (Question 15) (CT

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[26] This juror is also discussed in the next issue which addresses the biased composition of Appellant's jury, as she actually sat on it.

5760.) In her answer to Question 17, which asked "under what circumstances, if any, do you believe that the death penalty is appropriate?," she wrote "when brutal murders are proved beyond a shadow of a doubt and that the criminal is proven to be a menace to society for the remainder of there (sic) life." (CT 5760.) In contrast, this juror believed the death penalty is inappropriate only when "facts are not proven and when murder is not committed." (Question 18). *Id.*

Also of interest to the defense was this juror's answer to Question 29, whether the costs of keeping someone in prison for life would be a consideration. She checked the "yes" line and wrote "in the future if the government cannot feed these inmates it would be adverse cause (sic) to let them go, example 30 years from now." (CT 5763.)

At *voir dire*, the Court asked about this juror's response to the mandatory death penalty answer, and after hints and suggestions from the Court ("what did you mean? Did you mean that it should be—should be an optional punishment for them?" (RT 826); "In other words, you would have to know the circumstances of any particular case before you would decide..." *Id.*) this juror agreed that the death penalty should be an option and not mandatory. (RT 826.) As to the costs of the appellate process which influenced this juror, after similar prodding by the Court, this juror changed

her answer and stated she could put it out of her mind. (RT 827.)

The defense asked only about this juror's answer to the question of whether she could accept that life without parole meant exactly that. She agreed that she could keep out of her mind the possibility that the legislature might change the laws at some time in the future. (RT 827.)

Appellant was prejudiced as this prospective juror, who should have been excluded, eventually sat on his jury.

I(i): The Court improperly rehabilitated juror C. P. , who actually sat on Appellant's jury, by asking her leading and suggestive questions.[27]

Ms. C. P was a very strong mandatory death-penalty juror who should have been excused peremptorily by the Court or, at the very least, successfully challenged for cause by the defense based on her answers in the questionnaire. Her views, among the most extremely pro-death of the entire panel, included support of the death penalty without regard to any mitigating evidence, a strong belief in "an eye for an eye," strong doubt that she could set aside these feelings even after being instructed to do so by the Court, and even admitting an inclination to vote for death because of the cost considerations of a life in prison and the appellate process.

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[27] Ms. C. P. is also discussed in the following argument, which details the biased pro-death nature of the composition of Appellant's jury.

Ms. C. P. wrote in her questionnaire, as to Question 9, that she "strongly supports" the death penalty. (CT 5788.) She also wrote that she would support the death penalty if the crime was "premeditated" and there was "past criminal history." (CT 5789.) Asked in Question 11 how her views on the death penalty have changed over the years, she wrote that she is "sick and tired of appeals & paroles & shortened time served." (CT 5789.) In response to Question 12, whether she would support a mandatory death verdict for a defendant convicted of a crime similar to that alleged here, "regardless of the evidence regarding penalty which is introduced by the people and the defendant," she checked the "yes" line. (CT 5789.) She explained the answer with the comment that "[he] was armed and invaded a home with robbery planned possibly...he was armed in case he needed the gun." (CT 5789.) Thus her mind was made up before the trial had begun, not only as to Appellant's guilt or innocence but also as to the penalty.

The next question, number 13, asked whether she could have an open mind at the penalty phase and base her decision only on the evidence and the Court's instructions. She checked the "yes" line but then qualified it by stating that she "would have a hard time, however, if it were a 'cold-blooded' act." (CT 5789.) Question 14 inquired whether she thought the death penalty was imposed too frequently or too seldom, and her answer was "too

seldom...to many prisoners released on parole or appeals...waste of tax $$." (CT 5790.)

The next question, number 15, asked whether she felt the death penalty should be mandatory for any crime. Her "no" answer was rendered meaningless in light of her qualification: "only for murder, violent crimes & perhaps rape under certain circumstances." (CT 5790.) Question 16 asked whether she felt that the death penalty should be a possible penalty for any crime other than first degree murder, and her answer referenced the prior question, in which she supported such an expansion of death-eligible crimes. (*Id.*) Question 17 inquired as to the circumstances in which she felt the death penalty was appropriate. Ms. C. P. wrote "murder—brutal child abuse, convicted rapist w/ past repeated offenses." (CT 5790.) The following question, number 18, asked in what circumstances she would find the death penalty to be inappropriate. Her answer was "any possibility of doubt—whether it be a possibility of self-defense or accidental." (CT 5790.) Thus, this juror felt that the sole exceptions to the death penalty would be instances that were not even crimes, let alone capital crimes.

Ms. C. P., in answer to Question 22, "sometimes" believed in the adage "an eye for an eye," adding more unequivocally "you commit a crime...you pay the price. We are responsible for our actions...no excuses."

(CT 5791.) She also indicated this belief was based on her religious conviction and her "upbringing & moral being." *Id.*

Question 27 asked whether she could set aside her personal feelings regarding the death penalty and follow the Court's instructions. She was equivocal, writing "maybe—not sure." (CT 5792.) In another disqualifying answer, to Question 29, Ms. C. P. was asked whether the cost of keeping someone in prison for life would be a consideration, she checked "yes" and explained "I'm fed up with tax $$ used to house inmates (& pampering them with frivolities)." (CT 5793.) In a similar vein, Ms. C. P. also believed that the costs of the appellate process would be a consideration in her vote as to life or death, referring to her answer. (CT 5793.)

This juror even returned to this theme in a later question, number 37, which asked "[h]ow do you feel about serving as a juror in this case?" to which she answered "Not sure—haven't served before—can only base my feelings on my disgust with violent crime; appeals & actual time served." (CT 5795.) These concerns regarding the cost of incarceration and constitutionally-mandated appeals, which even strong pro-death penalty advocates generally regard as a necessary component of justice and due process, were perhaps the most troubling of this juror's attitudes. This juror's extreme and repeatedly-expressed concerns that tax money not be spent on appeals or on life sentences

for prisoners, to the point of "disgust" and to the extent that it would actually influence her to vote for death in a capital case just to avoid these costs, were in themselves enough for her to be excused for cause.

Ms. C. P.'s answer to Question 30 was similarly revealing. It asked whether the prospective juror would hesitate to vote for first degree murder or for a special circumstance if the evidence showed it to be true, just to avoid the task of deciding the penalty. (CT 5793.) Her answer, which misconstrued the question and again showed her predisposition toward death, was: "would try to be open-minded–I simply just have a problem with compromising penalty for FIRST-degree murder." (CT 5793.) Thus, rather than not voting for first-degree murder to avoid the penalty phase, she again seemed to be troubled with the prospect of anything but a death sentence for any first-degree murder, as well as for lesser crimes such as child abuse or rape. Additionally, her use of the word "compromising" indicates that she viewed a life verdict as somehow "compromised," and by implication a death verdict as "uncompromised," no matter what the mitigating evidence.[28] Under these circumstances, Ms. C. P. was not qualified to serve as an unbiased juror in

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[28] This view was again confirmed at voir dire. Ms. C. P. was asked, "You understand there are a lot of murders that don't call for the death penalty?" Her answer was "Yeah, I know. A lot of them get off." (RT 932.)

this capital case.

Further answers reenforce this unmistakable impression. When asked whether her feelings about the death penalty would cause her to automatically vote for it in every case, Ms. C. P. checked "no" but her explanation undercut this answer: "would depend on special circumstances—if there were no special circumstances I would vote for death penalty." (CT 5794.)

She also had problems with plea bargaining, but not in any manner that would have been prejudicial to the prosecution. Ms. C. P. was concerned only because she thought plea bargainers "avoid time for something they did that would warrant more punishment." (CT 5794.) She reiterated this concern, in terms that could only apply to Appellant, in the next answer: "I don't believe it is right to avoid ultimate punishment by plea bargain." (CT 5795.) The next question again showed that Ms. C. P.'s only concern was that Appellant might be the beneficiary of a plea bargain: "I don't feel there should be a 'plea agreement' to cold blooded murder/robbery—but I need to hear all circumstances." (CT 5795.) Thus this juror's concern about plea bargains was limited to fears that Appellant might avoid the death penalty, not skepticism toward the testimony of prosecution witnesses who plea-bargained.

Of special concern to the defense in a robbery-murder case, Ms. C. P. had "observed young males break into a neighbor's house" (CT 5799) and was

herself the victim of a car burglary. She had personal experience with alcohol and drug abuse, as she knew a neighbor who "drank throughout the day—every day—hides containers, etc." She stated "I don't tolerate alcoholics/drug addicts" and indicated that evidence of alcohol abuse or illegal drug use would make it difficult for her to be fair in deciding the case, stating "Yes. Have no use for illegal drugs. Tie it in with crime sometimes. A person has a right to choose to take or not to take drugs." (CT 5804, 5807-5808, 5810.) This intolerance of drug abuse prejudiced the defense more than the prosecution, as the testimony was to reveal that drug abuse and addiction was a prime motivating factor for the crime.

Ms. C. P.'s predisposition toward a death sentence can also be seen in her answer to Question 85, which inquired whether there was anything in the defendant's age or appearance that would prevent her from considering the case on the evidence and not on the basis of prejudice or sympathy. She did not check either the "yes" or "no" line and her explanation was "I'm really not sure. I would never judge a person by appearance alone. Sympathy or pity would play no part. *My sympathy or pity would be reserved for the victim & family.*" (CT 5804.)(emphasis added). Thus, this juror admitted in no uncertain terms that she could not have any sympathy for the defendant, even if sympathy was called for by the mitigating evidence, but could decide the

case on the basis of sympathy for the victim and the victim's family, contrary to the Court's instructions. This was yet another strong indication of this juror's bias against the defendant, her feeling that some mitigating evidence was not worthy of any consideration, and her unwillingness to accept both the Court's instructions and the basic minimal requirements of a fair trial and due process. It also shows clearly that Appellant could not have had a fair guilt/innocence trial and penalty phase hearing with this juror who actually sat on his jury.

Even at the end of her questionnaire, this juror took another opportunity to alert the Court to her inclinations. Asked in Question 120 if she had formed any opinion about the case based upon completing the questionnaire, she did not check either "yes" or "no" but wrote "I hope not—the term 'murder' doesn't set with me—but I'd have to hear all evidence." (CT 5811.)

Asked to describe herself in a sentence, in Question 109, this juror wrote, in what can fairly be characterized as an understatement, "not much tolerance for crime." (CT 5809.)

The Court's "rehabilitation" of this juror proceeded along familiar lines. Initially, the Court reminded this juror that Mr. Whalen had not yet been found guilty, as the trial had not yet begun. (RT 919.) As seen with other prospective jurors, the Court then asked leading and suggestive questions that

were meaningless in uncovering overt or latent bias or prejudice on the part of this juror, or in identifying her as a prospective juror that held disqualifying views. The sole purpose of the colloquy was to "rehabilitate" this pro-prosecution and death-prone juror, while ignoring the Court's duty to weed out those who could not afford Appellant a fair trial. A typical exchange was as follows:

> Q. Anding (sic) that if you got to the penalty phase and you listen to all of this evidence which is introduced by both sides if you felt that the evidence in mitigation, that is, those things tending to indicate the death penalty should not be imposed, outweighed those things in aggravation, do you have any hesitancy in voting for life without possibility of parole?
>
> A. Yes. Do I have any hesitancy?
>
> Q. Hesitancy in voting for life without possibility of parole if you felt that the evidence so indicated during the penalty phase?
>
> A. Would I be willing to go from death to life without...[29]
>
> Q. Well, you just have two possible...
>
> A. Yes.
>
> Q. ...sentences here. And neither one of them is automatic?
>
> A. Right.

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[29] The prospective juror's response, "would I be willing *to go from* death," even at this initial stage of the questioning, shows that this juror had her mind made up as to the appropriate penalty, as her starting position was death.

Q. Neither one of them is favored in this situation, you understand that?

A. Yes, I...

Q. In other words, it's not a situation where you're obligated to vote for life without...

A. Right.

Q. You understand that?

A. Yes, I do.

Q. So understanding those things that there is no preferred or automatic penalty when you get to that phase, if you felt that the evidence tending to indicate that life without possibility of parole was the more appropriate, do you have any hesitancy in voting for it?

A. No, I wouldn't.
(RT 921-922.)

.....

Q. Okay. In answer to question 15 you said "Should you feel the death penalty should be mandatory for any particular type of crime. Please explain." You said "No." Only for murder with violent crimes and perhaps rape under certain circumstances."
When you said that, ma'am, did you mean when you said "mandatory" did you mean that it automatically be imposed if a person is found guilty of it, or did you mean that it should be an available penalty?

A. It should be available penalty. Violent is the word that I...

Q. Okay. All right. Thank you.
In answer to question 19, question 19 was, 'If defendant was convicted of first degree murder of special circumstance, you feel you would automatically vote for the death penalty against life in prison without possibility of parole?" You said "No. But above explanation number 18."
And number 18 said, "Any possibility of doubt whether it be...be a

possibility of self-defense or accidental."
Now you understand, based on my previous discussion with you, that you're not going to get to the penalty phase unless you have already found beyond a reasonable doubt that defendant was guilty of the crime; in other words, it was not accidental, and that the special circumstances were true, i.e., it was done during the course of a robbery; you understand that?

A. Right.

Q. Okay. Understanding that, is it your feeling that you would not automatically vote for the death penalty nor would you automatically vote for the other side, life without possibility of parole; is that correct?

A. No. I'd have to hear all the details.

A. Hear the evidence and the details. Okay. Thank you.
(RT 922-923.)

.....

Q. In answer to question 27 question was, "Could you set aside your own personal feelings regarding what you think the law should be regarding the death penalty and follow the law as the court instructs you?" And you said "Maybe. Not sure." Do you think you can follow my instructions on the law in this matter?

A. Yes, I could.
(RT 924.)

A vital area, Ms. C. P.'s opposition to spending money on keeping inmates in prison and the cost of appeals, was not adequately covered by the Court's colloquy. It merely attempted to establish that these were "general" concerns, not related to this specific case, with a suggestion that she not consider them in this case:

Q. In answer to question 29, "In deciding penalty (sic) that is life in prison without possibility of parole, would the cost of keeping someone in jail for life be a consideration for you?" You said, "Yes. I'm fed up with tax dollars being used to house inmates and pampering them with frivolities," I guess is what you're saying.
And, "Would the cost of providing appellate review or appellate process be a consideration?"
"Yes."
Okay. Are you...were you saying in this case you were going to...that you were going to sit down there and say "Well, gee, I..."

A. No.

Q. No?

A. No. I was just generalizing that. I'm tired of appeals. I'm tired of...

Q. Okay. A lot of people are.[30]

A. I know. I didn't realize until I finished that that was talking about this specific. I thought that was a general questionnaire.

Q. Those were your feelings in general?

A. Yes.[31]

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[30] This comment by the Court to an eventual juror had the effect of legitimizing her belief that the costs of incarceration and appeals were intolerable.

[31] However, these *voir dire* statements that the questionnaire asked only for general opinions are contradicted by her earlier written answers. For instance, Question 12 asked whether she would support a mandatory death verdict in the specific circumstances of the allegations in Appellant's case, regardless of the mitigating evidence. She answered "yes," explaining that "[he] was armed and invaded a home with robbery planned possibly...he was armed in case he needed the gun." (CT 5789.) This again shows the coercive effect of the Court's suggestions regarding the fictitious general/specific distinction.

Q. And you would not consider those things in deciding...

A. No.

Q. ...in the penalty in this case?

A. (Nods head).
(RT 925.)

.....

Q. Okay. In other words, you'd judge the case on the evidence and let the chips fall where they may?

A. Right.

Q. Okay. All right. Well, there were a couple more here. Question 85 was, "Based on the apparent age and appearance of the defendant is there anything that would prevent you from deciding this case solely on the basis of the evidence and the law in which the court will instruct you and not on the basis of passion, prejudice, sympathy, pity or bias for or against the defendant?"
You said, 'I'm really not sure. I would never judge a person by appearance alone. Sympathy or pity would play no part. My sympathy or pity would be reserved for the victim and the family."
Is there anything about the defendant's appearance or anything like that that leads you to believe that you could not be fair and impartial as a juror in this case?

A. I think I could be fair.

Q. Thank you.
(RT 926-927.)

Despite these attitudes and answers, Ms. C. P. was passed for cause by the defense. (RT 935.) Appellant was prejudiced because this pro-death-penalty biased juror actually sat on his jury.

I(j): The Court improperly rehabilitated juror L. H., who actually sat on Mr. Whalen's jury, by asking her leading and suggestive questions.[32]

Juror L. H., despite the fact that just two years prior to the trial, her father had been assaulted and robbed, leading to his death, was allowed to sit on Appellant's jury in a robbery-murder capital case. In her questionnaire, Ms. L. H. checked two boxes when asked in Question 9 about her attitude toward the death penalty: "support" and "will consider." (CT 5698.) When asked to explain her views about the death penalty in the next question, she wrote "if the crime was violent and done without care." (CT 5699.) Her views had not changed over the years. (Question 11) (*Id.*) These views would have made the death penalty mandatory in this matter.

She wrote in her questionnaire that her "father was robbed and assault[ed] and died as a result." (CT 5710.) Given the circumstances of this case, that answer alone should have been disqualifying for this juror. Ms. L. H. added, regarding her father, that "cause of death they said was natural cause[s] but we think it was due to the assault." *Id.* She added that the date of his death was April of 1994, just two years prior to Appellant's trial. (CT 5711.) Again, this would indicate a natural and quite understandable bias

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[32] Ms. L. H. is also discussed in Argument III, which details the biased pro-death nature of the composition of Mr. Whalen's jury.

against a defendant accused of shooting an elderly man during a robbery. At the very least, her belief that her father's death was directly due to the robbery/assault rather than natural causes demanded a close inquiry.

Ms. L. H. , as to Questions 17 and 18, felt the death penalty was appropriate "when lives have been taken time, time again mainly for the pleasure of the criminal" but did not know of any circumstances where it was inappropriate. (CT 5700.) She wrote, in answer to Question 19, whether she would automatically vote for the death penalty if the defendant was convicted of first degree murder, that "if the facts in the case tend to lend (sic) that way, I would." (CT 5701.) As to Question 21, she did not know anything she would want to know about the defendant's background in deciding whether to impose the death penalty, indicating a closed mind to mitigating evidence. (CT 5701.)

In *voir dire* questioning, Ms. L. H. explained that her father had been gambling at a card place where he was robbed and hit over the head and was missing for three weeks. (RT 816.) The questioning was done by the Court in the same sort of suggestive and leading manner that left no room for disagreement. After Ms. L. H. explained the details, the Court followed up with very leading questions:

> Q. All right. Thanks. We appreciate that. I guess we just want—I just wanted to make sure that in your mind that that has nothing to do with

this case, and you wouldn't?

A. Oh, no.

Q. This would not affect in any way your verdict in this case?

A. No. I don't see how it could.

Q. Different situations?

A. Yes.
(RT 816-817.)

Despite the similarity to the crime with which the defendant was charged here, a robbery-murder, the defense had no questions of this juror and passed her for cause. (RT 817.) Without such questioning, the Court and the defense ran an unreasonable risk that this juror could not put aside strong feelings of bias against Appellant as a result of the tragic events that befell her father.

Ms. L. H. also wrote in her questionnaire that she was familiar with the effect alcohol or drugs have on people's behavior because of "the changes her daughter went through while on drugs." (CT 5714.) This was especially relevant due to Appellant's life-long addiction problems and the circumstances of the crime. Yet the defense asked no questions of this prospective juror.

Appellant was prejudiced because this pro-death biased juror eventually sat on his jury. The Court's rehabilitation of this juror and others who held similar views resulted in a biased panel from which it was impossible to

choose a jury that could afford Appellant a fair trial.

I(k): The trial Court improperly rehabilitated juror M. C. by asking her leading and suggestive questions designed to allow her to sit on Appellant's jury, which she ultimately did.

M. C. was allowed to sit on Appellant's jury, despite several disqualifying answers in her questionnaire that should have alerted the Court and the defense that her pro-death-penalty views would substantially impair the chances for a fair trial.

She supported the death penalty (CT 5938) to the extent that "if I feel after testimony and evidence in that it should prove against the defendant, I could approve the death penalty." (Question 9) (CT 5939.) Significantly, in Question 12, she thought the death penalty should be mandatory for a robbery-murder such as the one Mr. Whalen was charged with, writing "a crime of robbery is one thing but to take another person's life to rob that person and kill them is wrong and they should pay for their crime." (CT 5939.) As to Question 14, she felt the death penalty was used "too seldom, even criminals that know they can still harm people are not put to the death penalty." (CT 5940.) Ms. M. C., in the next question, even felt that the death penalty should be mandatory (as well as a possible penalty) for "repeated sex offenders." (CT 5940.) As to Question 17, she felt the death penalty appropriate when "people have harmed others repeatedly with no remorse."

(CT 5940.) In contrast, in the next question, she believed it inappropriate only if the defendants "have not physically harmed any person." (CT 5940.)

Significantly, Ms. M. C. checked "yes" on Question 29 when asked if the costs of keeping a person in prison for life would be a consideration in her penalty decision, writing "I still feel that convicted persons causing bodily harm that have repeated offense (sic) should be given the death penalty." (CT 5943.) She distrusted testimony resulting from plea agreements, but only because "if they did a crime they should be tried whether or not they have testimony (sic) in another case" and "but I still think if they committed a crime they should be tried." (CT 5944.) She also was concerned because "[t]he people who use it [plea bargaining] are usually guilty of something and know they can use the system to get out of trouble." (CT 5945.)

At *voir dire*, the Court rapidly went through the "rehabilitative" procedure which still left doubt as to whether this juror would automatically vote for death. The Court questioned her as follows:

> Q. Okay. And do you have...as you sit there right now, do you have any feelings that you would tend to...that you would automatically vote for the death penalty if you found the defendant guilty or that you would automatically vote for life without possibility of parole?
>
> A. I...you know, it would go either way, whichever way...after hearing all of the circumstances of the case..
>
> Q. After hearing the circumstances of the case...

Q. After hearing the circumstances of the case...

A. Yeah.

Q. ...you'd have to make up your mind?

A. Yeah. Because you couldn't...I mean that would be...

Q. Sure.
(RT 414-415.)
...

Q. Okay. On page...or Question 29 you said, "In deciding penalty, would the costs of keeping somebody in prison be a factor or consideration for you"?
And you answered, "Yes." You said you still feel convicted persons causing bodily harm, that have repeated offense, should be given the death penalty.
Do you mean by that that you would...because of the fact that this person might be here and it might cost money to house this person in prison, that would allow you to influence (sic) to vote for the death penalty just to save the State some money?

A. No, not...not in the fact to save money. I feel that if somebody committed a crime over and over again, they're not getting the help they need; therefore, maybe some other direction should be taken.

Q. So if the evidence showed, then, that the circumstance...one of the circumstances in aggravation might be repeated offenses, you might take that into consideration in deciding whether to vote for the death penalty or not?

A. Yes.

Q. Okay. Would you automatically, if the evidence showed repeated offenses, vote for the death penalty under all circumstances?

A. I believe I would. But there's always that portion of your mind that might go, Wait a minute, you know. After hearing all the testimony and everything and everything that's happened, maybe this person, you

know, needs to be rehabilitated. Maybe there's a possibility down the road that this person could join society again.
(RT 415-416.)

Although supposedly "rehabilitated," there was an unresolved possibility that this juror was still inclined to automatically vote for death. The defense did not challenge this juror for cause (RT 412) and she ultimately sat on Appellant's jury. The Court's rehabilitation of this juror and others who held similar views resulted in a biased panel from which it was impossible to choose a jury that could afford Appellant a fair trial. Appellant was thus prejudiced.

I(l): The trial Court improperly rehabilitated prospective juror Jacqueline Marchetti by asking her leading and suggestive questions designed to allow her to sit on Appellant's jury.

In her juror questionnaire (CT 2398-2425), prospective juror Jacqueline Marchetti gave answers that would have caused her to be subject to a defense challenge for cause. Ms. Marchetti, in response to Question 9, indicated that she strongly supported the death penalty (CT 2400) and that her support of it has become stronger over time. (Question 11)(CT 2401.) As to Question 14, she felt the death penalty was used "too seldom! There are too many convicted murderers sitting on death row for years." (CT 2402.) Asked in the next question when the death penalty should be mandatory, Ms. Marchetti answered "when there is a conviction based on hard evidence--not circumstantial." (CT

2402.) She also believed in the death penalty for any "crimes involving children as victims" (RT 2402) and for child molesters. (*Id.*). In the next question, number 18, Ms. Marchetti believed the death penalty was inappropriate only when the evidence is circumstantial. (RT 2402.)

Revealingly, in her answer to Question 19, Ms. Marchetti wrote that she would automatically vote for the death penalty "if the conviction was based on hard evidence" regardless of the circumstances of the crime or the mitigating evidence (RT 2403.) She would reject plea-bargain-based testimony. (RT 2406.)

Here too, despite these pro-death answers, the Court engaged in an attempt to rehabilitate this juror who would otherwise have been successfully challenged for cause. The following was the Court's exchange with this juror:

> THE COURT: In answer to question 15 you said—the question was, "Do you feel the death penalty should be mandatory for any particular type of crime? Please explain."
> You said, "Yes. If it's a conviction based on hard evidence not circumstantial evidence."
> Okay, when you say "mandatory" did you have in mind that if the defendant is convicted of the crime he would be put to death regardless of any other circumstances?
>
> MARCHETTI: I could not think of any other circumstances that would be relevant if it was a conviction based on facts, eye-witnesses, whatever.
>
> THE COURT: Okay. Well, let me ask—let me tell you a couple of things.
> First of all, although the death penalty is authorized for cases of the

type with which the defendant is charged here, it is not mandatory. You understand that?

MARCHETTI: Yes.

...

THE COURT: Okay. Is it your position that if the defendant were convicted of the crime, that you are going to vote for the death penalty regardless of the evidence in aggravation and mitigation?

MARCHETTI: I don't think so. I would say no.

THE COURT: No?

MARCHETTI: I would say that I would have to weigh everything that was presented and base my decision in a particular instance based on that. My statement is rather broad.

THE COURT: That was a broad statement?

MARCHETTI: Yes. I would have to qualify that as a broad statement.

THE COURT: So in any event—so if I understand your answer to [question] 15 correctly what you mean by that is that you would favor the death penalty in cases of this type but you would not necessarily do it in this case?

MARCHETTI: That's an accurate (sic), yes.

THE COURT: Do you believe that if—if in your mind the evidence in mitigation which was introduced by the defendant or if it came out through the prosecution somehow in the penalty phase outweighed in your mind the circumstances in aggravation, do you believe that you would be comfortable in voting for life without possibility of parole?

MARCHETTI: Yes.

THE COURT: On the other hand, if you believed that the evidence in aggravation outweighed the circumstances in mitigation, do you believe you would be comfortable in voting for the death penalty?

MARCHETTI: Yes.
(RT 604-606.)

On the basis of these answers, this juror was "skillfully" led down the path toward rehabilitation, with questions from the Court about which there could be little doubt as to the desired answer. A common theme of the questioning was repeated here, with the Court prompting and virtually putting into the prospective juror's mouth the idea that the questionnaire reflected her views in general but the *voir dire* questioning reflected her views in this specific case.[33] Of course, this distinction was not pursued with any anti-death penalty jurors, nor, based on the questionnaire questions and answers, did it have any basis in fact. This rehabilitative effort had the effect of causing the defense to use an additional peremptory challenge to a juror that otherwise should have been excused for cause, and contributed to the "stacking" of the panel with pro-death prospective jurors.

The defense challenged Ms. Marchetti for cause based on her responses to answers 15, 19 and 28 in the questionnaire. The challenge was denied, the Court stating that "based on my examination of the juror I believe that she can fairly judge the case." (RT 610-611.)

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[33] *E.g.,* "so if I understand your answer to [question] 15 correctly what you mean by that is that you would favor death penalty (sic) in cases of this type but you would not necessarily do it this (sic) an individual case?" (RT 605-606.).

Appellant was prejudiced as this prospective juror, along with many others discussed herein, remained in the potential juror panel at the conclusion of jury selection, thus inhibiting and rendering futile the further exercise of defense peremptory challenges. Without the Court's rehabilitative efforts, this juror would have been subject to a successful challenge for cause by the defense.

I(m): The trial Court improperly rehabilitated prospective juror Robert Zabell by asking him leading and suggestive questions designed to allow him to sit on Appellant's jury.

In his juror questionnaire (CT 2908-2935), prospective juror Robert Zabell gave answers that would have caused him to be subject to a defense challenge for cause. In Question 9, Mr. Zabell indicated that he strongly supported the death penalty (CT 2910), with the comment "do it more often." (CT 2911.) Mr. Zabell thought that everyone convicted of a crime similar to what Appellant was charged with should be given the death penalty, regardless of the mitigating evidence. (Question 12) (CT 2911.) Without explanation, this prospective juror felt that the death penalty should be mandatory for some crimes and should be a sentence for crimes other than first degree murder. (Questions 15 and 16) (CT 2912.) Revealingly, in Question 19, Mr. Zabell indicated that if the defendant was convicted of first degree murder with special circumstances, he would automatically vote for the death penalty and

against life imprisonment. (CT 2912.) Showing a closed mind on this subject, in response to Question 21, asking what he want to know about the defendant before imposing a life or death sentence, he wrote "nathing" (sic) (CT 2913.) He also believed in the adage "an eye for an eye." (Question 22) (CT 2913.) In Question 23, he could not accept the Court's instructions that a sentence of life without the possibility of parole meant exactly that. (CT 2915.) The costs of keeping someone in prison for life would be a consideration for this prospective juror (CT 2915) as would the costs of the appellate process. (Question 29) (CT 2915.)

This prospective juror wrote that he would be inclined to reject plea-bargain-based testimony (CT 2916) but he would not automatically reject it. (CT 2916.)

It must also be noted that Mr. Zabell showed signs of illiteracy or only very tentative literacy, which should have been another cause for concern for the Court and the defense. There are very few written explanations throughout his questionnaire and many blanks. (CT 2908-2935.) His answer to the question of whether he thought the death penalty was used too seldom or too often was "no" (CT 2912); his job duties were described as "mechal"; his ex-spouse was employed at the "Oak Vally hospitle" (sic)(CT 2919); asked for his children's occupation, he wrote their names instead and could not write or

spell his 10-year old daughter's name (CT 2919); as to the role expert witnesses should play in the criminal justice process he wrote "do know" (CT 2926); he watched television "evar (sic) day" (CT 2923); had dropped out of high school (CT 2913); never read any books (CT 2923); the kind of news he was interested in was "ane" (sic)(CT 2923); and his reaction to the O. J. Simpson verdict was "Gelty" (sic)(CT 2932). Such a level of literacy and understanding would in all probability have impeded or totally precluded this juror's ability to read and understand the jury instructions, evaluate written exhibits and testimony, and come to an independent evaluation of the evidence.

Despite these disqualifying answers, here again, the trial court asked leading and suggestive questions designed to "rehabilitate" this pro-prosecution and pro-death prospective juror. The following was the exchange with Mr. Zabell:

> THE COURT: Question Number 12 was, "In this case, the defendant's charged with murder for killing an elderly man with a shotgun. Do you think everyone convicted of such a murder committed during a robbery should receive the death penalty, regardless of the evidence regarding penalty which is introduced by the People and the defendant?"
> And you answered that question—you checked yes, okay?...
> (RT 639.)

> THE COURT: Do you feel that you would automatically vote the death penalty regardless of the evidence that is presented in the penalty phase of the trial if the defendant were convicted of the crime?

ZABELL: Depends on the circumstances.
(RT 640.)
...

THE COURT: In Question 15, you said—the question was, "Do you feel the death penalty should be mandatory for any particular crime? Please explain."
You said, "Yes."
What did you—what types of crimes were you thinking of, sir?

ZABELL: Like murder and stuff like that.

THE COURT: Okay. When you use the term "mandatory", do you mean that anyone who is convicted of that crime should be put to death, regardless of the circumstances?

ZABELL: No.

THE COURT: You meant that that should be a possible sentence for that type of crime—

ZABELL: Yes.
(RT 641-642.)
...

THE COURT: And Question 19, it says, "If a defendant was convicted of first degree murder with a special circumstance, do you feel that you would automatically vote for the death penalty and against life imprisonment without possibility of parole? Please explain."
And you said, "Yes."
Is that still your answer to that question?

ZABELL: No. I didn't read it right.

THE COURT: You didn't read it correctly?

ZABELL: (Nods head.)

THE COURT: So your answer to that question would be no?

ZABELL: Yeah.

THE COURT: I shouldn't say that.[34]
What would be your answer to that question, sir?

ZABELL: It would be—I wouldn't—it would be under the special circumstances.

THE COURT: I'm sorry?

ZABELL: On the special circumstances. I guess I wouldn't know until—
(RT 642.)

The Court went on to explain the meaning of special circumstances, but ended the explanation with another leading question:

THE COURT: Okay. So you don't—mean by that answer to that question, you don't mean that—if you find the special circumstances, as I've told you about them to be true, you mean you would automatically impose the death penalty; is that correct?

ZABELL: I wouldn't.
(RT 643.)

The Court continued to lead this prospective juror through a number of answers to the jury questionnaire that likewise left little doubt as to the desired answer. (RT 643-645.) Mr. Zabell changed his answers to questions regarding whether life without the possibility of parole really meant that, again claiming he "read it wrong," (RT 644); rejecting testimony from plea

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[34] Here again, the Court not only suggests the desired answer, but actually puts it in the prospective juror's mouth. There are many such instances throughout the *voir dire*.

agreements (RT 644); and his statement that he would not be able to set aside any feelings of pity or sympathy for the victim or the defendant and decide the case on the evidence (RT 644-645.) Given the evidence of the tentative and tenuous literacy of Mr. Zabell, his forced rehabilitative march through the questionnaire by an authoritative judge resulted only in forced "acceptable" answers from a pro-death-penalty juror. As with all such jurors, the questioning did nothing to uncover underlying bias, but merely served to put a respectable face on it.

Not surprisingly, this prospective juror was challenged for cause by the defense, based on his answers to jury questionnaire numbers 12, 15, 19, 28, and 87. (RT 645.) The challenge was denied based on his *voir dire* answers. (*Id.*)

Appellant was prejudiced because not only was a peremptory challenge used to excuse this prospective juror, the cumulative effect of the improper rehabilitations meant that many pro-prosecution biased jurors were left in the juror panel and were ultimately seated than would have been the case had the Court properly excluded them.

I(n): The trial Court improperly rehabilitated prospective juror Ray Lindsay by asking him leading and suggestive questions designed to allow him to sit on Appellant's jury.

In his juror questionnaire (CT 3629-3655), prospective juror Ray

Lindsay gave answers that should have caused him to be subject to a defense challenge for cause. Mr. Lindsay, in Question 9, indicated that he strongly supported the death penalty. (CT 3630.) In Question 10, asked to explain his views, Mr. Lindsay wrote that "if someone takes a life with premeditation or during the act of another crime I believe that person should not live." (CT 3631.) The next question, number 12, gave details of the allegations in this case and asked "[d]o you think everyone convicted of such a murder committed during a robbery should receive the death penalty, regardless of the evidence regarding penalty which is introduced by the People and the defendant?" Mr. Lindsay answered "Yes." (*Id.*) As to his attitudes as to whether the death penalty was used too frequently or not enough (Question 14), Mr. Lindsay answered "I feel it is not used too often. If it is imposed I think it should be carried out quickly." (CT 3632.)

More revealingly, as to Question 19, Mr. Lindsay wrote that he would automatically vote for the death penalty and against life imprisonment, referring to his answer as to Question 12. (RT 3632-33.) Had his answer been the reverse, an automatic vote for a life sentence, this prospective juror would have been peremptorily excused. Mr. Lindsay, on Question 21, which asked what he would want to know about the defendant before he voted to impose sentence, wrote "Nothing—people must be responsible for their actions." (RT

3633.) As to Question 22, whether he believed in the adage "an eye for an eye," Mr. Lindsay wrote "If someone kills someone else on purpose or while committing a crime they should lose their life." (RT 3633.) Mr. Lindsay also wrote in his answer to the next question that he could not put the "eye for an eye" principle out of his mind and apply the law the Court will give him. (RT 3634.)

This prospective juror also indicated that the costs of keeping a person in prison for life would be a consideration in deciding the penalty. (Question 29) (RT 3635.) In another answer that should have automatically disqualified him, Mr. Lindsay wrote, in response to Question 31, that his feelings about the death penalty were such that if there was a penalty phase of the trial, he would automatically vote for the death penalty rather than life in prison without the possibility of parole, and referred to his answer to Question 10, where he stated that if someone took the life of another, that person should be put to death. (RT 3636.) He also wrote in response to Question 87, that he would not be able to overcome any feelings of pity or sympathy for the victim or defendant, adding "compassion is hard to overcome." (RT 3647.) Mr. Lindsay expressed "disgust" at the O.J. Simpson verdict. (RT 3652.)

Despite these many disqualifying answers, here again, the trial court asked leading and suggestive questions designed to "rehabilitate" this pro-

prosecution and pro-death-penalty prospective juror. The following was part of the Court's questioning of Mr. Lindsay:

> THE COURT: in your mind if you listen to the evidence in the guilt—in the penalty phase of the trial, if you got there, in your mind, the factors in mitigation indicating it [the death penalty] should not be imposed outweighed those factors in aggravation which indicate that it should, would you have any hesitancy in voting for life without possibility of parole as opposed to death?
>
> MR. LINDSAY: Yes. I would have a little problem with that.
>
> THE COURT: You feel that regardless of what evidence was put in about mitigation you would vote for the death penalty anyway?
>
> MR. LINDSAY: I would lean heavily that way. Yes.
>
> THE COURT: And you don't—you don't believe that you would be able to impartially weigh the various factors and make a decision based on those factors as opposed to your preconceived beliefs about this?
>
> MR. LINDSAY: Well, I think I could consider them, but I still would be very heavily influenced the other way.
>
> THE COURT: Under these circumstances do you believe that you could fairly try this case if you got to the penalty?
>
> MR. LINDSAY: To the penalty phase?
>
> THE COURT: Yes.
>
> MR. LINDSAY: I think so.
>
> THE COURT: Well, do you think you would be fair?
>
> MR. LINDSAY: I think so.
> (RT 881.)
>
> ...

THE COURT: With respect to your answer to Question 15, the question was" "Do you feel the death penalty should be mandatory for any particular type of crime? Please explain."
You say: "See the answer to Number Ten," which was your feelings about the death penalty.
Do you mean by that, sir, that you feel that if the defendant were convicted in this case it's your view that he should be put to death automatically without any kind of a further hearing as to what penalty was appropriate?

MR. LINDSAY: Not automatically. No. I think—

THE COURT: So when you said, "mandatory"___
MR. LINDSAY: —process—

THE COURT: —mandatory, did you mean that it should be always imposed or did you mean that that is one of the sentences that could be imposed?

MR. LINDSAY: Did I put "mandatory?"

THE COURT: Well, that was one of the—a lot of people had difficulty with this question. You would not be the first to misunderstand.
Did you mean anyone convicted should be automatically put to death or did you mean that should be one of the punishments which should be available?

MR. LINDSAY: I think that should be one of the punishments which should be available.
(RT 882-883.)

...

The Court then continued to review Mr. Lindsay's questionnaire with more leading questions. (RT 883-884.) An example is the treatment of Mr. Lindsay's answer to the question regarding the costs of imprisonment:

THE COURT: In answer to Question 29, you said: "In deciding

penalty, that is, life in prison without the possibility of parole or death, would cost of keeping someone in jail for life be a consideration for you?"
You said, "Yes. We waste too much money in death row inmates now. Unfair to victims' families."
I think actually what the intent of the question was probably was would you vote for the death penalty just to avoid the cost of having somebody kept in prison for the rest of their lives. I think that was what counsel were trying to get at.
But in any event, regardless of what the intent of the question was, if you get to that phase, penalty phase, you would be instructed on what you can and—what you can consider in determining death versus life without the possibility of parole. I think that you will find that none of the factors have anything to do with how much it would cost to keep a person if you voted for life without possibility of parole.
Can you promise me that if you got to that phase you would not consider that as a factor in making your life or death decision?

MR. LINDSAY: Putting it that way, no, I would not.
(RT 884.)

Even after all this rehabilitation, Mr. Lindsay still had trouble answering in a way that would not disqualify him, and further prompting was needed:

THE COURT: In answer to Question 32 you said: "Are your feelings about the death penalty such that if there were a penalty phase of a trial you would in every case automatically vote for the death penalty rather than life in prison without the possibility of parole?"
You checked, "Yes. See number Ten."
Is that still your answer?

MR. LINDSAY: Well, again, if—if all the circumstances were the same and the results were the same, and it was—it leads to the same thing, of course I would.

THE COURT: Well, see, the question, this question was paired with the

one in the previous thing. They're mirror images of each other. What they ask, are you automatically going to vote for the death penalty in every case if—if the defendant is found guilty, if the special circumstances are found true.
We have had some discussion here in which you indicated or at least I think you have indicated that you would not. I just want to clarify—

MR. LINDSAY: Well, I said that it depends. The way the question was presented and the way you just described it seem, you know, a little bit different. But again, my answer would probably be yes, I would, if the situations were the same.

THE COURT: What do you mean by, "the situations being the same," sir?

MR. LINDSAY: Well, I think we are getting questions confused here again. But if—if they were convicted, special circumstances, and you know, it follows down that same line again, I would be weighted towards the—

THE COURT: Yeah. You indicated you were weighted towards it, but that's not exactly the same thing as saying in every case that you would.

MR. LINDSAY: No, not in every case I would not.

THE COURT: In other words, it would depend not only on whether the defendant was guilty, found guilty, and where the special circumstances were found true, but what evidence was presented afterwards about what should happen to him?

MR. LINDSAY: I think so. Yes.

THE COURT: Is that correct?

MR. LINDSAY: Yes.
(RT 886-887.)

The defense challenged Mr. Lindsay for cause based on his answers to questions 8, 10, 12, 13, 15, 17, 19, 20, 23, 29, 30, 32, 78, and 87. (RT 887.)

The challenge was denied. (RT 889.) The defense was forced to use a peremptory challenge to exclude Mr. Lindsay.

Appellant was prejudiced because he was forced to use a peremptory challenge on this prospective juror, but, more importantly, the cumulative effect of the improper rehabilitations meant that the panel and ultimately the actual jury were seeded with objectionable jurors that would not have been there had the Court not improperly "rehabilitated" them.

I(o): The Court improperly rehabilitated prospective juror Steve Witt by asking him leading and suggestive questions designed to allow him to sit on Appellant's jury.

In his juror questionnaire (CT 4739-4767), prospective juror Steve Witt gave answers that caused him to be subject to a defense challenge for cause. Mr. Witt indicated in Question 9 that he supported the death penalty. (CT 4740) and indicated that these views have become stronger over time. (Question 11) (CT 4741.) Mr. Witt also wrote that "the death penalty would be equal to the crime if found guilt." (CT 4741), and that the death penalty is used "too seldom, according to what I see in the news." (Question 14) (CT 4742.) Mr. Witt also believed that the rape of a child should also be subject to the death penalty (CT4742) as should a "prearranged killing." (Question 16) (*Id.*) He also wrote in response to Question 22 that he believed in the adage "an eye for an eye," adding that "you take a life with a prearranged plan, you

give your life." (CT 4743.) Mr. Witt was "not sure" whether he could put this belief out of his mind and apply the principles given to him by the Court. (Question 23)(CT 4744.) The costs of keeping a person in jail for life would be a consideration for him. (Question 29)(CT 4745). Mr. Witt had also been a member of the John Birch Society. (CT 4759.)

Despite these answers which would have disqualified him from serving on Appellant's jury, the Court again went to extraordinary lengths to rehabilitate this prospective juror:

> THE COURT: And your job as a juror would be to weigh the factors in aggravation against the factors in mitigation and determine which one is appropriate. In other words, whether the death penalty is appropriate or whether life without the possibility of parole is appropriate. Do you think you would be able to do that impartially?
>
> MR. WITT: Not positive on that, Your Honor.
>
> THE COURT: Do you want to explain that to me?
>
> MR. WITT: If—if I was given a rule that this is the way it is, then, yes, I could go with that. You know, if that's—I will go with the rules of the court.
> (RT 976.)

...

> THE COURT: And I take it that you understand that this choice that you would have to make conflicts to some extent with the principle of "an eye for an eye," because if—if you determined that life without possibility of parole was the appropriate sentence, that doesn't follow "an eye for an eye." Understand that?
>
> MR. WITT: Absolutely.

THE COURT: Can you live with that concept and put that out of your mind and determine what the appropriate penalty is in this case?

MR. WITT: Yes, Your Honor.
(RT 978.)

...

THE COURT: Question 87 said: "Would you be able to set aside any feelings of pity or sympathy you might feel for the victim or the defendant and decide the case solely on the evidence?"
You said, "No, Not sure as of now."
Is that–

MR. WITT: Well, Your Honor, I'm learning this process. I don't have every answer to all of those. It's a complicated decision to make.

THE COURT: Well, you're going to be instructed, if you get to be a juror in this case you will be instructed that in your deliberations you're not to consider passion, prejudice, public opinion, public feeling sympathy, compassion, pity, any of those things that you are to decide the case based on the evidence that you receive and not on any of these factors.
Do you believe you could follow that instruction?

MR. WITT: Yes. Your Honor.

THE COURT: All right. Thank you.
(RT 980-81.)

In his questionnaire, Mr. Witt wrote that he would suffer a loss of income and pay if chosen for the jury; that he was just emerging from bankruptcy; and that based on his personal situation, he would not be able to give the case his full and undivided attention. (RT 983-985.) Mr. Witt told the Court that the problems he mentioned "will interrupt my thinking." (RT

985.) The Court answered, "I'm sure they will." (*Id.*) The defense challenged Mr. Witt for cause, based on his statement that he would not be able to pay full attention to the case. (RT 985.) Mr. Witt stated that he could give the case five hours a day and the challenge was denied. (RT 985.)

Appellant was prejudiced as this prospective juror, along with many others discussed herein, remained in the potential juror panel at the conclusion of jury selection, thus inhibiting and rendering futile the further exercise of defense peremptory challenges. Without the Court's rehabilitative efforts, achieved through leading and suggestive questioning that left no doubt as to what answer was being sought, this prospective juror would have been successfully challenged for cause by the defense.

I(p): The Court improperly rehabilitated prospective juror Frank Gatto by asking him leading and suggestive questions designed to allow him to sit on Appellant's jury.

In his juror questionnaire (CT 4558-4585), prospective juror Frank Gatto gave answers that caused him to be subject to a defense challenge for cause. Mr. Gatto, in response to Question 9, indicated that he supported the death penalty (CT 4560) and these views had not changed over time. (CT 4561.) He also indicated that an "individual who commit (sic) a crime with the possible results of a victim's death must or should be held accountable and face possible death." (CT 4561.) In his answer to Question 12, Mr. Gatto

wrote that "anyone using a weapon in a crime that results in a victim's death should receive or be consider (sic) for the death penalty." (CT 4561.) He also felt that the death penalty should be mandatory for "any individual who commits a crime that results in a cruel/sadistic murder." (Question 15)(CT 4562.) Mr. Gatto believed in the adage "an eye for an eye," writing that "if you take a life you should be accountable for your actions." (Question 22)(CT 4563.) He twice wrote that he favored the death penalty (CT 4563, 4566.)

Despite these answers showing that Frank Gatto had a predisposition to impose the death penalty, the Court again attempted to rehabilitate by asking leading questions and putting words into his mouth:

> THE COURT: In answer to Question 12, you said:"In this case defendant's (sic) charged with murder for killing an elderly man with a shotgun. Do you think everyone convicted of such a murder committed during a robbery should receive the death penalty regardless of the evidence regarding penalty which is introduced by the People and the defendant?"
> You said, "Yes. Anyone using a weapon in a crime that results in a victim's death should receive or be considered for the death penalty.
> And then 13, you said: "If you were selected as a juror in this case and if the jury got to a penalty phase would you agree to listen open-mindedly to any evidence submitted about the penalty, and base your decision about the penalty solely on such evidence and instructions?
> You say, "Yes, I would base my decision on the instructions (sic) me by the Court and the evidence presented." So you were saying in answer to question 12 here, I don't want to put words in your mouth, can you tell me, did you mean that—
>
> MR. GATTO: I think I would base that on my personal feelings, but not on—as far as what I would feel if you're asking me if something came over the news and that evidence was presented in a case I had heard

that I would probably voice an opinion on that.
As far as me being on a jury, I would have to stand by my own citizenship as far as me following through on my duties and my professionalism as a juror.
So I would have to follow through on the laws, if you're asking me that question, as far as what I would—my decision would be on the information.

THE COURT: So you're saying that regardless of your personal beliefs you would follow the Court's instructions?

MR. GATTO: I would hopefully be strong enough, and I think I am, to separate that and realize what my duties are.
(RT 1001-1002.)
...

THE COURT: Do you think you would listen to the evidence and base those factors and determine which in your mind prevailed over the other?

MR. GATTO: I hope so. I would believe based on the evidence and based on the Court's instruction and discussing that with the jurors at the conclusion.

THE COURT: And if you felt that the factors in aggravation outweighed those in mitigation would you have any hesitancy in voting for the death penalty?

MR. GATTO: No.

THE COURT: If, on the other hand, you felt the—that they did not outweigh the factors leading towards life without possibility of parole, were more upward in your mind, would you have any hesitancy in voting for that?

MR. GATTO: No. If that's what the evidence and the district attorney presented and the way they presented it.
(RT 1003-1004.)
...

THE COURT: ...Did you mean that the death penalty should be automatic in such a case or that that's one of the available penalties?

MR. GATTO: ...So I basically just made a general statement. If someone dies because of a crime where that person who committed the crime has—basically creates a murder, where that person was cruelly punished and then—and died, yes. I would feel—but it's a hard question to answer for me unless I was given time to really think about it...
(RT 1005.)
...

THE COURT: I guess we are asking the way you feel about it.

MR. GATTO: I—I probably feel pretty strongly that that person if there was a cruel crime which resulted in murder, I would feel very strongly about that person receiving the death penalty.
(RT 1006.)
...

MR. SPOKES: Will you be able to set aside your personal belief that the death penalty is appropriate and weigh the circumstances in aggravation and weigh the circumstances in mitigation with an open mind, with fairness towards both the defense and the prosecution, and reach a verdict based on the facts that are presented and the instructions that the Court gives you?

MR. GATTO: I—I would hope. I think this in all honesty, that I would base it on the evidence that is presented in the Court.

MR. SPOKES: Can you assure us that you will be able to set aside your personal—

MR. GATTO: I can't assure you a hundred percent. I don't know if I can. I would hope. I think that basically I would in all honesty base it on the evidence.

MR. SPOKES: But you cannot give us a hundred percent assurance?

MR. GATTO: Well, I don't know. I'm trying to be as honest as I can.

(RT 1009)

...

MR. SPOKES: Okay. So you—let's go back to the first question. Can you assure us that in your mind you're a hundred percent sure that you will be able to set aside your personal feelings and follow the Court's instruction?

MR. GATTO: No.

MR. SPOKES: Challenge for cause.
(RT 1010.)

The prosecutor then asked a few questions and Mr. Gatto replied that he was still not sure he could give full assurances that he would set aside his personal feelings. (CT 1010-1011.) Yet when the challenge for cause was renewed, the Court rejected it. (CT 1011).

Appellant was prejudiced as this prospective juror, along with many others discussed herein, remained in the potential juror panel at the conclusion of jury selection, thus inhibiting and rendering futile the further exercise of defense peremptory challenges. Without the Court's rehabilitative efforts, achieved through leading and suggestive questioning that left no doubt as to the answer being sought, this prospective juror would have been subject to a challenge for cause by the defense.

I(q): The Court improperly rehabilitated prospective juror Mami

Aligire[35] by asking her leading and suggestive questions designed to allow her to sit on Appellant's jury.

In her juror questionnaire (CT 4320-4345), prospective juror Mami Aligire gave answers that would have caused her to be subject to a defense challenge for cause. Ms. Aligire indicated that she supported the death penalty (Question 9; CT 4320), adding that "[i]t serves a purpose to the extent that the perpetrator will not/cannot repeat the offense, as many murderers do that are released. [a]n 'eye for an eye.'" (CT 4321.) As to Question 12, Ms. Aligire wrote that she thought that everyone convicted of a murder such as the one Appellant was charged with should receive the death penalty, regardless of the evidence regarding penalty, adding that "the operative word is—convicted—he's been found guilty of 1st degree murder with special circumstances. What more needs to be said." (CT 4321.) She felt the death penalty appropriate for "a repeat offender, serial murderer" and for abduction and sexual assault or exploitation of children." (CT 4322.) This prospective juror, in response to Question 22, wrote that she believed in the adage "an eye for an eye," adding that "you take a life, unless in self-defense, you show a total disregard for a human being, you should forfeit your life for the one you

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[35] As this prospective juror's first name appears in the Reporter's Transcript as "Mamie" and in her questionnaire as "Mami," the latter will be used.

took." (CT 4323.) Ms. Aligire also expressed reservations about Question 28, which asked her to accept the Court's representation that a sentence of life without the possibility of parole meant exactly that, because "I would expect reassurances from the court that in no instance would this sentence be overturned." (CT 4325.)

Despite these disqualifying answers, the Court continued with its pattern of leading the prospective juror through leading questions that strongly suggested the correct answers, providing a pretext for a denial of the defense's challenge for cause. As in the other cases, the questioning also had the effect of masking the prospective juror's biases in the changed answers the Court was virtually putting into her mouth.

The Court initially read her answers to questions 12 and 13, and then explained the phases of the trial. (CT 1044-1046.) This led into a series of leading questions which had the effect of having her completely change her answers:

> THE COURT: You understand that it would be your duty as a juror at that point to weigh the evidence in aggravation against those in mitigation in deciding whether in your mind under the circumstances the one outweighs the other, and if so, what penalty is appropriate?
>
> MS. ALIGIRE: Um-hmm.
>
> THE COURT: You understand that?
>
> MS. ALIGIRE: Yes.

THE COURT: Okay. Is there any feeling in your mind right now that if you found the defendant guilty of the special circumstances true that you would automatically vote for the death penalty without considering the evidence in aggravation and mitigation?

MS. ALIGIRE: I would consider it.

THE COURT: You would consider it. Okay.
If you found that in your own mind that the evidence in mitigation outweighed that evidence in aggravation, would you have any hesitancy to vote for life without possibility of parole?

MS. ALIGIRE: It would be difficult for me, to be perfectly honest.
THE COURT: Okay. That's because you tend to think that death penalty would be more appropriate for the circumstances as you know them in this case?

MS. ALIGIRE: (Nods head.)

THE COURT: What you know about it or what is your—what is it you're saying?

MS. ALIGIRE: If the evidence showed that the defendant were guilty of the crime—

THE COURT: Right.

MS. ALIGIRE: Of murder with special circumstances.

THE COURT: Right. Which is that it was done during a robbery.

MS. ALIGIRE: Yes. Than I would feel that probably the death penalty would be most appropriate, but I would be willing to consider any mitigating information that was submitted.
(RT 1047-1048.)
...

THE COURT: Okay. You indicated that in answer to question 15 you said, "Do you feel the death penalty should be mandatory for any particular type of crime?"

You said, "A repeat offender, serial murderer."
Does that mean someone who has killed more than once, is that what you're talking about?

MS. ALIGIRE: Yes.

THE COURT: Okay. And when you say "mandatory" there, you mean that if he—if–did you mean that if he's found done that (sic) more than once he should automatically receive the death penalty?

MS. ALIGIRE: Yes. I could say death penalty.

THE COURT: On the other hand, but do you feel it should be mandatory in those circumstances, or do you feel that there's room for life without possibility of parole in under (sic) these circumstances?

MS. ALIGIRE: Depending on the information that's provided. You're asking us to look at any kind of mitigating evidence so—

THE COURT: Right. And aggravating information.

MS. ALIGIRE: Um-hmm. So I think it would weigh on that but—

THE COURT: Okay.

MS. ALIGIRE: But like I said, I tend to probably go more for the death penalty in those circumstances.
(RT 1049-1050.)

Next, even after this prospective juror's answers still indicated, at the very least, some reluctance to even consider a life sentence, the Court then completely walked Ms. Aligire through another troublesome and disqualifying answer:

THE COURT: With respect to question 28, you said, "If you're selected as a juror in the case if the jury got to a penalty phase, would you agree to accept the court's representation that life without the possibility of

parole means exactly that, that the sentence would be life without the possibility of parole?"
And you said, "I would accept reassurances from the court that in no instance would this sentence be overturned."
I can tell you right—well, sentence be overruled. I can tell you right now that there are only two sentences for this crime. One of them is death, and the other one is death and the other one is life without possibility of parole. And so when you talk about a sentence being overturned, that's not going to happen. There are only one of two things unless the death penalty were imposed and the appellate authority overturned that for some reason. But you can't overturn the sentence of life without the possibility of parole.
The only thing you can overturn is if the appellate court threw out the entire case and had to have a retrial.

MS. ALIGIRE: (Nods head.)

THE COURT: That I can't promise you would not happen. That's not within my power to promise you.

MS. ALIGIRE: Um-hmm.

THE COURT: And I—it would have no bearing anyway whether you found the death penalty or you found life without possibility of parole.

MS. ALIGIRE: (Nods head.)

THE COURT: Right?

MS. ALIGIRE: Thank you for explaining that.

THE COURT: Okay
Having said that and having said that as far as we know since this life without possibility of parole has been instituted nobody has ever been paroled and there is no mechanism for the parole, does that answer your concerns?

MS. ALIGIRE: Um-hmm.
(RT 1050-1051.)

Based on her questionnaire and her *voir dire* answers, the defense challenged this prospective juror for cause. (RT 1053.) The Court denied the challenge (*Id.*) even though her answers were so obviously biased against the defense that the prosecutor joked "I think we found a foremen for Ernie [Spokes, defense attorney]...This lady." (RT 1053.) As there were quite a few potential jurors who were even more pro-death than Ms. Aligire, the prosecutor's joke inadvertently shows how biased and pro-death this panel was.

Appellant was prejudiced as this prospective juror, along with many others discussed herein, remained in the potential juror panel at the conclusion of jury selection, thus inhibiting and rendering futile the further exercise of defense peremptory challenges. Without the Court's rehabilitative efforts, this juror would have been subject to a challenge for cause by the defense.

I(r): The Court improperly rehabilitated prospective juror Cleo Parella by asking her leading and suggestive questions designed to allow her to sit on Appellant's jury.

In her juror questionnaire (CT 4859-4885), prospective juror Cleo Parella gave many "mandatory death" answers that would have caused her to be subject to a defense challenge for cause. This prospective juror's answers were among the most extremely pro-death-biased of the entire panel, yet the

Court denied the defense's challenge for cause. Ms. Parella, when asked her feelings about the death penalty in Question 9, checked the line that indicated she "would always impose regardless of the evidence" in total disregard of any mitigating evidence. (CT 4860.) Asked to explain her views on the death penalty, Ms. Parella wrote "take a life/pay the price." (CT 4861.)[36] In a significantly disqualifying answer to Question 12, which asked whether she thought someone convicted of a murder with similar circumstances to that allegedly committed by Appellant should receive the death penalty, Ms. Parella answered "yes," adding "non-negotiable." (CT 4861.) She thought the death penalty was used too seldom (Question 14) and that it should be mandatory for first degree murder, or even "victim death because of assault-such as a heart attack." (CT 4862.) As to Question 17, she thought the death penalty was appropriate for any "willful intent, planned" murders, and inappropriate only when there was "no victim loss of life," which of course would not be murder. (CT 4862.) When asked in Question 21 what she would want to know about the defendant before deciding his penalty, this prospective juror wrote "I would hope to be considering crime only, and not unfortunate childhood, etc.," indicating an unwillingness to consider mitigating evidence. (CT 4863.)

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[36] But had this opinion been reversed, in favor of a life sentence, the prospective juror would have been excused in short order, as many were.

Ms. Parella believed in the adage "an eye for an eye," adding "take a life, give your own." (Question 22) (CT 4863.) She also admitted in the next question that she could not put "an eye for an eye" out of her mind even though the Court instructed to do so. (CT 4864.) She was also not willing to accept the Court's representation that life without the possibility of parole meant that the sentence would be exactly that. (Question 28) (CT 4865.) Ms. Parella stated that the costs of keeping someone in prison for life would be a consideration for her in deciding the penalty. (Question 29) (CT 4865.)

In another series of disqualifying answers, Ms. Parella stated that if she found the defendant guilty of first degree murder, her feelings about the death penalty would not automatically cause her to vote against it, but she "would in every case automatically vote <u>for</u> the death penalty rather than life in prison without the possibility of parole." (Questions 31 and 32)(CT 4866.) Asked about her feelings about serving on the jury, Ms. Parella wrote "I favor the death penalty for first degree [murder]. This may not favor the defendant." (CT 4867.) Additionally, she was "disgusted" at the outcome of the O.J. Simpson trial. (CT 4882.)

These extreme answers should have mandated that this prospective juror be excused for cause. Yet, in keeping with the pattern discussed herein, the Court led Ms. Parella through a series of leading questions aimed at

"rehabilitation." The Court first focused on Ms. Parella's answer that she would always impose the death penalty regardless of the evidence. After leading her through a discussion of the phases of the trial and special circumstances, the court asked her the following questions:

> THE COURT: Okay. Understanding that, do you feel that you would be able to follow the court's instructions and fairly evaluate the evidence in favor of the death penalty and against the death penalty and arrive at a rational decision?
>
> MS. PARELLA: Yes.
>
> THE COURT: Okay. So in your mind then the answer that you checked initially, that you would always impose the death penalty regardless of the evidence, is not your answer as you sit there right now?
>
> MS. PARELLA: Your Honor, I did not have a definition of murder one with special circumstances when I was filling that out.
>
> THE COURT: Okay. So you didn't understand?
>
> MS. PARELLA: No. I understand it now.
>
> THE COURT: And understanding the situation now?
>
> MS. PARELLA: Yes.
>
> THE COURT: There's no hesitation in your mind about your ability to be fair and impartial in deciding the correct penalty; is that correct?
>
> MS. PARELLA: Right.
> (RT 1095.)

Ms. Parella then changed her answer as to keeping the "eye for an eye" adage out of her mind when deliberating as to sentence. (RT 1098.) She also

changed her answer as to life without the possibility of parole really meaning exactly that, in response to more leading questions from the Court. (RT 1097.)

In response to questioning from defense counsel Mr. Spokes, Ms. Parella was asked about her belief that anyone convicted of a crime such as the one that Appellant was charged with should receive the death penalty, and her former written response that this was "nonnegotiable" was "open now." (RT 1098.) She was then asked about her feelings about sitting on this jury, to which she had answered that she favored the death penalty which "may not be favorable to the defendant." Her *voir dire* answers indicated that despite the Court's attempt to lead her away from her questionnaire answers, she still had a hard time being fair to Appellant:

> MR. SPOKES: If you were the defendant in this case, would you feel comfortable with a juror with your mind set sitting on the jury?
>
> MS. PARELLA: No.
>
> MR. SPOKES: You wouldn't?
>
> MS. PARELLA: I would not feel it was fair to put someone with my mind set on the death penalty on this type of jury because of that reason.
>
> MR. SPOKES: So as you sit there now in your mind you do not believe that you would be a fair and impartial juror in this case; is that correct?
>
> MS. PARELLA: With the judge's definitions I would have an open mind.
>
> MR. SPOKES: Okay. Well, if you were the defendant would you want

someone with your mind set sitting on your jury?

MS. PARELLA: It's a risk. I don't know how he would feel about it. (RT 1099.)

As a result of the Court's leading and suggestive questions, Ms. Parella then indicated that she would have an open mind (RT 1099), changed her answer about the cost of imprisonment influencing her verdict (RT 1100) and very reluctantly agreed that she would consider aspects of the defendant's life and alcohol and drug addiction as mitigating ("It would depend on the parameters of the court instructions. If they would allow it, I would have to allow it") (RT 1101.) This prospective juror also knew people in the district attorney's office and had worked there for two months just a few months before the trial. (RT 1102.)

Ms. Parella had in the most unambiguous terms given the Court a reason to exclude her for cause: her own frank admission that it would not be fair to the defendant if she sat on his jury. Despite this, the Court denied the defense challenge "based on the answers here in court. The juror has assured the court that she can follow the court's instructions and did not fully understand the original answers given." (RT 1102.)

The disparate treatment given pro-and-anti-death penalty prospective jurors is clearly shown here. An anti-death-penalty individual who admitted they should not be on the jury because of their beliefs would not have been

afforded the treatment given to Ms. Parella or the others discussed herein.

Appellant was prejudiced as this prospective juror, along with many others discussed herein, remained in the potential juror panel at the conclusion of jury selection, thus inhibiting and rendering futile the further exercise of defense peremptory challenges. Without the Court's rehabilitative efforts, achieved through leading and suggestive questioning that left no doubt as to what answer was being sought, this juror would have been subject to a challenge for cause by the defense.

I(s): The Court improperly rehabilitated juror C. H., who served on Mr. Whalen's jury.

Juror C. H. also had several pro-death answers in her juror questionnaire and was a declared crime victim of a rape, which was significant in light of the prosecution's allegations that Mr. Whalen had raped one of his co-defendants.[37] Ms. C. H. stated in her questionnaire in response to Question 9 that she supported the death penalty. (CT 5638.) When asked to explain her views, she simply stated "I support the death penalty." (CT 5639.) She further stated in Question 11 that her views on it had not changed over time and that she has "supported the death penalty for some time." (*Id.*) When asked in Question 18 in what circumstances the death penalty would not be

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[37] Ms. C. H. is also discussed in the subsequent argument, relating to the pro-death composition of Appellant's jury.

appropriate, she wrote only "if the person is not guilty," (CT 5640) implying that it was appropriate in all circumstances when the defendant was found guilty. Ms. C. H. was unsure in Question 22 whether she believed in the adage "an eye for an eye" (CT 5641) stating that "I do in some cases and in some cases not." (*Id.*) She further stated that "I believe that regardless of an eye for an eye or not everyone pays in some way or another for there (sic) bad ways against another." (*Id.*)

A reasonably alert Court and competent defense attorney would have wanted to explore these views, given their ambiguity and probable pro-death inclination, yet Ms. C. H. was not asked about her views on the death penalty at all, in a one-page *voir dire.* (RT 590-591.) Neither the Court nor defense counsel had any way of telling whether her views on the death penalty were disqualifying or not.

Ms. C. H. stated in her questionnaire that she had been raped and assaulted in 1990. (CT 5650.) This allegation called out for delicate and sensitive further questioning, preferably by the Court, as such an experience would have likely left life-long scars and psychic trauma. It was especially relevant in this case due to the allegation by one of the co-defendants that Appellant had raped her.

Ms. C. H. also wrote that her "husband became very physically

aggressive. That is why we are divorced." (CT 5630.) She also wrote that she had been threatened by her ex-husband and that she was still "very fearful" of him at the time of the trial. (CT 5652.) Left unexplored by the Court and the defense were how these threats and fears would impact her service on a capital murder trial jury.

Ms. C. H. also stated that her father was both a drug addict and an alcoholic. (CT 5654.) She stated she was familiar with alcohol and drugs and their effect on human behavior, writing in her questionnaire that "when you grow up with it every day you see the sad effects." (CT 5654.) She added that she thought that people become alcoholics or drug addicts because they are "unable to deal with life situations, decisions." (*Id.*) In light of Appellant's life-long drug addition, and heavy methamphetamine use at the time of the crime, these answers demanded both a detailed inquiry and some indication as to whether Ms. C. H. would be capable of viewing these factors as mitigating evidence in the punishment phase of the trial. There was an opportunity and duty for defense counsel to explain how such addiction, was generally accepted as a mitigating factor, because it lessened volitional capacity and free will, and caused addicts to act based solely on their overwhelming need for the drugs. Yet she was never asked about this subject on her extremely brief *voir dire.* (RT 590-591.)

Appellant was prejudiced as this juror actually sat on his jury.

I(t): The Court improperly rehabilitated prospective juror E. S..

The answers of prospective juror E. S. on her juror questionnaire (CT 4828-4857) should have given the Court notice that she was subject to a defense challenge for cause based on her unwillingness to vote for a life sentence. She wrote that she "strongly supported" the death penalty in her answer to Question 9. (CT 4830.) Asked to explain her views on the death penalty, she wrote "a life for a life." (CT 4831.) She added that these absolutist views had not changed over time. (Question 11) (*Id.*). In a disqualifying answer to Question 12, she indicated that everyone who was convicted of a murder committed during a robbery should receive the death penalty, regardless of the penalty phase evidence introduced by the defense, writing "this is a senseless act of taking another person's life." (CT 4831.) Ms. E. S. felt that the death penalty was not used often enough. (Question 14) (CT 4832.) She also felt the death penalty should be mandatory in murder cases, and even that it should be a possible sentence in a second-degree murder or any murder at all. (Questions 15 and 16) (*Id.*). In contrast, she believed the death penalty was inappropriate for "robbery." (Question 18) (*Id.*). While this juror apparently confused Questions 19 and 20 regarding when she would automatically vote for the death penalty or life, as to one she wrote "only in

case of self-defense." (CT 4833.) Asked in Question 21 what she would want to know about the person before deciding on a life or death sentence, she wrote "is this person sorry they did the killing or does he or she care at all." (*Id.*). Ms. E. S., in response to Question 22, believed in the adage "an eye for an eye," writing "do the crime, take your punishment." (*Id.*). She opposed plea agreements only because "too many have gotten out of punishment in this plea agreement." (CT 4837.)

At *voir dire* questioning, the Court again asked leading questions designed to "rehabilitate" this prospective juror. Pointing to her answers that indicated that she thought that everyone who was convicted of a murder committed during a robbery should receive the death penalty, she was questioned as follows:

> Q. Is there anything as you sit there right now, is there anything in your mind that would prevent you from listening to the evidence in aggravation and the evidence in mitigation and deciding which one outweighs the other and which penalty would be appropriate?
>
> A. No.
>
> Q. Do you believe that if the evidence in mitigation, that's the evidence indicating the death penalty should not be imposed, in your mind outweighed the evidence in aggravation, would you have any hesitancy in voting for life without possibility of parole?
>
> A. No.
>
> Q. Do you believe that you could evaluate that evidence fairly and impartially?

A. Yes.

Q. All right...If you believe that the evidence in aggravation indicating the death penalty was appropriate outweighed the evidence in mitigation, would you have any hesitancy in voting that way?

A. No.

Q. In answer to Question 15, said: "Do you feel the death penalty should be mandatory for (sic) particular type of crime? Please explain." You said: "No. Only in murder cases."
When you answered that question, ma'am, did you mean that anyone who commits a murder should automatically be put to death or did you mean it should be an available punishment?

A. Well, appropriate punishment for that.

Q. In other words, it should not...would it necessarily be automatic or mandatory to be put to death or should be available that he could be put to death if the jury so decided?

A. If the jury decide that way.

Q. All right. And you indicated in answer to Question 19: "If the defendant was convicted of first degree murder with a special circumstance, do you feel that you would automatically vote for the death penalty and against life in prison without possibility of parole?" And you said: "Only in the case of self-defense."
After our discussion, ma'am, do you have any feeling that you would automatically vote for the death penalty without hearing the evidence that would be introduced during the subsequent phase of the trial?

A. Well, I would want to hear the evidence first, then make my decision.
(RT 1107-1109.)

There was further questioning of this prospective juror regarding her attitude toward plea bargaining in which, after first stating she was unsure

about disregarding such testimony, she agreed to hear all the evidence. (RT 1109-1110.) Eventually, this juror was passed for cause by both sides and she sat on Appellant's jury. (RT 1111.) Appellant was thereby prejudiced.

I(u): The Court improperly rehabilitated prospective juror Moises Serna.

The answers of prospective juror Moises Serna on his jury questionnaire were some of the most extremely pro-death of all prospective jurors, and he gave disqualifying answers to several questions.

Mr. Serna wrote in response to Question 9 that he "strongly support[ed" the death penalty and explained his views with the statement "take a life, eye for eye." (CT 3150-3151.) Asked in Question 12 whether he thought everyone convicted of a robbery-murder of a person should receive the death penalty regardless of the penalty phase evidence, he checked the "yes" line. (CT 3151.) In answer to Question 14, whether he thought the death penalty was used too frequently or not enough, he wrote "No, there are lots of criminals walking in the street, or in jail (people who got it easy in the trial)." (CT 3152.) Asked in the next question whether he thought the death penalty should be mandatory for any crime, he wrote "No, only people who kill at will." (CT 3152.) He believed the death penalty was appropriate for "murders" and inappropriate only "when it is self-defense or the person(s) was not aware do to (sic) the mind." (Questions 17 and 18)(CT 3152.) As to

Questions 19 and 20, which asked whether he would automatically vote against or for the death penalty if the defendant was convicted of first degree murder, he apparently mixed up his intended answers, as seen by his prior answer to Question 15 in which he said it should be automatic for murder, and as he wrote in answer to Question 20, which asked if he would automatically vote against the death penalty and for life, and he answered with relish "Yes! If so he should suffer like the people he hurt."[38] (CT 3153.) The only thing this prospective juror wanted to know about the person in deciding whether to impose a life or death sentence was "what was he thinking." (Question 21) (CT 3153.)

Mr. Serna, in his answer to Question 22, believed in "an eye for an eye." (CT 3153.) Although he wrote that his religious training held that it was wrong to take another person's life (CT 3154), at *voir dire* questioning he indicated he did not believe in this tenet of his Catholic religion. (RT 796.)[39]

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[38] The Court likewise interpreted his answer to these questions as indicating a mandatory-death view. (RT 1112-1114.)

[39] "I'm a Catholic and it's against, you know, our religion to be put to death...but if it was a fair trial and, you know, it was a fair case and the person got what he deserved that would be fine with me. As long as, you know, that person wouldn't blame like, 'Oh, I was under the influence of something...'" (RT 796.) Of course, this belief had significant meaning given Appellant's history of drug addiction and methamphetamine use at the time of the crime.

Additionally, in his answer to Question 29, Mr. Serna believed that the costs of keeping someone in prison for life would be a consideration in his decision at the penalty phase, writing "it is keeping some who would do you harm if this person had a chance." (CT 3155.) Mr. Serna again unequivocally stated his mandatory death views when he answered "yes" to Question 32 which asked whether his feeling about the death penalty were such that he would automatically vote for it. (CT 3156.) Mr. Serna described himself as a Republican. (CT 3157.) He also had a very negative attitude toward drug users, writing that drugs "destroy and confuse the mind" and his thoughts about why people become addicts were "nothing else to do and lazy." (CT 3166.)

At voir dire, the Court began with "do you understand" questions that gave no room for disagreement:

> Q. In answer to question 32...You indicated that your feelings about the death penalty such (sic) that if there was a penalty phase in the trial you would in every case automatically vote for the death penalty regardless rather than life in prison without the possibility of parole. And you said yes.
> So I would like to discuss that with you just briefly here for a couple of minutes, okay?
> You understand if you are called as a juror in this case—if you serve as a juror this trial would have two parts. The guilt phase and the penalty phase. You understand that?
> ...
> Q. And during the guilt phase you would be called upon to determine whether defendant committed the crime that he is charged with and whether the special circumstances are true beyond a reasonable doubt.

A. Yes.

Q. Understand that only if the jury did that would you then move onto the penalty phases at which time it would be the jury's task to decide whether or not the penalty should be death or whether it should be life without possibility of parole?

A. Yes.

Q. You understand that during that penalty phase evidence would be introduced for the—well, first of all, do you understand that death is only one of two possible sentences for this crime?

A. Yes.

Q. Okay. You understand that if you got to that phase, evidence would be introduced indicating to indicate in the opinion of the prosecution of (sic) the defendant should receive the death penalty, and evidence would be introduced from the defense indicating that the defendant should not receive the death penalty. These are called aggravating factors and mitigating factors. Do you understand that?

A. Yes.

Q. You understand that your task as a juror, if you got to that phase, would be to weigh the aggravated factors against the mitigating factors and determine in your own mind which penalty, that is death or life without possibility of parole, is more appropriate?

A. Yes.

Q. If you listen to all of the evidence and felt that the mitigating factors, that is those factors indicating that defendant (sic) should not be put to death, outweighed those indicating that he should, would you have any hesitancy in voting for life without possibility of parole?

A. Yes.

Q. Okay. Do you feel that regardless of that that you would want to vote for the death penalty you—just because he had been convicted of

the crime without any further considerations?

A. No. I would, you know—may I speak freely?

Q. Sure.

A. Some people, you know, act stupid, you know, and excuse me for using that, you know, they try to blame things on other things. And if somebody did something they knew what they were doing, you know, why blame something else, 'cause, you know. They should have thought about that before.

Q. Okay.

A. That's how I feel. I'm a Catholic and it's against, you know, our religion to be put to death...but if it was a fair trial and, you know, it was a fair case and the person got what he deserved that would be fine with me. As long as, you know, that person wouldn't blame like, 'Oh, I was under the influence of something,' or, you know what I mean?

Q. Um-hmm.
(RT 794-796.)

This prospective juror, in response to more leading questions, indicated he could consider mitigating evidence and would not vote for death automatically. (RT 796-797.) More leading questions followed regarding Mr. Serna's consideration of the costs of keeping someone in prison and the costs of appeal:

Q. All right. At one point you said in deciding the penalty, that is life in prison without the possibility of parole or death, would the cost of keeping somebody in jail for life be a consideration for you. And you said, "Yes. Keeping some who would do you harm if this person had a chance."
If you were instructed by the court that you were not to consider as a factor whether or not it's going to cost money to keep somebody in jail

or whether it's going to cost money for an appeal, you believe that you could follow that instruction and not consider or discuss that matter?

A. I would follow it.

Q. Okay. So you—if you were told not to consider that you would not consider it?

A. Yes.
(RT 797-798.)

The defense challenged this prospective juror based on his answers to questions 12 (automatic vote for death in these circumstances), 15 (mandatory death for those who "kill at will") and 32 (automatic vote for death based on feelings about the death penalty). (RT 798.) Neither the defense nor the prosecution asked this prospective juror any questions. The Court denied the challenge "based on the answers of the juror in open court." (RT 798.)

Appellant was prejudiced as this prospective juror, along with many others discussed herein, remained in the potential juror panel at the conclusion of jury selection, thus inhibiting and rendering futile the exercise of defense peremptory challenges. Without the Court's rehabilitative efforts, achieved through leading and suggestive questioning, this prospective juror would have been successfully challenged for cause by the defense.

I(v): The Court improperly rehabilitated prospective juror Larry Vessel.

Despite many disqualifying answers on his questionnaire, prospective juror Larry Vessel was "rehabilitated" by the Court through leading questions.

When asked to explain his views on the death penalty in Question 10, he wrote that "I believe in the death penalty." (CT 3181.) These views have "stayed the same over the years." (Question 11) (CT 3181.) As to Question 12, which asked whether everyone convicted of a murder-robbery of an elderly man with a shotgun, without regard to the mitigating evidence, should receive the death penalty, Mr. Vessel wrote "yes," explaining "if you kill someone in the first degree, should receive the death penalty." (CT 3181.) He thought the death penalty was used too seldom. (Question 14)(CT 3182.) He also felt it should be mandatory for "first degree murder." (Question 15)(CT 3182.) Mr. Vessel, asked in Question no. 19 if he felt that he would automatically vote for the death penalty for a defendant convicted of first degree murder, wrote "yes, first degree murder should be the death penalty." (CT 3182.) All that he wanted to know about the defendant in deciding the penalty of life or death was "whether he was guilty or not." (Question 21)(CT 3183.) Mr. Vessel also believed in "an eye for an eye" (Question 22) and stated it was based upon a religious conviction. (CT 3183.) He owned "3 deer rifles, 3 shotguns and 2 handguns." (CT 3195.)

At *voir dire*, the Court explained the two phases of the trial to Mr. Vessel and confirmed he would have no hesitancy in voting for either the death penalty or life without the possibility of parole. (RT 784-786.) The Court

asked him, "So would it be fair to say then that you would not automatically vote for the death penalty just because the defendant was convicted of the crime?" Mr. Vessel answered "No." (RT 786.) The Court continued with its leading questions as to his opinion on the scope of a "mandatory" death penalty for certain crimes. The Court asked, "In other words, you didn't mean by that that anybody convicted of a crime should automatically be put to death. You meant that it should be considered?" Vessel answered "Yes." (RT 786-787.)

Defense counsel challenged based on questions 12, 15 and 19, but the Court denied the challenge. (RT 788.) Neither defense counsel nor prosecution asked Vessel any questions.

Appellant was prejudiced because he was forced to use a peremptory challenge on this defendant. More importantly, the cumulative effect of the Court's "rehabilitations" meant that more improperly-biased, pro-prosecution jurors were seated than would have been the case had the Court not improperly "rehabilitated" them.

I(w): The Court improperly rehabilitated prospective juror Genevieve Timmerman.

In her questionnaire, Ms. Timmerman wrote that she "believed in an eye for an eye, but I would have to be absolutely sure the defendant is guilty and that he intended to kill without a doubt." (CT 1951.) She also felt the

death penalty should be mandatory for rape and murder. (CT 1952.) The death penalty was felt to be inappropriate only when there was "insufficient evidence." (CT 1952.) In reiterating that she believed in "an eye for an eye" she wrote in explanation that "it means that if you take a life willfully then your life should be taken too." (CT 1953.) This belief was based on her religious convictions. (CT 1953.) She wrote that she could apply the principles the Court would give her but she stated her religious training regarding the death penalty came from the bible, and she believed that "God is the judge." (CT 1954.) Ms. Timmerman was a Jehovah's Witness. (CT 1957.) When asked whether she could set aside this religious training, she wrote "I really don't know how to answer this–I do feel that if a person willfully kills someone then he should be severly (sic) punished." (CT 1954.) She thought O. J. Simpson should have been found guilty. (CT 1972.)

On voir dire, the Court recited a long summary of the above answers, running to almost a page and a half of transcript, and then the following colloquy ensued:

> THE COURT: Do you think that you would be able to decide this case, if you were to sit as a juror, according to the law as I explain it to you here in court and according to the evidence that's presented by the attorneys? Will you be able to do that?
>
> A. Un-huh. Yes.
>
> Q. And you don't perceive at this time any conflicts between those

matters and Bible or your religion as you understand it; is that correct?

A. See, I don't really know how to answer that. I...I...you know, these are questions I've never really given a lot of thought to.

Q. Sure.
(RT 500.)

Even when the defense later questioned this prospective juror, she still had disqualifying answers to the question:

Q. According to your answer in Number 10, you believe that the death penalty should be imposed if the defendant is guilty and that he intended to kill.

A. Yes.

Q. That doesn't take into consideration any circumstances in aggravation or any circumstances in mitigation. That merely takes into consideration whether or not he's guilty of the crime. Do you understand?

A. Yes.
(RT 509.)

This prospective juror was properly challenged for cause, on the basis of her answers to the above questions, but the challenge was denied. (RT 510.) Appellant was prejudiced by her presence in the prospective juror pool.

I(x): The cumulative effect of this improper rehabilitation deprived Appellant of a fair jury, caused his counsel to expend many peremptory challenges on prospective jurors that were subject to challenges for cause, rendered futile the exercise of defense peremptory challenges for cause, and resulted in a pro-death bias to Appellant's jury.

Ultimately, all of these actions must be seen cumulatively, and even if

no one improper rehabilitation can be seen as depriving Appellant of a fair trial, the cumulative effect was overwhelming. It caused many mandatory death jurors to escape challenges for cause and ultimately led to several such jurors sitting on Appellant's jury as it was finally constituted.

The defense peremptory challenges were rendered irrelevant, as a biased jury would still have resulted due to the Court's ability and demonstrated inclination to "seed" the panel with an unlimited number of pro-death-biased prospective jurors in a quantity sufficient to overwhelm the defense peremptory challenges. The Court's rehabilitative efforts also inhibited and prejudiced the exercise of defense peremptory challenges, as it would have been futile to challenge too many of the earlier-chosen objectionable jurors, beyond the extremely biased, if the remaining eligible pool had an equal or possibly even higher proportion of objectionable jurors.[40] Additionally, the presence in the pool of so many "rehabilitated" jurors with extreme pro-death-penalty biases was another prejudicial factor for the defense, as challenging the moderately-biased risked their substitution with the extremely-biased. Thus, the fact that the defense did not exercise all its peremptory challenges is of no moment, but actually illustrates the chilling effect of the Court's *voir dire* questioning procedure.

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[40] *See* Appendix A.

Equally important, the *voir dire* process employed by the Court was not designed to ferret out disqualifying bias, but rather to change objectionable views and make them non-objectionable, and thus hide these biases. This process failed to perform its primary function of assuring the defendant a fair and objective jury that would listen to his mitigating evidence without pre-judging it or discounting it on the basis of prejudicial beliefs or attitudes. In the circumstances described here, a fair trial for Appellant was impossible.

C) Legal Argument.

The Sixth Amendment to the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." (U.S. Const., Amend. VI.) The Fourteenth Amendment extended the right to an impartial jury to criminal defendants in all state criminal cases. (*Duncan v. Louisiana* (1968) 391 U.S. 145.) In addition, the Due Process Clause of the Fourteenth Amendment independently requires the impartiality of any jury empaneled to try a cause. (*Morgan v. Illinois*, *supra*, 504 U.S. at 726.)

Whether a prospective capital juror is impartial within the meaning of the Sixth and Fourteenth Amendments is determined in part on the basis of their opinions regarding the death penalty. A prospective capital juror is not

impartial and "may be excluded for cause because of his or her views on capital punishment [if] 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* (1985) 469 U.S. 412, 424; citing *Adams v. Texas* (1980) 448 U.S. 38, 40.) A prospective juror who will automatically vote either for or against the death penalty regardless of the court's instructions will fail to consider in good faith evidence of aggravating and mitigating circumstances. Such a juror is not impartial and cannot constitutionally remain on a capital jury. (*Witherspoon v. Illinois* (1968), 391 U.S. 510, 88 S. Ct. 1770; *Morgan v. Illinois* (1992), 504 U.S.719 at 728, 733-734, 112 S. Ct. 2222.)

In *Witherspoon*, the United States Supreme Court held that capital-case prospective jurors may not be excused for cause on the basis of moral or ethical opposition to the death penalty unless those jurors' views would prevent them from judging guilt or innocence, or would cause them to reject the death penalty regardless of the evidence. Excusal is permissible only if such a prospective juror makes this position "unmistakably clear." (391 U.S. at 522, fn. 21.) *Witherspoon* also holds that the defendant is entitled to an impartial jury at both phases of the trial, which was denied Appellant here.

That standard was amplified in *Wainwright v. Witt* (1985), 469 U.S. 412, 105 S. Ct. 844, where the Court, adopting the standard previously

enunciated in *Adams v. Texas* (1980), 448 U.S. 38 at 45, 100 S. Ct. 2521 448, held that a prospective juror may be excused if the juror's voir dire responses convey a "definite impression" (*Witt, supra*, 469 U.S. at 426) that 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.'" (*Id.* at 424.) The *Witt* standard applies here. (*People v. Avena* (1996) 13 Cal.4th 394, 412.)

Thus, this Court's duty is to

> [E]xamine the context surrounding [the juror's] exclusion to determine whether the trial court's decision that [the juror's] beliefs would "substantially impair the performance of [the juror's] duties . . ." was fairly supported by the record.

(*People v. Miranda* (1987) 44 Cal.3d 57, 94, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 176.)

A review of these jurors' entire juror questionnaires and *voir dire* leaves the "definite impression" that they so strongly in favor of the death penalty that their ability to follow the law was substantially impaired within the meaning of *Witt*. Hence, their "rehabilitation" by the Court was error.

In *Ross v. Oklahoma* (1988), 487 U.S. 81, 108 S. Ct. 2273, the Supreme Court held that the erroneous refusal to disqualify a juror for cause under *Witherspoon,* causing the defendant to exercise a peremptory challenge, did not violate his constitutional rights because no claim was made that any of the jurors who sat were not impartial nor were any challenged for cause and

peremptory challenges are not a constitutional right. Here however, both exceptions are present. Many of the jurors discussed above were challenged for cause and it is alleged that the above-discussed jurors who actually sat on Appellant's jury were biased and not impartial.

(D) Conclusions.

What is most disturbing about this process, and most violative of Appellant's right to a fair trial, is the fact that the Court's colloquy and inquiry did not serve the purpose of seating an unbiased jury that would be fair to both sides. None of the Court's questioning of these pro-prosecution prospective jurors was done with the intent to weed out those with disqualifying or objectionable views regarding the death penalty or mitigating evidence. None of the questioning was two-sided or posed questions that were designed to reveal the extent of the bias rather than put an acceptable face on it. The nature of the questioning, with long statements of the law backed by the authority of the trial judge, along with "don't you think" or "did you really mean" type questions left no room for disagreement. The sole purpose of the questioning was to "rehabilitate" the pro-death jurors, a process that benefitted only the prosecution. Nor did any anti-death-penalty jurors receive the same rehabilitative treatment from the Court. They were simply excused for cause without this "rehabilitative" questioning. (*See, e.g.,* RT 1137 (prospective

juror Billie Costa would not impose death penalty, excluded pursuant to agreement)).

Looking at the individual and cumulative effects of the Court's actions as to these jurors, Appellant has shown that he was denied his right to a fair and impartial jury, and reversal of his conviction and sentence of death is mandatory.

II.

THE COURT ERRED IN DENYING CHALLENGES FOR CAUSE TO MANY PROSPECTIVE JURORS WHO HAD DISQUALIFYING OPINIONS, THEREBY DEPRIVING APPELLANT OF A FAIR AND IMPARTIAL JURY.[41]

Appellant's conviction, judgment, sentence and confinement are illegal and were obtained in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to a fair and impartial jury, the presumption of innocence, a fair trial, freedom from self-incrimination, effective assistance of counsel, due process of law, and reliable guilt and penalty determinations, because, *inter alia*, biased pro-death jurors were allowed to serve due to the Court's

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[41] This argument discusses the Court's actions in denying challenges for cause against pro-death-penalty jurors; the prior argument discussed the Court's improper "rehabilitation" of pro-death jurors, some of whom were not challenged for cause. Hence, there is some overlap as some, but not all, jurors were both rehabilitated and challenged for cause by the defense.

denial of defense challenges for cause.

Appellant hereby incorporates by reference the facts and argument from the prior issue.

(A) Facts in Support.

II(a): The Court erred in denying the defense challenge to Juanita Edwards.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 427.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(b): The Court erred in denying the defense challenge to Isabelle Williams.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 650-653.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(c): The Court erred in denying the defense challenge to Yvonne Caselli.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 563.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(d): The Court erred in denying the defense challenge to Mozella Evans.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 689-691.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(e): The Court erred in denying the defense challenge to Jessica Jones.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 597.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(f): The Court erred in denying the defense challenge to Jacqueline Marchetti.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 610-611.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(g): The Court erred in denying the defense challenge to Robert Zabell.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 645.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(h): The Court erred in denying the defense challenge to Ray Lindsay.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 887.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(i): The Court erred in denying the defense challenge to Steve Witt.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 985.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(j): The Court erred in denying the defense challenge to Frank Gatto.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 1010.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(k): The Court erred in denying the defense challenge to Mami Aligire.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 1053.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(l): The Court erred in denying the defense challenge to Cleo Parella.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 1102.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(m): The Court erred in denying the defense challenge to Moises Serna.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 798.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(n): The Court erred in denying the defense challenge to Larry Vessel.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 788.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(o): The Court erred in denying the defense challenge to Genevieve Timmerman.

Appellant hereby incorporates by reference the facts regarding this juror from the prior argument. The Court denied the defense challenge to this prospective juror. (RT 510.) The Court's erroneous refusal to grant the challenge biased the panel against Appellant and deprived him of a fair jury.

II(p): The cumulative effect of the denial of these defense challenges deprived Appellant of a fair jury and a fair trial.

The prejudicial effect of the denial of these defense challenges must not only be seen individually, but cumulatively. Even if no single denial was erroneous, the effect of all of the denials caused the juror pool to be stacked against the defense and had an inhibiting effect on the use of defense peremptory challenges.

(B) Argument.

The challenges for cause were well taken and should have been granted, because these juror's views would prevent or substantially impair the performance of their duties as jurors. (*Wainwright v. Witt,* (1985) 469 U.S. 412, 424.) Under *Wainwright,* criminal defendants have a Sixth Amendment right to remove from the panel jurors who, because of their views regarding the death penalty, would be substantially impaired in the performance of their duties. This standard applies to jurors whose views in favor of the death penalty would impair their ability to judge the case impartially, as well as to those jurors whose opposition to the death penalty has such effect. (*Morgan v. Illinois* (1992), 504 U.S. 719.) The rulings of the trial court in this case were, in constitutional terms, the equivalent of a ruling granting the prosecution more challenges than were given to the defense. More importantly, the failure to grant these challenges for cause resulted in a biased and pro-

death jury to be chosen, one that by their own written statements and words could not afford Appellant a fair trial. Appellant's conviction and sentence of death must therefore be reversed.

III.

APPELLANT WAS DEPRIVED OF A FAIR TRIAL BECAUSE HIS JURY WAS COMPOSED OF BIASED AND PRO-DEATH JURORS.

Appellant's conviction, judgment, sentence and confinement are illegal and were obtained in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to a fair and impartial jury, the presumption of innocence, a fair trial, freedom from self-incrimination, effective assistance of counsel, due process of law, and reliable guilt and penalty determinations, because, *inter alia*, biased pro-death jurors were allowed to serve, the trial court and trial counsel failed adequately to *voir dire* the prospective jurors to ensure an impartial jury, and the trial court improperly "rehabilitated" many death-prone jurors who would otherwise have been successfully challenged for cause by the defense.

This argument looks only at those who actually served on Appellant's jury, while the prior arguments looked at those prospective jurors who were subject to challenges for cause but were improperly rehabilitated by the trial court. Appellant hereby incorporates by reference the facts and arguments

from the prior issues, as they have a strong bearing on, and are at least a partial explanation of the composition of the panel that ultimately resulted.

A. Mandatory Death Penalty or Death-Favoring Jurors

Many jurors expressed views that would either make the death penalty mandatory in all murder cases or had a strong bias towards the death penalty. These views were rarely effectively explored by the trial court or effectively challenged by the defense on *voir dire*.

1) Juror **C. H.** stated in her questionnaire that she supported the death penalty. (Question 9) (CT 5638.) When asked to explain her views in the next question, she simply stated "I support the death penalty." (CT 5639.) She further stated in Question 11 that her views on it had not changed over time and that she has "supported the death penalty for some time." *Id.* When asked in Question 18 what circumstances the death penalty would not be appropriate, she said only "if the person is not guilty," (CT 5640) leaving the implication that it was appropriate in all other circumstances. Ms. C. H. was unsure in her answer to Question 22 as to whether she believed in the adage "an eye for an eye" (CT 5641) stating that "I do in some cases and in some cases not." *Id.* She further stated that "I believe that regardless of an eye for an eye or not everyone pays in some way or another for there (sic) bad ways against another." (*Id.*) A reasonably alert court and reasonably

competent defense attorney would have wanted to explore these views, given their ambiguity and probable pro-death inclination, yet Ms. C. H. was not asked about her views on the death penalty at all, in a one-page *voir dire*. (RT 590-591.) The Court and the defense had no way of telling whether her views on the death penalty were disqualifying or not.

2) Similarly, **P. E.** , who was chosen for Mr. Whalen's jury (RT 2526), also wrote in her questionnaire as to Question 9 that she "supported" the death penalty. (CT 5668.) She also wrote that persons "under special circumstances [should] get the death penalty." (CT 5669.) Somewhat ambiguously, she wrote that "I've always felt pretty much the same regarding a guilty and special circumstances but first it must be proven." (*Id.*) As to her definition of "special circumstances," she wrote that "well there might have been special accidental circumstances where an individual may be found innocent." (*Id.*) In a similar vein, Ms. P. E. also wrote, in response to Question 16 asking whether the death penalty should be a possible sentence for any crime other than first degree murder with special circumstances, "[n]o. Because there could be such a thing as accidental death or not even committing the crime." (CT 5670.) She also wrote that the death penalty is appropriate "if a person is found to be a cold-blooded killer or premeditated with actual intent to kill with proof."(*Id.*) Ms. P. E. believed that the death penalty is

inappropriate only "in accidents" (Question 18) (*Id.*), circumstances in which the defendant would actually not even be guilty of murder, let alone eligible for the death penalty. To a question asking what she would want to know about the defendant before deciding on life or death, Ms. P. E. wrote "whether or not it was premeditated." (Question 21) (CT 5671.) Asked in Question 32 whether she would automatically vote for the death penalty, she stated she would not but "it would need to be without a reasonable doubt—with special circumstances—all things (meaning proof considered)." (CT 5674.)

This expansive view of the acceptable parameters of the death penalty, confused view of "special circumstances," and very circumscribed view of mitigating evidence was an obvious topic for questioning by both the Court and counsel. As a result, the Court took the juror through the same leading, suggestive and rehabilitating questions examined in the prior arguments. The answers to these questions were never in doubt because of their leading nature, mostly of the "do you understand" variety. (RT 693-695.) The Court took her through the meaning of some terms and the concept of mitigating evidence, but defense counsel never attempted to clarify or pin down this juror's views regarding the death penalty or what she believed were the acceptable parameters for its imposition. In fact, the defense asked no questions at all of

this juror, but passed her for cause. (RT 697.)[42]

3) Juror **L. H.,** in her questionnaire, checked two boxes when asked about her attitude toward the death penalty in Question 9: "support" and "will consider." (CT 5698.) When asked to explain her views in the next question, she wrote "if the crime was violent and done without care." (CT 5699.) Her views had not changed over the years (*Id.*) These views would have made the death penalty mandatory in this matter.

4) Juror **P. W.** wrote in her questionnaire that she supported the death penalty (Question 9), adding in explanation that "I believe that there are some crimes that are beyond human tolerance." (CT 5728-5729.) She also stated in Question 11 that her views on the death penalty had not changed over time. (CT 5729.) When asked in Question 14 whether she thought the death penalty was used too seldom or too frequently, she circled "too seldom" and wrote "[i]t does not appear that the criminals care." (CT 5730.) In answer to Question 12, whether she thought a person convicted of an offense similar to what the defendant was charged with should receive the death penalty, she wrote that "it would depend on the circumstances at the time of the crime." (CT 5729.) This of course left out a broad range of mitigating evidence not

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[42]The prosecution asked questions regarding her attitude toward plea bargains. (RT 697-698.)

connected to the crime itself. Ms. P. W. felt that the death penalty should be mandatory for some crimes, such as torture where the person was not killed but permanently left "a vegetable" for life, without consideration of any mitigating evidence. (CT 5730.) She also felt this offense should merit the death penalty.(*Id.*) Of interest to the defense in this matter was her answer to Question 17, under what circumstances she felt that the death penalty is appropriate, to which she responded "prior record of criminal" and "type of crime & deaths & etc." (CT 5730.) As to the next question, Ms. P. W. believed the death penalty inappropriate only in the event the death was "accidental" which might not be a crime at all. (*Id.*) Another warning sign for the defense was Ms. P. W.'s answer to Question 21, what she would want to know about the defendant before deciding whether to impose a life or death sentence, to which she wrote "nothing personnal (sic)," which virtually negated the entire concept of mitigating evidence.

Yet another danger sign for the defense, and a possibly disqualifying answer was her response to Question 29, "[w]ould the costs of providing the appellate process be a consideration?" (CT 5733.) She checked the "yes" box and wrote "I believe there should be a limit as to how far and long this could be done." (*Id.*)

Yet in her extremely brief *voir dire*, which lasted only four pages (RT

789-793), Ms. P. W. was asked about her statement that "it would depend on the circumstances at the time of the crime" as to what factors should be considered in mitigation. (RT 789-790.) Her answer to the death penalty being mandatory for torture was also briefly explored and she was instructed that she could not consider the costs of the appellate process in arriving at a verdict. (RT 791-792.) The defense did not ask any questions at all of this juror and passed her for cause. (RT 792.)

5) Although juror **L. G.-H.** wrote on Question 9 that she "will consider" the death penalty (CT 5758) she explained that she "would support the death penalty if the factual evidence proved to me beyond a shadow of a doubt malicious crime & murder was committed." (CT 5759.) She further wrote that "[c]riminals who would present a great threat to society such as persons who have a history of violent crime in some cases deserve such sentences. It is our human and civic duty to protect those who cannot protect themselves." (CT 5759.) This juror also wrote that the death penalty should be mandatory for any "brutal murder." (CT 5760.) In her answer to Question 17, which asked under what circumstances the death penalty was appropriate, she wrote "when brutal murders are proved beyond a shadow of a doubt and that the criminal is proven to be a menace to society for the remainder of there (sic) life." (CT 5760.) In contrast, this juror believed the

death penalty inappropriate only when "facts are not proven and when murder is not committed." (*Id.*)

This juror, in answer to Question 29, thought that the costs of keeping someone in prison for life would be a consideration, explaining "in the future if the government cannot feed these inmates it would be adverse cause (sic) to let them go, example 30 years from now." (CT 5763.)

The Court asked about this juror's response to the mandatory death penalty answer, after hints and suggestions ("what did you mean? Did you mean that it should be—should be an optional punishment for them?" (RT 826); "[i]n other words, you would have to know the circumstances of any particular case before you would decide..."(*Id.*)). This juror then agreed that the death penalty should be an option and not mandatory. (RT 826.) As to the costs of the appellate process, after similar prodding by the Court, this juror changed her answer and stated she could put it out of her mind. (RT 827.)

The defense asked only about this juror's answer to the question of whether she could accept that life without parole meant exactly that, and she agreed that she could keep out of her mind the possibility that the legislature might change the laws at some time in the future. (RT 827.)

6) Juror **Carolyn Phipps** was a very strong mandatory death juror who should have been successfully challenged for cause by the defense based on

her answers in the questionnaire. She wrote in her questionnaire as to Question 9 that she "strongly supports" the death penalty. (CT 5788.) She also wrote that she would support it if the crime is "premeditated" and there was "past criminal history." (CT 5789.) Asked in Question 11 how her views on the death penalty have changed over the years, she wrote that she is "sick and tired of appeals & paroles & shortened time served." (CT 5789.) In response to Question 12, whether she would support a mandatory death verdict for a defendant convicted of a crime similar to what Mr. Whalen was charged with, "regardless of the evidence regarding penalty which is introduced by the people and the defendant" she checked the "yes" line. (CT 5789.) She explained the answer with the comments that "[he] was armed and invaded a home with robbery planned possibly...he was armed in case he needed the gun." (CT 5789.) This indicates her mind was made up before the trial had begun, not only as to guilt/innocence but also as to the penalty.

As to the next question, which asked whether she could have an open mind at the penalty phase and base her decision only on the evidence and the Court's instructions, she checked the "yes" line but then qualified and virtually negated her answer by stating that she "would have a hard time, however, if it were a 'cold-blooded' act." (CT 5789.) The next question, number 14, inquired whether she thought the death penalty was imposed too frequently or

too seldom, and her answer was "too seldom...to many prisoners released on parole or appeals...waste of tax $$." (CT 5790.)

Question 15 asked whether she felt the death penalty should be mandatory for any crime, and while she answered "no" this was rendered meaningless in light of her qualification: "only for murder, violent crimes & perhaps rape under certain circumstances." (CT 5790.) The next question asked whether she felt that the death penalty should be a possible penalty for any crime other than first degree murder, and her answer referenced her answer to the prior question, in which she supported such an expansion of death-eligible crimes. *Id.* The answer to Question 17, which inquired as to what circumstances if any she felt that the death penalty was appropriate, Ms. C. P. wrote "murder—brutal child abuse, convicted rapist w/ past repeated offenses." (CT 5790.) The following question asked in what circumstances she would find the death penalty to be inappropriate, and her answer was "any possibility of doubt—whether it be a possibility of self-defense or accidental." (CT 5790.) Thus, this juror felt that the sole exceptions to the death penalty would be instances that were not even crimes, let alone capital crimes.

Ms. C. P. "sometimes" believed in the adage "an eye for an eye," adding "you commit a crime...you pay the price. We are responsible for our actions...no excuses." (Question 22) (CT 5791.) She also indicated this belief

was based on her religious conviction and her "upbringing & moral being." *Id.*

As to Question 27, which asked whether she could set aside her personal feelings regarding the death penalty and follow the Court's instructions, she was equivocal, writing "maybe—not sure." (CT 5792.) In another disqualifying answer, to Question 29, Ms. C. P. was asked whether the cost of keeping someone in prison for life would be a consideration, she checked "yes" and explained "I'm fed up with tax $$ used to house inmates (& pampering them with frivolities"). (CT 5793.) In a similar vein, Ms. C. P. did believe that the costs of the appellate process would be a consideration in her vote as to life or death, referring to her previous answer. (CT 5793.) This juror even returned to this theme in a later question which asked "[h]ow do you feel about serving as a juror in this case?" to which she answered "Not sure—haven't served before—can only base my feelings on my disgust with violent crime; appeals & actual time served." (CT 5795.) This juror's extreme and repeatedly-expressed concern that tax money not be spent on appeals or on life sentences for prisoners, to the point of "disgust" and to the extent that it would actually influence her to vote for death in a capital case just to avoid these costs, was in itself enough for her to be excused for cause.

Ms. C. P.'s answer to Question 30 was similarly revealing. It asked

whether the prospective juror would hesitate to vote for first degree murder or for a special circumstance if the evidence showed it to be true, just to avoid the task of deciding the penalty. (CT 5793.) Her answer, which misconstrued the question and again showed her bias toward the death penalty, was: "would try to be open-minded–I simply just have a problem with compromising penalty for FIRST-degree murder." (CT 5793.) Thus, rather than not voting for first-degree murder to avoid the penalty phase, she again seemed to be troubled with the prospect of anything but a death sentence for any murder at all, as well as for lesser crimes such as child abuse or rape. Additionally, her use of the word "compromising" indicates that she viewed a life verdict as somehow "compromised," and by implication a death verdict as "uncompromised," no matter what the mitigating evidence. Under these circumstances, Ms. C. P. was not qualified to serve as an unbiased juror in this capital case.

Further answers reenforce this unmistakable impression. When asked in Question 31 whether her feelings about the death penalty would cause her to automatically vote for it in every case, Ms. C. P. checked "no" but her explanation undercut this answer: "would depend on special circumstances—if there were no special circumstances I would vote for death penalty." (CT 5794.) She also had problems with plea bargaining, but only because those who plea bargain "avoid time for something they did that would warrant more

punishment." (CT 5794.) She reiterated this concern in the next question: "I don't believe it is right to avoid ultimate punishment by plea bargain." (CT 5795.) The next question shows that Ms. C. P.'s only concern was that Appellant might be the beneficiary of a plea bargain: "I don't feel there should be a 'plea agreement' to cold blooded murder/robbery—but I need to hear all circumstances." (CT 5795.)

Ms. C. P.'s disposition toward a death sentence can also be seen in her answer to Question 85, which inquired whether there was anything in the defendant's age or appearance that would prevent her from considering the case on the evidence and not on the basis of prejudice or sympathy. She did not check either the "yes" or "no" line and her explanation was "I'm really not sure. I would never judge a person by appearance alone. Sympathy or pity would play no part. *My sympathy or pity would be reserved for the victim & family.*" (CT 5804.)(emphasis added). This was yet another strong indication of this juror's bias against the defendant.

At the end of her questionnaire, this juror took another opportunity to alert the Court and the defense of her inclinations. Asked if she had formed any opinion about the case based upon completing the questionnaire, she did not check either "yes" or "no" but wrote "I hope not—the term 'murder' doesn't set with me—but I'd have to hear all evidence." (CT 5811.)

Asked to describe herself in a sentence, this juror wrote, in what could fairly be described as an understatement, "not much tolerance for crime." (CT 5809.)

As discussed *supra* in Argument I, the Court's "rehabilitation" of this juror proceeded along familiar lines. Initially, the Court reminded this juror that Appellant had not yet been found guilty, as the trial had not yet begun. (RT 919.) The Court then asked leading and suggestive questions that were meaningless in uncovering overt or latent bias or prejudice on the part of this juror, or in identifying her as a juror that held disqualifying views. The sole purpose of the colloquy, as examined in the prior issue, was to "rehabilitate" prosecution-prone and death-prone jurors, while the Court had the duty to weed out those who could not afford Mr. Whalen a fair trial. A typical exchange was as follows:

> Q. Anding (sic) if you got to the penalty phase and you listen to all of this evidence which is introduced by both sides if you felt that the evidence in mitigation, that is, those things tending to indicate the death penalty should not be imposed, outweighed those things in aggravation, do you have any hesitancy in voting for life without possibility of parole?
>
> A. Yes. Do I have any hesitancy?
>
> Q. Hesitancy in voting for life without possibility of parole if you felt that the evidence so indicated during the penalty phase?
>
> A. Would I be willing to go from death to life without...

Q. Well, you just have two possible...

A. Yes.

Q. ...sentences here. And neither one of them is automatic?

A. Right.
(RT 921.)

Q. Okay. In answer to question 15 you said "Should you feel the death penalty should be mandatory for any particular type of crime. Please explain." You said "No." Only for murder with violent crimes and perhaps rape under certain circumstances."
When you said that, ma'am, did you mean when you said "mandatory" did you mean that it automatically be imposed if a person is found guilty of it, or did you mean that it should be an available penalty?

A. It should be available penalty. Violent is the word that I...

Q. Okay. All right. Thank you.
(RT 922.)
...

Q. In answer to question 27 question was, "Could you set aside your own personal feelings regarding what you think the law should be regarding the death penalty and follow the law as the court instructs you?" And you said "Maybe. Not sure." Do you think you can follow my instructions on the law in this matter?

A. Yes, I could.
(RT 924.)

7) Juror **B. S.** wrote in his questionnaire that he "supported" the death penalty (CT 5818) and "I believe the death penalty is appropriate if the evidence can prove that an individual has murdered someone." (CT 5819.) Similarly, he believed that the death penalty is appropriate "[i]f a murder is

committed during a crime and when someone purposely seeks out and murders another." (CT 5820.) He believed the death penalty to be inappropriate only in "the death of someone by accident" (CT 5820) which of course might not be a crime at all. These views had not changed throughout his 52-year life. (CT 5819.)

The only questioning on *voir dire* concerned his attitude about plea bargains, and a couple of questions from the defense regarding his view that the death penalty should be an option, not mandatory. (RT 955-956.)

8) Juror **L. K.** wrote she would consider the death penalty. (CT 5848.) She believed in "an eye for an eye." (Question 22)(CT 5851.)

9) Juror **S. R.** wrote that she would consider the death penalty. (CT 5878.) She felt the death penalty was appropriate "[i]f a murder is committed with no provocation." (CT 5880.) She also had extensive contacts with district attorneys, policemen and lawyers. (CT 5889.)

10) Juror **J. A.** supported the death penalty and felt it should be mandatory "when a life is taken and circumstances-evidence indicate such as permitted by law." (CT 5910.) She believed in "an eye for an eye" and it meant that "if someone is killed and the circumstances (evidence) warrant then yes." (CT 5911.)

11) Juror **M. C.** supported the death penalty to the

extent that "if I feel after testimony and evidence in that it should prove against the defendant, I could approve the death penalty." (CT 5938.) Significantly, in her answer to Question 12, she thought the death penalty should be mandatory for a robbery-murder such as the one Mr. Whalen was charged with: "a crime of robbery is one thing but to take another person's life to rob that person and kill them is wrong and they should pay for their crime." (CT 5939.) She also felt the death penalty was used "too seldom, even criminals that know they can still harm people are not put to the death penalty." (CT 5940.) Ms. M. C. also felt that the death penalty should be mandatory (as well as a possible penalty) for "repeated sex offenders." (CT 5940.) In her answer to Question 17, she felt the death penalty appropriate when "people have harmed others repeatedly with no remorse." (CT 5940.) In contrast, in the next question she believed it inappropriate only if the defendant "have (sic) not physically harmed any person." (CT 5940.)

Significantly, Ms. M. C. checked "yes" to Question 29 when asked if the costs of keeping a person in prison for life would be a consideration in her penalty decision, writing "I still feel that convicted persons causing bodily harm that have repeated offense (sic) should be given the death penalty." CT 5943. She distrusted testimony resulting from plea agreements, but only because "if they did a crime they should be tried whether

or not they have testimony (sic) in another case" and "but I still think if they committed a crime they should be tried." CT 5944. She also was concerned because "[t]he people who use it [plea bargaining] are usually guilty of something and know they can use the system to get out of trouble." CT 5945.

12) Juror **C. E.** wrote on her questionnaire that she supported the death penalty to the extent that she believed that "if a person is found guilty and there's no doubt and the crimes (sic) bad enough it should happen." (CT 5968-5969.) In response to Question 11 about how her views had changed, she indicated that "people need to do something to stop the crime." (CT 5969.) In Question 14, she felt the death penalty was used "to (sic) seldom otherwise there would not be so many people in prison!" (CT 5970.) As to Question 15, Ms. C. E. felt that the death penalty should be mandatory "for murder, only if its not in self-defense." (CT 5970.) She also felt the death penalty was appropriate when "they kill someone in cold blood" and inappropriate only "when it is self-defense." (CT 5970.)

This juror indicated on Question 29 that the costs of keeping a person in prison for life would be a consideration for her in imposing sentence as would the costs of providing the appellate process because "you have to consider everything when it comes to someone's life." (CT 5973.)

B. Jurors Who Were Crime Victims or Had Family Who Were Victims

1) Juror **C. H.** stated in her questionnaire that she had been raped and assaulted in 1990. (CT 5650.) This allegation called out for delicate and sensitive further questioning, preferably by the Court, as undoubtedly such an experience would have left life-long scars and psychic trauma. It was especially relevant in Mr. Whalen's case due to the allegation by one of the co-defendants that Mr. Whalen had raped her.

Ms. C. H. also stated that her "husband became very physically aggressive. That is why we are divorced." (CT 5630.) She also stated that she had been threatened by her ex-husband and that she was still "very fearful" of him at the time of the trial. (CT 5652.)

Despite answers that a reasonably competent attorney or trial judge would want to explore, astonishingly the *voir dire* of Ms. C. H. was only one page of transcript (RT 590-591.) She was only briefly asked about the rape, but the defense was severely prejudiced due to the failure of the prosecution to divulge details of an alleged rape by one of the co-defendants, Ms. Fader. (RT 1618-1623.)[43] The lack of questioning regarding the rape leads to the conclusion that the defense must either have been unaware of the rape allegations or unaware they would be presented by the prosecution. This non-disclosure prevented the defense from inquiring with more specificity as

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[43] *See* Argument VIII(d).

to this juror's attitudes toward a defendant who allegedly committed a rape, and prevented a challenge for cause as to this juror based on her experience.

2) Juror **L. H.** wrote in her questionnaire that her "father was robbed and assault[ed] and died as a result." (CT 5710.) Given the circumstances of this case, that answer would have been virtually disqualifying for this juror. Ms. L. H. added, regarding her father, that "cause of death they said was natural cause[s] but we think it was due to the assault." (*Id.*) She added that the date of his death was April of 1994. (CT 5711.) Again, this would indicate a natural and quite understandable bias against a defendant accused of shooting an elderly man during a robbery, and her belief that the death was due to the assault rather than natural causes was additional cause for inquiry.

In *voir dire* questioning, Ms. L. H. explained that her father had been gambling at a card place where he was robbed and hit over the head and was missing for three weeks. (RT 816.) The questioning was done by the Court in the same sort of suggestive and leading manner that left no room for disagreement. After Ms. L. H. explained the details, the Court followed up: "All right. Thanks. We appreciate that. I guess we just want—I just wanted to make sure that in your mind that that has nothing to do with this case, and you wouldn't?" (RT 816.) These leading questions were discussed in

Argument I *supra*. Despite the similarity to the crime with which the defendant was charged here, a robbery-murder, the defense had no questions of this juror and passed her for cause. (RT 817.) Without such questioning, the defense ran an unreasonable risk that this juror could not put aside strong feelings of bias against Appellant as a result of the tragic events that befell her father.

3) Juror **C. P.** , in addition to many disqualifying views on the death penalty, observed a residential break-in, although she herself was not a victim of that break-in. (CT 5799.) She observed "young males break into a neighbor's home." (CT 5800.) She was also a victim of a car burglary. (CT 5800.) In light of this juror's apparent hyper-sensitivity to crime issues and predisposition towards the death penalty, discussed *supra* and in Argument I, these answers were additional warnings for the defense.[44]

4) Juror **S. R.** 's brother's home was robbed. (CT 5890.)

C. Connections to and Relationship with Law Enforcement

1) Juror **C. P.**, in addition to many disqualifying answers in her questionnaire, also had relationships with law enforcement as she knew Jim Horn and Jim Calvillo of the Stanislaus County Sheriff's Department. (CT

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[44] This juror was a member of Neighborhood Watch and, even in a one-sentence description of herself, wrote in evident understatement, "not much tolerance for crime." (CT 5807, 5809.)

5799.)

2) Juror **L. K.** had a great uncle who was a retired police officer. (CT 5859.) Her cousin was arrested for car theft and sentenced to prison. (CT 5861.) She visited him in prison. (CT 5862.)

3) Juror **S. R.** wrote that she had extensive contacts with district attorneys, police men and lawyers. (CT 5889.) She knew several employees of the district attorney's office as acquaintances, her brother-in-law was prosecutor Don Stahl, and another brother-in-law was a policeman in Oakdale. (CT 5889.) These many close relationships, particularly the last two, virtually guaranteed that Appellant could not receive a fair trial or that this juror would be unbiased.

4) Juror **J. A.** knew "Cliff" a deputy sheriff who worked in the court building. (CT 5919.)

5) Juror **C. E.** knew law enforcement officer Dave Heald, a homicide detective sergeant. (CT 5979.) Her uncle was also a policeman. (CT 5981.)

D. Opinions Regarding Mental Health Testimony

1) Juror **C. H.** stated that she had "read a lot of books" on psychiatry or psychology, was "so-so" familiar with psychological terms, and, as to her opinion regarding the validity of psychiatric opinions, stated

somewhat ambiguously that "some are valid and some are not." (CT 5653.) Ms. C. H. admitted that she herself had consulted a psychiatrist, psychologist or counselor. (*Id.*) As to whether or not expert witness in the field of psychology should play a part in the criminal justice system, her answer was again somewhat ambiguous: "[it] depends on the case." (CT 5654.)

Despite these answers that a reasonably prudent Court and counsel would want to explore, her *voir dire* was almost non-existent (RT 590-591) and Ms. C. H. was never questioned regarding these opinions.

2) In addition to her many disqualifying answers regarding her attitude toward the death penalty, prisoners and the right to appeal, juror **C. P.** wrote in her questionnaire that she had "mixed feelings" regarding the validity of psychiatric opinions, writing that "some things don't need to be analyzed—[I] feel some psychiatric reasoning is hogwash." (CT 5803.) As to the role of expert witnesses in the criminal justice system, she wrote "some people do have mental (valid) problems, some are excuses people use." (CT 5804.)

E. Personal Experience with Alcohol or Drug Abuse.

1) Juror **C. H.** stated that her father was both a drug addict and an alcoholic. (CT 5654.) Ms. C. H. stated she was familiar with

alcohol and drugs and their effect on human behavior, writing in her questionnaire that "when you grow up with it every day you see the sad effects." (CT 5654.) She thought people become alcoholics or drug addicts because they are "unable to deal with life situations, decisions." (*Id.*) In light of Appellant's life-long drug addition and heavy methamphetamine use at the time of the crime, these answers demanded both a detailed inquiry and some indication as to whether Ms. C. H. would see these factors as mitigating evidence. This was an opportunity and duty for defense counsel to explain how such addiction, because it lessened volitional capacity and free will, and caused addicts to act based on their overwhelming need for the drugs, was generally accepted as a mitigating factor. Yet she was never asked about this subject on her extremely brief *voir dire.* (RT 590-591.)

2) Juror **P. E.** wrote in her questionnaire that "when [she] was young [her] father used to drink very much and my parents divorced when I was in the 6th grade." (CT 5684.) Ms. P. E. answered the question "why do you think people become alcoholics and/or drug addicts as follows: "very ignorant and they feel they have no reason to live...very depressed people." (CT 5684.)

3) Juror **L. H.** wrote in her questionnaire that she was familiar with the effect alcohol or drugs have on people's behavior because of "the

changes her daughter went through while on drugs." (CT 5714.) This was especially relevant due to Appellant's life-long addiction problems and the circumstances of the crime. Yet the defense asked no questions of this prospective juror who ultimately sat on Appellant's jury.

4) Juror **P. W.** wrote in her questionnaire that she was familiar "to a point" with alcohol and drugs and their effect on human behavior. (CT 5744.) She wrote that people become drug addicts or alcoholics because of a "weakness in personality." (*Id.*) Given Appellant's history, these answers should have been explored by the Court and the defense. Yet neither the defense nor the Court inquired into her views in this area and she was passed for cause by the defense. (RT 792.)

5) Juror **L. G.-H.** had extensive contacts with people who had drug or alcohol problems, including an uncle by marriage who was a recovering alcoholic, a brother-in-law who was a "speed freak," and a cousin's ex-husband, who was also a recovering alcoholic. (CT 5774.) As a result, she was familiar with the effects of drugs and alcohol on human behavior and listed several reasons why people become drug addicts or alcoholics. (*Id.*)

6) Juror **C. P.,** who had many disqualifying views on the death penalty, prisoners and their right to appeals, also had strong opinions

regarding drug and alcohol abuse. She stated she knew a neighbor who "drank throughout day—every day—hides containers, etc." (CT 5804, 5807.) In response to a question of how she felt about such people, she stated "I don't tolerate alcoholics/drug addicts." (CT 5804.) Additionally, in response to a question about whether evidence of illegal drug use would make it difficult for her to be fair in deciding the case, she checked the "yes" line, explaining "[I] have no use for illegal drugs—tie it in w/crime sometimes—a person has right (sic) to choose to take or not take drugs." (CT 5807.) In a similar vein, this juror admitted that "evidence of someone having an alcohol problem" would "make it difficult for [her] to be fair in deciding the case," but, reassuringly, "not in every case." (CT 5807-5808.) Aside from being contrary to what is generally accepted medical knowledge concerning the physiological and psychological dynamics of addiction, in view of Appellant's long history of drug and substance abuse, this opinion should have been an additional warning sign for the Court and the defense regarding this potential juror.

7) Juror **B. S.** wrote on his questionnaire that he was familiar with the effects of alcohol on others, writing that "I have seen members of my family destroyed as a result of alcohol." (CT 5834.) Additionally, someone close to him had a problem with drugs. (CT 5837.) He was not asked any questions about this on *voir dire.*

8) Juror **L. K.** was familiar with the effects of drugs and alcohol on people and believed "its [a] weekness (sic)" (CT 5864.)

9) Juror **S. R.** was familiar with alcohol and drugs and was aware of their effect on people. (CT 5894.) She thought people became alcoholics or drug users because of "their inability to cope with the challenges life presents them." (CT 5894.) She was a member of Neighborhood Watch. (CT 5897.)

10) Juror **J. A.** was familiar with alcohol and drugs and their effect on people and had opinions about the cause of such addictions. (CT 5924.) Her brother was an alcoholic. (CT 5924.)

11) Juror **M. C.** had observed people drunk but did not have an opinion as to the causes. (CT 5954.)

12) Juror **C. E.** was also familiar with the effect of alcohol and drugs on people, stating that "us people usually do stupid or crazy things when the (sic) get drugs or alcohol in their systems." (CT 5984.)

F. Miscellaneous Factors.

1) Juror **P. W.** left many of the questions on her questionnaire unanswered, with only a line drawn across the space provided for an answer. (CT 5737-575.) She also wrote that she was made uncomfortable about the questionnaire because "some questions are no one's business but mine." (CT

5750.) This would have been an indication that at least a basic inquiry about the unanswered questions should have occurred. Yet her *voir dire* was only four pages long. (RT 789-793.)

2) Juror **C. P.**, whose many disqualifying views on the death penalty, prisoners, and the right to appeal are discussed *supra*, additionally had unsurprisingly strong feelings about the O. J. Simpson trial, writing that it was an "Outrage!! A farce! Money played a big factor!" (CT 5810.)

3) Juror **L. K.** 's father had his truck stolen. (CT 5860.)

G. Conclusion.

The results of the Court's rehabilitative efforts are shown dramatically in the actual composition of Appellant's jury.[45] Of the twelve, nine supported or strongly supported the death penalty and four would consider it, and none had negative or even slightly negative opinions about it.[46] Four were crime victims or had families who were crime victims; two jurors had opinions regarding mental health testimony (both were doubtful or negative); five jurors had connections with or were related to law enforcement and one of these was related to a Stanislaus County prosecutor; and a remarkable twelve out of

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[45] Argument I discusses the prejudicial effects of all of the Court's "rehabilitations," including those prospective jurors who did not sit on Appellant's jury.

[46] One juror, L. H., checked both the "support" and the "will consider" box on the questionnaire. (RT 5698.)

twelve had experience with alcohol or drug abuse or knew their effects, especially important given the facts of the case. As constituted, Appellant's jury was unconstitutionally biased against him, and he was thereby deprived of a fair trial.

By its efforts in constituting the jury in this unbalanced manner, the Court violated petitioner's Sixth, Eighth and Fourteenth Amendment rights to due process, to a fundamentally fair jury trial and to a reliable verdict. (*Wardius* v. *Oregon* (1973) 412 U.S. 470, 93 S.Ct. 2208; *Beck* v. *Alabama* (1980) 447 U.S. 625, 100 S. Ct. 2382). As the Supreme Court has held, "Any claim that the jury was not impartial, therefore, must focus not on [just the juror peremptorily challenged],[47] but on the jurors who ultimately sat." (*Ross v. Oklahoma* (1988) 487 U.S. 81, 86).

During *voir dire* and through review of the juror questionnaires, the trial Court was placed on notice that several of the prospective jurors held views that rendered them partial to the prosecution. Under these circumstances, the trial Court had a duty to conduct an inquiry as would determine whether these potential jurors could fairly and impartially assess the evidence and apply the relevant law. "Without an adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the

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[47] As was done in Argument II.

court's instructions and evaluate the evidence cannot be fulfilled." (*Morgan v. Illinois* (1992), 504 U.S. 719, 729-730).

Here, the trial Court failed to conduct an adequate inquiry into the biases of prospective jurors and permitted biased jurors to sit on Appellant's jury in violation of his Sixth and Fourteenth Amendment rights to a fair trial, to an unbiased jury, and to due process of law. *See* Arguments I and II, which are incorporated herein by reference.

As discussed in those Arguments, under *Wainwright v. Witt,* (1985) 469 U.S. 412, 424, criminal defendants have a Sixth Amendment right to remove from the panel jurors who, because of their views regarding the death penalty, would be substantially impaired in the performance of their duties. This standard applies to jurors whose views in favor of the death penalty would impair their ability to judge the case impartially, as well as to those jurors whose opposition to the death penalty has such effect. (*Morgan v. Illinois* (1992), 504 U.S. 719.)

Given that Appellant's jury included actually and presumably biased jurors, reversal is required without a particularized showing of prejudice. *Arizona v. Fulminante* (1991), 499 U.S. 279, 309.

IV.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXCUSING PROSPECTIVE JURORS MATTHEW FIGURES AND BEATRICE HAMPTON PRIMARILY BASED ON THEIR WRITTEN ANSWERS TO THE QUESTIONNAIRE, WITHOUT ANY EFFORTS TO REHABILITATE THEM.

A. Introduction

Based primarily on their written answers to the juror questionnaire, the trial Court excused prospective jurors Matthew Figures (RT 524-525) and Beatrice Hampton (RT 668-670) without making any rehabilitative efforts similar to those made for pro-death-penalty prospective jurors. The answers these prospective jurors gave to the questionnaire established that they were opposed to the death penalty, but in all cases, the questioning was short and quick, did not involve the "do you understand" leading and suggestive questions the Court used with pro-death-penalty jurors, and was designed to eliminate these prospective jurors as quickly as possible. In excluding them as potential jurors, in conjunction with the treatment of the pro-death-penalty prospective jurors, the trial Court deprived Appellant of his right to be tried by a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16 of the California Constitution, as well as his rights to due process and a reliable penalty determination under the Fifth, Eighth and Fourteenth Amendments. Reversal

of Appellant's death judgment is required. (*Gray v. Mississippi* (1987) 481 U.S. 648, 658, 668.)

Figures' and Hampton's excusals clearly shows the contrast in the Court's disparate treatment of pro-and anti-death-penalty jurors. The pro-death-penalty jurors who gave many disqualifying answers were patiently rehabilitated, but those holding questionable anti-death-penalty views were peremptorily dismissed with just one or two questions.

B. The Relevant Facts.

1) Matthew Figures (RT 524-525.) stated in his questionnaire that he opposed the death penalty (CT 2250) "but I don't know how I would feel if the crime involved one of my family." (CT 2252.) Although he stated he would automatically vote against the death penalty (CT 2253, 2256) many such answers in favor of the death penalty were made by prospective jurors who were later "rehabilitated" by the Court.[48] He also wrote that he "can't see spending tax dollars on appells (sic) for death penalty verdicts." (CT 2254.) He also wrote that the costs of prison and appeals would be considerations for him. (CT 2255.) Mr. Figures wrote that he would not hesitate to vote for first degree murder to avoid deciding the penalty. (CT 2255.)

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[48] *See, e.g.,* discussions of prospective jurors Cleo Parella, and Ray Lindsay and actual jurors C. P. , J. A. , M. C., and C. E. , *supra,* Arguments I, II, and III.

Despite these somewhat conflicting answers, the Court made no rehabilitative efforts on Mr. Figures. Instead of leading questions that encouraged rehabilitation through changed questionnaire answers, the questions were still leading but favored disqualification by reaffirming the questionnaire answers:

> Q. In other words, if the evidence, and I'm not saying that it would, showed that this crime was exceedingly vicious and callous and horrible, and if the evidence, and I'm not saying that it does, were to show that the defendant was a particularly vicious, brutal and horrible person, under no circumstances do you believe that you could impose the death penalty; is that correct?
>
> A. I don't believe I could.
> (RT 525.)

This prospective juror was then excused. RT 525.

2) Beatrice Hampton also wrote in her questionnaire that she opposed the death penalty, not that she would always oppose it regardless of the evidence. (RT 3060.) She agreed to listen to the evidence with an open mind (CT 3061) and on the question of whether the death penalty was used too frequently or too often, wrote "I don't hear it being used often." (CT 3062.) She believed the death penalty was inappropriate "under no circumstances." (RT 3062.) Additionally, she indicated that she would not automatically vote against the death penalty if the defendant was convicted of first degree murder. (CT 3063.) She also stated that she could put aside her own feelings about the

death penalty and follow the law as instructed by the Court. (CT 3064.) Ms. Hampton did answer that she would hesitate to vote for first degree murder to avoid the task of deciding the penalty (CT 3065) and would vote against death automatically (CT 3066) but her earlier answer and her willingness to follow the Court's instructions contradicted this answer.

These answers were much less disqualifying than those of many pro-death-penalty prospective jurors who were "rehabilitated" by the Court through leading and suggestive questions. However, no similar efforts were made with Ms. Hampton. (RT 668-670.) The Court asked just a very few questions that again *leaned toward and suggested disqualifying answers*:

> Q. I'm not clear here on some of your answers exactly what you feel here.
> Is your feeling about the death penalty such that under no circumstances could you vote to approve it?
>
> A. Under no circumstances.
>
> Q. None whatsoever?
>
> A. None whatsoever.
>
> Q. Okay. So if—even if this were the most horrible crime in history?
>
> A. Even if.
> (RT 668-669.)

This prospective juror was not asked whether she could follow the Court's instructions, whether she could set aside these views if instructed to

do so, and whether she could follow the law, as was done with many pro-death-penalty prospective jurors.

C. The Evidence Failed to Establish A Proper Basis Upon Which To Excuse These Prospective Jurors For Cause.

Both the United States Supreme Court and this Court have repeatedly held that a juror may be excused for cause because of his or her death penalty views "only if those views would '"prevent or substantially impair"'the performance of the juror's duties as defined by the court's instructions and the juror's oath." (*Wainwright v. Witt*, *supra*, 469 U.S. at 424.) A jury assembled "by excluding veniremen for cause simply because they expressed general objections to the death penalty or voiced conscientious or religious scruples against its infliction" violates the Sixth Amendment guarantee of an impartial jury and the Fourteenth Amendment's guarantee of due process. (*Witherspoon v. Illinois*, *supra*, 391 U.S. 510, 522-523.) The same standard is dictated by the California Constitution. (*See, e.g.*, *People v. Guzman* (1988) 45 Cal.3d 915, 955; *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

Under the foregoing authorities, the defendant in a capital case has a Sixth Amendment right to object to exclusion of persons with reservations about the death penalty. (*See Witherspoon v. Illinois*, *supra*, 391 U.S. at 518-23.) "[M]ere emotional opposition to capital punishment alone is insufficient cause for juror exclusion." (*Mann v. Scott* (5th Cir. 1994) 41 F.3d 968, 981,

citing *Adams v. Texas*, *supra*, 448 U.S. 38, 50.) The simple fact that a prospective juror says that he or she does not believe in capital punishment does not justify excusal of that juror for cause. (*Szuchon v. Lehman* (3rd Cir. 2001) 273 F.3d 299, 328.) "The crucial inquiry is whether the venireman could follow the court's instructions and obey his oath, notwithstanding his views on capital punishment." (*Dutton v. Brown* (10th Cir. 1986) 788 F.2d 669, 675.)

In *People v. Richard Stewart* (2004) 33 Cal.4th 425, 15 Cal.Rptr.3d 656, 670-682, this Court recently held that the trial court had committed reversible error by excusing five prospective jurors for cause based solely upon their written answers on a jury questionnaire. In answering the questionnaire, the five jurors had expressed general objections to the death penalty. However, this Court held that their answers to the questionnaire did not establish that they would be unable to set aside their own beliefs and apply the instructions given to them by the court. This Court reiterated the United States Supreme Court's holding that personal objection to the death penalty is not a sufficient basis for excluding a person from jury service in a capital case:

> "'Not all those who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they clearly state that they are willing to temporarily set aside their own beliefs in deference to the rule of law.'" (*People v. Stewart*, *supra*, 15 Cal.Rptr.3d at 675, quoting *Lockhart v. McCree* (1986) 476 U.S. 162,

176.)

Relying also on its own opinion in *People v. Kaurish* (1990) 52 Cal.3d 648, 699, this Court held that particularly in California, those who are opposed to the death penalty are legally qualified to serve as jurors:

> "Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt, supra,* 469 U.S. 412, . . . A juror might find it very difficult to vote to impose *the death penalty,* and yet such a juror's performance still would not be substantially impaired under *Witt,* unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law." (*People* v. *Stewart*, *supra*, 15 Cal.Rptr.3d at 675. [emphasis in original].)

In the *Stewart* case, all five jurors gave answers in the questionnaire which indicated that they were personally opposed to the death penalty. In discussing one of these jurors, this Court stated,

> "Absent clarifying follow-up examination by the court or counsel, however – during which the court would be able to further explain the role of jurors in the judicial system, examine the prospective juror's demeanor, and make an assessment of that person's ability to weigh a death penalty decision – the bare written response was not by itself, or considered in conjunction with the checked answer, sufficient to establish a basis for exclusion for cause. (*Id.* at 676.)

This Court held that the same was true of the other four jurors there at issue.

Similarly, in the present case Mr. Figures and Ms. Hampton's responses do not indicate that their views on capital punishment would have "substantially impair[ed] . . . the performance of [their] duties as a juror in accordance with [the court's] instructions and [her] oath." (*Witt*, 469 U.S. at 424.) Their answers indicated that they opposed the death penalty, but they did not establish that those views would cause them to disobey the Court's instructions. In fact, Ms. Hampton indicated she could set aside her own opinions and follow the Court's instructions. (CT 3064.) Standing alone, Mr. Figures' and Ms. Hampton's answers to the questionnaires did not establish that they would be unwilling to follow the controlling California law if instructed to do so.

In this case, the prosecution bore the burden of demonstrating to the trial Court that the juror's views would "prevent or substantially impair" the performance of her duties. (*Witt*, *supra*, 469 U.S. at 423; *People v. Stewart*, *supra*, 15 Cal.Rptr.3d at 674.) "The burden of proving bias rests on the party seeking to excuse the venire member for cause." (*United States v. Chanthadara* (10th Cir. 2000) 230 F.3d 1237, 1270, citing *Witt, supra*, 469 U.S. at 423.) "[W]hen the state wishes to exclude a prospective juror for cause because of his or her views on the death penalty, it must question that juror to make a record of the bias." (*Szuchon v. Lehman*, *supra*, 273 F.3d at

328, citing *Gray v. Mississippi*, *supra*, 481 U.S. at 652 n. 3. Yet the prosecution was never put to this burden because of the Court's lopsided questioning.

As noted by this Court in *People v. Heard* (2003) 31 Cal.4th 946, another recent case concerning the improper excusal for cause of a prospective juror for his death penalty views, the trial Court could easily have followed up with additional questions designed to probe beneath the surface questionnaire responses. (See *People v. Stewart*, *supra*, 15 Cal.Rptr. at 681; *People v. Heard*, *supra*, 31 Cal.4th at 965.)

Perhaps further inquiry by the Court or counsel would have established that Mr. Figures and Ms. Hampton were not fit to serve as jurors in a death penalty case. Conversely, any doubts regarding their suitability may have been allayed. Had they been questioned further, they could have been provided an explanation of the governing legal principles and their ability to follow them could have been further explored. (Cf. *People v. Heard*, *supra*, 31 Cal.4th at 964.) As the United States Supreme Court stated over a century ago,

> ". . . we have so often observed . . . that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. (*Reynolds v. United States* (1879) 98 U.S. 145, 156-57; cited with approval in *Wainwright v. Witt*, *supra*, 469 U.S. 412, 428 & fn. 9.)

With such deficient and disqualification-prone *voir dire*, the answers which Mr. Figures and Ms. Hampton gave on their questionnaires were insufficient as a matter of law to establish that they were unqualified to serve as jurors because of their views on the death penalty. The trial Court excused them "without first clarifying that [they] opposed the death penalty to a degree which would have made it impossible for [them] to follow the law." (*Mayes v. Gibson* (10th Cir. 2000) 210 F.3d 1284, 1292.) At most, their responses "appear[ed] ambiguous" and therefore "[did] not justify dismissal for cause." (*United States v. Chanthadara, supra*, 230 F.3d at 1271.)

Mr. Figures and Ms. Hampton were prospective jurors who "merely express[ed] personal opposition to the death penalty," and therefore were not properly subject to excusal. (*People v. Kaurish, supra*, 52 Cal.3d at 699.) As this Court has held, "A prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law." (*Ibid.*)

Ms. Hampton indicated that she was able to follow the Court's instructions and obey her oath as a juror, notwithstanding her views on the death penalty. (*See United States v. Chanthadara, supra,* 230 F.3d at 1270, 1272; *Dutton v. Brown* (10th Cir. 1986) 788 F.2d 669, 675.) She did not oppose the death penalty to the degree which would have made it impossible for her to follow the law. (*See Chanthadara, supra,* 230 F.3d at 1272; *Mayes*

v. Gibson (10th Cir. 2000) 210 F.3d 1284, 1292.) The exclusion of both Mr. Figures and Ms. Hampton, coupled with the disparate treatment given pro-death jurors, guaranteed that Appellant would be tried by a jury "uncommonly willing to condemn a man to die." (*Witherspoon, supra,* 391 U.S. at 521.)

D. No Deference Is Due to the Trial Court's Ruling

Where prospective jurors are excused for cause after *voir dire*, this Court accords "considerable deference" to the trial court's determination that a prospective juror's views on the death penalty would "'prevent or substantially impair the performance of his duties as a juror.'" (*People v. Cox* (1991) 53 Cal.3d 618, 646; *People v. Heard, supra*, 31 Cal.4th at 958; *People v. Cunningham* (2001) 25 Cal.4th 926, 975.) Deference is given because the trial court has had the advantage of seeing and hearing the juror's demeanor on voir dire and is therefore able to "assess the juror's state of mind." (*People v. Cox, supra*, 53 Cal.3d at 646, quoting *People v. Coleman, supra*, 46 Cal.3d at 767, fn. 10.) "[A] finding as to state of mind depends in turn on a finding as to 'demeanor and credibility,' which 'are peculiarly within a trial judge's province.'" *People v. Cox, supra*, 53 Cal.3d at 679, quoting *Wainwright v. Witt, supra*, 469 U.S. at 428, fn. omitted; *see also, e.g., People v. McPeters* (1992) 2 Cal.4th 1148, 1175.) A trial court which views the juror while he or she is being questioned may be able to discern far more from the juror's tone

and demeanor than is apparent from the juror's written words alone:

> "The high court observed in *Witt* that frequently voir dire examination does not result in an 'unmistakably clear' response from a prospective juror, but nonetheless 'there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.'" (*People v. Ghent* (1987) 43 Cal.3d 739, 768, quoting *Wainwright v. Witt*, *supra*, 469 U.S. at 425-426.)

Where, on the other hand, the trial court has ruled on a challenge for cause based mainly on the basis of the juror's written answers to written questions, without any in-depth questioning, no such deference is warranted: the trial court has made its determination on the basis of virtually the exact same "cold record" that is before the reviewing court and therefore, independent review is appropriate. (*People v. Stewart*, *supra*, 15 Cal.Rptr.3d at 679.)

> "[T]he discretion generally accorded the [trial] court is based on its ability to assess the credibility of prospective jurors upon observing their demeanor in responding to questions. Accordingly, because the trial court here was not in a position to observe [the prospective juror's] demeanor, it was in no better position than an appellate court to assess her answers pursuant to the law governing the removal of prospective jurors based on their death penalty views. Thus, the court's decision to remove the juror for cause based on her death penalty views is entitled to no particular deference. Consequently, we review de novo the court's determination that [the prospective juror's] questionnaire responses alone warranted excusing her for cause under the *Witherspoon-Witt* standard." (*United States v. Chanthadara*, *supra*, 230 F.3d at 1270.)

In Appellant's case, the trial court excluded Mr. Figures and Ms.

Hampton almost entirely on the basis of their answers to the questionnaire, as the *voir dire* was so succinct as to be virtually meaningless. This Court is in as good a position as the trial Court to assess the significance of their written answers at *voir dire*. Accordingly, this Court should review the propriety of the excusals for cause independently and no deference to the trial Court's decision is warranted.

E. Reversal of the Death Judgment Is Required

The erroneous exclusion of just one prospective juror because of his or her opposition to the death penalty is reversible error *per se* and is not subject to harmless error analysis. (*Gray v. Mississippi*, *supra*, 481 U.S. at 666-668; *Davis v. Georgia* (1976) 429 U.S. 122, 123; *People v. Stewart*, *supra*, 15 Cal.Rptr.3d at 681; *People v. Heard*, *supra*, 31 Cal.4th at 146.) It is "of no moment" that the prosecution had unused peremptory challenges and could have struck the prospective juror. (*Szuchon*, *supra*, 273 F.3d at 331.) As shown above, the trial court's decision to excuse prospective jurors Figures and Hampton is not fairly supported by the record and should not be accorded any deference by this Court, because the trial court based its decision on their questionnaire opposition to the death penalty, without the sort of "rehabilitative" questioning accorded to pro-death-penalty jurors. The trial Court's erroneous discharge of these prospective jurors violated Appellant's

rights to a fair and impartial jury, to due process, and to a reliable penalty determination under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. (*Gray v. Mississippi, supra,* at 658-659, 663, 668.) Appellant's death judgment must therefore be reversed. (*Id.* at 660, 668.)

V.

THE TRIAL COURT ERRED IN DENYING A DEFENSE MOTION FOR A DIRECTED VERDICT BASED ON THE FACT THAT THERE WAS INSUFFICIENT NON-ACCOMPLICE CORROBORATING EVIDENCE.

A. Relevant Facts.

The three main witnesses against appellant were Melissa Fader, Michelle Joe and John Ritchie and their testimony connected Appellant to the crime. However, as all of them were accomplices, there was insufficient non-accomplice corroborating evidence to sustain the conviction.

Accordingly, at the conclusion of the State's case at guilt/innocence, defense counsel made a motion for a directed verdict of not guilty under California Penal Code Sec. 1118, based on the lack of corroboration by non-accomplices. (RT 2097.) In support of the motion, the defense argued that

> we have labored all along under the assumption that the corroborating evidence was the testimony of John Ritchie testifying that the defendant had told him that he'd fired the shot.
> That was sufficient and adequate corroborating evidence up until the point in time when Michelle Joe testified that John Ritchie got her a

pair of gloves.
During Mr. Ritchie's testimony, he told us that he knew that they were planning on doing a robbery, and he told Mr. Whalen not to go. That didn't bother me too much.
But once he aided and abetted by providing one of the participants with an instrumentality to do the crime, he became an aider and abettor, and, therefore, a principal, therefore, a person who could be charged with the identical offense.
And the rules of evidence require that corroboration cannot be done by one co-conspirator to corroborate the testimony of another co-conspirator.
Without Ritchie's testimony, the only thing you have putting my client, Mr. Whalen, anywhere around this time is Rick Saso testifying that he was present when he gave up the dope for the guns.[49]
(RT 2097.)

Aside from Ritchie and Saso,[50] the case against Appellant rested on the main prosecution witnesses, Michelle Joe and Melissa Fader. It was uncontested that they were accomplices, as they conceived and planned it,

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[49] Michelle Joe testified that John Ritchie overheard her talking to appellant outside the apartment, and she was overheard to say that she was looking for someone to help her commit a burglary. (RT 1341.) But Joe also testified that John Ritchie gave her the gloves. (RT 2005.) Joe testified she returned to John Ritchie's house, called Ritchie over, and asked him to get Whalen and got a pair of gloves. (RT 2004.) The action of Mr. Ritchie in supplying the gloves, after being told that a burglary was being planned, meant that he must have known what the gloves were to be used for, and that he was therefore an accomplice. Additionally, Ritchie's actions *after* the crime, in which he helped with the fencing of the proceeds from the robbery, provided the buyer (Rick Saso) and helped with the loading of the property into Saso's car all support this unescapable conclusion. (RT 1345-1350.)

[50] Saso could not directly connect appellant to the crime, but was involved with the fencing of the stolen property.

accompanied Appellant to the crime scene, and aided and abetted its commission.

In response to the defense motion, the prosecution argued there was nothing connecting Ritchie to the crime. (RT 2098.) The Court accepted this argument and denied the motion on the basis that there was not enough evidence linking Ritchie to the crime as a conspirator. (RT 2100.)

The prosecutor, Mr. Palmisano, in his final argument admitted that it was not clear whether or not Mr. Ritchie was an aider and abetter: "John Ritchie either may or may not be an aider and abettor to this crime....If he's an aider and abettor, his testimony needs to be corroborated..." and that corroboration was accomplished through Saso's testimony, the prosecutor argued. (RT 2236.) The defense argued there was no corroboration and Ritchie was an accomplice. (RT 2266-2270.) The defense also argued that the statement Appellant made to Detective New about hiding in plain sight could have been a reference to his status as a parole violator. (RT 2270.)

Clearly, the defense met their burden to show that Ritchie was an aider and abettor, and hence there was insufficient non-accomplice corroboration.

B. Argument.

This Court recently held, citing Penal Code section 1111, that accomplice testimony is inadmissible absent corroboration. (*People v. Gurule*

(2002) 28 Cal.4th 557, 628; *see also People v. McDermott* (2002) 28 Cal.4th 946, 1000 [when prosecutor presents accomplice witness testimony at penalty phase regarding a defendant's alleged prior violent conduct there must be corroboration of that testimony].) The corroborating evidence "may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense," but it must be present. (*People v. Brown* (2003) 31 Cal.4th 518, 556, citations omitted.[51]) Corroborating evidence will be sufficient "if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*Ibid.*)

Although the corroboration need only be "slight," it nonetheless must exist. Here, it didn't. To be considered as evidence, it must be admissible under the relevant rules. Here, the evidence the prosecutor introduced was that of a "totally uncorroborated" accomplice witness. As such, it was inadmissible. (*People v. Gurule, supra*, 28 Cal.4th 557 at 628; *People v. McDermott, supra*, 28 Cal.4th at 1000.)

Because Appellant has a state-created right to a penalty phase free from non-statutory aggravation, the plain violation of this right trampled his federal due process rights. (U.S. Const., 14th Amend.; *see Hicks v. Oklahoma* (1980)

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[51] Although this opinion was modified (2003 WL 22448524, Oct. 29, 2003(unpublished)) the modification does not affect the judgment.

447 U.S. 343, 346.) Moreover, the admission of this evidence rendered appellant's trial fundamentally unfair in violation of due process and deprived him of his Eighth and Fourteenth Amendment rights to a reliable penalty determination.

VI.

THE TRIAL COURT'S ERROR IN FAILING TO INSTRUCT THE JURY THAT MELISSA FADER, MICHELLE JOE AND JOHN RITCHIE WERE ACCOMPLICES AS A MATTER OF LAW REQUIRES REVERSAL OF APPELLANT'S DEATH SENTENCE

A. Relevant Facts.

Appellant hereby incorporates by reference the facts from the previous Argument.

The Court instructed the jury that Appellant was accused of violation of Sec. 187 of the Penal Code, and count two, 212.5 of the Penal Code, a felony. (RT 2215.) The Court also instructed them that "[a] defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense." (RT 2226.) Further instructions stated that if murder and robbery were committed by anyone, Joe and Fader were accomplices, and their testimony was subject to the rule requiring corroboration. Thus, the Court came close to instructing the jury that Fader and Joe were accomplices as a matter of law. However, the Court erred

when it instructed the jury that it must determine whether Ritchie was an accomplice, adding that the defense had the burden of proving that he was by a preponderance of the evidence. (RT 2227.)

The jury was also told that a principal to a crime is one who aids and abets it, and an aider and abettor need not be personally present at the scene of the crime. (RT 2228.)

The defense argued that Ritchie was an accomplice because he knew there was going to be a robbery and he gave Joe the gloves, and since the weather was not cold at this time, the gloves would not be needed to keep their hands warm. Ritchie therefore knew what the gloves were for and that made him an aider and abettor. (RT 2264 *et. seq.*) As the defense argued, there was nothing else to connect Appellant to the crime. The statement to Det. New could have been about his status as a parole violator. Because there were two reasonable inferences about this testimony, the defense correctly argued that they must choose the one that points to innocence. (RT 2270.)

B. The Record Demonstrates That Melissa Fader, Michelle Joe and John Ritchie Were Accomplices As A Matter of Law.

Penal Code section 1111 defines an accomplice as a person "who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111; *People v. Brown* (2003) 31 Cal.4th 518, 555.) This definition

encompasses all principals to the crime (*People v. Tewksbury* (1976) 15 Cal.3d 953, 960), including aiders and abettors. (*People v. Gordon* (1973) 10 Cal.3d 460, 468.) To qualify as an aider and abettor, the subject must act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing the offense or of encouraging or facilitating the commission of the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

Even a cursory examination of the record in this case demonstrates that Ritchie acted with knowledge of the plan to burglarize the victim's residence and -- by giving Appellant the gloves -- did so with the intent or purpose of encouraging or facilitating the planned burglary. (*People v. Beeman, supra*, 35 Cal.3d at 560.)

When trial testimony establishes as a matter of law that a witness is an accomplice, the trial court has a *sua sponte* duty to so instruct the jury. (*People v. Zapien* (1993) 4 Cal.4th 929, 982; *People v. Robinson* (1964) 61 Cal.2d 373, 394.) Because the testimony of Fader, Joe, and Ritchie himself shows that Ritchie was an accomplice as a matter of law, the trial Court erred in failing to instruct the jury *sua sponte* with CALJIC No. 3.16.

Because Appellant was entitled under state law to have the jury which was determining his fate properly instructed, the trial court's failure to do so violated his right to due process under the Fourteenth Amendment of the

United States Constitution. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *see also Clemons v. Mississippi* (1990) 494 U.S. 738, 746 ["[c]apital sentencing proceedings must of course satisfy the dictates of the Due Process Clause"].) This error further violated Appellant's federal constitutional rights under the Fifth, Eighth, and Fourteenth Amendments to a fundamentally fair and reliable penalty trial based on a proper consideration of relevant sentencing factors and undistorted by improper, non-statutory aggravation. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 884-885 [death penalty cannot be predicated on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process"].) Generally, because the law regarding accomplice witness instructions is applicable to the penalty phase of a capital trial, it is *ipso facto* a necessary component of guaranteeing the reliability of the evidence which is presented to a jury making a life or death decision.

C. The Trial Court's Error In Failing To Find That Ritchie Was An Accomplice As A Matter Of Law And In Failing To So Instruct The Jury Was Prejudicial

Because the trial court's error occurred at the penalty phase of a capital trial, this Court must determine whether there is a "reasonable possibility" that

the error affected the verdict.[52] (*People v. Brown* (1988) 46 Cal.3d 432, 447.) But because the error violated appellant's rights under the federal constitution, the state must prove the error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The state cannot meet that burden here.

This Court recently observed that a trial court's error in failing to instruct the jury with CALJIC No. 3.16 that a witness was an accomplice as matter of law is harmless if there is adequate corroboration of the witness. (*People v. Brown, supra*, 31 Cal.4th at 556, 557.) The corroborating evidence "may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense." (*Id.* at 556, citations omitted.) Corroborating evidence will be sufficient "if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*Ibid.*)

Here, the analysis is straightforward, because Ritchie provided the gloves and had knowledge of their intended use. Accordingly, Appellant's conviction and death sentence must be vacated.

D. The Trial Court's Failure To Instruct The Jury That It Was Responsible For Determining Whether Or Not Ritchie Was An

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[52] This test is essentially the same test used to analyze errors of federal constitutional dimension, i.e., the state must prove the error harmless beyond a reasonable doubt. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965; *see Chapman v. California* (1967) 386 U.S. 18, 24.)

Accomplice Was Prejudicial.

In assessing error at the guilt phase of a capital trial, this Court must determine whether there is a "reasonable possibility" that the error affected the verdict.[53] (*People v. Brown* (1988) 46 Cal.3d 432, 447.) Because, however, the instructional errors in Appellant's case violated his rights under the federal constitution, the State must prove the error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The State cannot meet that burden here, for the reasons discussed *supra.*

VII.

THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT THE ACCOMPLICE TESTIMONY OF MS. JOE, MS. FADER AND MR. RITCHIE WAS TO BE VIEWED WITH DISTRUST.

A) Facts in Support:

The main evidence against Appellant was the accomplice testimony of two alleged co-conspirators, Michelle Joe and Melissa Fader, and that of Mr. Ritchie, another accomplice.

B) Accomplice Testimony Must Be Viewed With Distrust

Distrust of accomplice testimony is as an important component of a

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[53] This test is essentially the same test used to analyze errors of federal constitutional dimension, i.e., the state must prove the error harmless beyond a reasonable doubt. (*People v. Ashmus* (1991) 54 Cal.3d 932, 965; *see Chapman v. California* (1967) 386 U.S. 18, 24.)

defendant's right to a fair trial and to a reliable jury verdict. (*People v. Guiuan* (1998) 18 Cal.4th 558, 564-569.) Thus, Penal Code section 1111 proscribes basing a conviction upon the uncorroborated testimony of an accomplice. The section provides in relevant part:

> A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.
> (§ 1111.)

The due process roots for safeguards in the use of accomplice testimony are deep and well documented. (*People v. Guiuan, supra*, 18 Cal.4th at 565-567.) As Justice Kennard explained in her concurring opinion:

> A skeptical approach to accomplice testimony is a mark of the fair administration of justice. From Crown political prosecutions, and before, to recent prison camp inquisitions, a long history of human frailty and governmental overreaching for conviction justifies distrust in accomplice testimony.
> (*People v. Guiuan, supra*, 18 Cal.4th 558, 570, Kennard, J., dissenting, quoting *Phelps v. United States* (5th Cir. 1958) 252 F.2d 49, 52.)

There are good reasons for such skepticism. First, accomplices, because they are liable for prosecution for the same offense, have a powerful built-in motive to aid the prosecution in convicting a defendant, with the hopeful expectation that the prosecution will reward the accomplice's assistance with immunity or leniency. (*Id.* at p. 572.) "A person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role

in comparison with that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation." (*Williamson v. United States* (1994) 512 U.S. 594, 607-608, concurring opinion. of Ginsburg, J.) "There is solid historical justification for an accomplice's expectation that, even in the absence of an explicit agreement, the prosecution will reward testimony that results in a conviction by granting the testifying accomplice immunity from prosecution or at least leniency in charging or sentencing." (*People v. Guiuan, supra*, 18 Cal.4th at p. 572, Kennard, J., concurring). Accomplices are rarely persons of integrity whose veracity is above suspicion. An accomplice's participation in the charged offense is itself evidence of bad moral character. (*Id.* at p. 574.) As the Ninth Circuit put it in *Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir. 2001) 243F.3d 1109:

> [B]ecause of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "get"a target of sufficient interest to induce concessions from the government.
> (*Id.* at p. 1124.)

The danger of relying on testimony from people who are receiving a deal for that testimony was brought to light by a study of the Actual Innocence Project which illustrated the high incidence of reliance on informants in cases where the defendant was later exonerated as innocent by DNA tests. (*Id.* at p. 1124, fn. 6.)

A second reason for such skepticism is the accomplice's obvious interest in minimizing his own role in the charged offense. Quite apart from any hope that the prosecution will grant the accomplice immunity or leniency as a reward for testimony that results in the defendant's conviction, it is in the accomplice's interest to persuade the prosecution that the offense is less serious than the charge indicates or that the accomplice's own role in its commission is relatively insignificant. (*See* Alarcon, 25 Loyola L.A.L.Rev. 953, 960.) For this reason, accomplice testimony may falsely minimize the seriousness of the crime or the accomplice's culpability for it. Testimony portraying the offense as less serious than charged necessarily would favor the defense, but testimony minimizing the accomplice's role could favor either the prosecution (by shifting primary blame to the defendant) or the defense (by shifting primary blame to other individuals).

Finally, special caution is warranted because an accomplice's firsthand knowledge of the details of the criminal conduct allows for the construction of plausible falsehoods not easily disproved. This Court has previously described the problem in these words:

> [A]ccomplice testimony is frequently cloaked with a plausibility which may interfere with the jury's ability to evaluate its credibility. '"[A]n accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth."' (Heydon, *The Corroboration of Accomplices*

(Eng. ed. 1973) Crim.L.Rev. 264,266; *see also* Note, 54 Colum.L.Rev. 219, 234.)" (*People v. Tewksbury* [1976] 15 Cal.3d 953, 967 [127 Cal.Rptr. 135]; also Note, *Accomplices in Federal Court: A Case For Increased Evidentiary Standards* (1990) 100 Yale L.J. 785, 787 ["Since the accomplice alone knows about the pattern of criminal events, he can manipulate the details of those events without blatant discrepancies."]; Hughes, *[Agreements for Cooperation in Criminal Cases* (1992) 45 Vand. L.Rev. 1, 33 ["Courts should instruct juries to consider how easily suspects with inside knowledge can fabricate testimony and the strong incentive for suspects to do so when their liberty may depend on it."].)

(*People v. Guiuan, supra*, 18 Cal.4th at p. 575, Kennard, J., concurring)

In *People v. Tewksbury* (1976) 15 Cal.3d 953, 967, this Court affirmed the Legislature's mandated skepticism for accomplice testimony:

> Juries are now compelled rather than cautioned to view an accomplice's testimony with distrust, for while his testimony is always admissible and in some respects competent to establish certain facts (see *People v. McRae* [(1947)] 31 Cal.2d 184, 157 [187P.2 SUPP CT 741] [probable cause to hold defendant to answer at preliminary hearing]), such testimony has been legislatively determined never to be sufficiently trustworthy to establish guilt beyond a reasonable doubt unless corroborated.
>
> Thus, whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies, the jury must be instructed, sua sponte, that the accomplice's testimony should be viewed with caution. (*People v. Guiuan, supra*, 18 Cal.4th at p. 569.) Where a witness is an accomplice as a matter of law, the trial court must in addition instruct the jury that the accomplice's testimony must be corroborated.
>
> (*People v. Robinson* (1964) 61 Cal.2d 373; *People v. Dailey* (1960) 179 Cal.App.2d 482, 485-486.)

VIII.

THE PROSECUTOR ENGAGED IN NUMEROUS ACTS OF MISCONDUCT WHICH BOTH INDIVIDUALLY AND COLLECTIVELY DEPRIVED APPELLANT OF A FAIR TRIAL.

Appellant's conviction and death sentence are invalid under state and federal constitutional guarantees of due process, equal protection, trial before an impartial jury and a reliable sentence due to the substantial and injurious effect of a consistent pattern of prosecutorial misconduct and overreaching which distorted the fact finding process and rendered both the trial and sentencing hearing fundamentally unfair. U.S. Const. Amends. V, VI, VIII, & XIV.

VIII(a): Prosecutorial misconduct for mentioning Appellant's priors to prospective juror Thomas Pereira and thereby causing him to be excused.

The prosecutor Mr. Palmisano, on the third day of the *voir dire*, caused prospective juror Thomas Pereira to be excused because the subject of Appellant's prior convictions was mentioned to him.

After questioning this prospective juror, Mr. Pereira was passed for cause by the defense. (RT 466). The prosecution then challenged Mr. Pereira for cause, and this was denied. (RT 466). The following exchange then took place:

MR. PALMISANO: May I address the point your honor?

THE COURT: Briefly.

MR. PALMISANO: Thank you. The Court has indicate (sic) to Mr. Periera twice that he can get the assistance of other jurors to tell them what the evidence is. And I don't think that he gets the services of a reader in jury deliberations to decide on the validity of the prior convictions. That troubles me greatly.

THE COURT: Well—

MR. SPOKES: Now I'm going to have to challenge for cause because the subject matter of prior convictions has come up in voir dire.

THE COURT: Okay.

MR. PALMISANO: I apologize. I didn't realize I had said it that way.

THE COURT: All right sir. You're excused. Please go back and see the jury commissioner before you leave.
(RT 466-67.)

The prosecutor's error, even if inadvertent, was serious as it precluded Mr. Pereira from being a juror in the matter. His knowledge of Appellant's prior convictions was obviously unacceptable to the defense as he could have infected the entire panel with this knowledge had he been allowed to remain on the jury. The misconduct was particularly serious as it caused the defense to lose a juror they had previously passed for cause; allowed the prosecution to remove a juror they had previously attempted to challenge for cause, and caused the defense to lose a challenge through no fault of their own. (RT 465 *et. seq.*) Coupled with the serious problem discussed in the first three arguments which resulted in a lopsidedly pro-death jury, this error exacerbated the pro-death-penalty bias of Appellant's jury. Even if this

misconduct was inadvertent, it seriously compromised the fairness of the jury selection, and for sound reasons of policy, such conduct must be sanctioned.

VIII(b): Prosecutorial misconduct in eliciting testimony regarding Appellant's prior record of incarcerations.

During the examination of State's witness John Ritchie, the prosecutor asked him the following:

> Q. And Mr. Ritchie, are you acquainted with the defendant, Daniel Whalen, sitting at the far end of counsel table?
>
> A. I have known him a very short time.
>
> Q. When did you first meet him?
>
> A. At a place called Butler's camp years ago.
>
> Q. About—About how many years ago? Roughly?
>
> A. Five.
>
> Q. Could have been a little earlier than that, in 87' or 88'?
>
> A. I'm not sure. It was during my—I was living there.
>
> Q. Now was there some gap of time between the last time you saw him four or more years ago and when you saw him in 1994?
>
> A. Yes. He—he mysteriously disappeared.
>
> MR SPOKES: Objection, Your Honor. Move to strike all after "yes."
>
> THE COURT: Sustained.
> (RT 1332-1333.)

The prosecutor, knowing that the "gap" was accounted for by

Appellant's time in prison, and also knowing that the Court had ruled that references to Appellant's prior convictions were improper, nevertheless asked him about this "gap in time." While prison was not directly mentioned by Mr. Ritchie, the jury would have readily concluded that this is what was being referred to by the "mysterious disappearance."

VIII(c): Prosecutorial misconduct for failure to turn over handwritten notes and photographs from a State's expert.

John Miller, a criminalist with the Department of Justice for the State of California, testified as to the circumstances of the crime, including firearms evidence, estimates of the distance the shotgun was from the victim when fired, the angle of the fatal shot, and the position of the victim when he was shot. (RT 1520-1526.)

When defense counsel attempted to cross-examine this expert, he could not do so, as "[d]espite numerous requests for all handwritten notes, this is the first time I've ever seen this file. I can't adequately cross-examine this witness without having time to review these notes." (RT 1527.) As a result, the witness had to step down. (RT 1528.)

This non-disclosure was the partial basis of a defense motion for a mistrial. (RT 1618.) Mr. Spokes explained that he had served the prosecutor with a motion for informal discovery, including all handwritten notes by criminalists and all photographs of the crime scene. (RT 1620.) Mr. Miller

went through his file accompanied by defense counsel and seven rolls of film were discovered therein. (RT 1620.) But the notes and photographs were not turned over. (RT 1621.) The Court later granted the defense motion for discovery of all handwritten notes and all photographs of the crime scene and ordered the prosecution to deliver them to the defense not later than December 29, 1995. (RT 1621.) But the first time defense counsel saw this material was in the middle of the trial, in June of 1996. (RT 1621.) This prejudiced the defense as their "investigator has [had] absolutely no opportunity to follow up in his investigation to determine the evidentiary value and/or value to the defense of these seven rolls of film and approximately...half an inch thick sheet of handwritten notes." (RT 1621-1622.) As a result, the defense did not "have the benefit of those handwritten notes at the time that [they] consulted with a defense criminalist...had those handwritten notes been available to me at that time, I may have been able to direct the criminalist in a new direction. Without those handwritten notes, the criminalist was unable to reach any conclusion other than that which [Modesto police crime lab expert] Duane Lovaas had reached." (RT 1622.)[54] Given the importance of Mr. Miller's

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[54] This conclusion was that a 20-gauge shell was loaded into the shotgun and then a 12-gauge shell was loaded on top of it and the 12-gauge shell set off the 20-gauge shell. (RT 1622.) The defense was thus unable to explore the possibility that two rounds had been fired by different people or that two different persons had loaded the firearm, both viable defense

testimony regarding the crime scene, this was a serious violation of the prosecution's duty to turn over all evidence to the defense.

The Court denied a mistrial based partly on this misconduct, suggesting there was still time during trial for the defense to become acquainted with the material. (RT 1624.) However, this was an inadequate remedy as some of the photos were of shoe prints, and if they had them when they should have, "we may have been able to track down some shoes." (RT 1625.) Now, two years later, "[t]here's not much chance we're going to be able to find those shoes." (RT 1625.) Additionally, the evidence was now unavailable, as "once [the criminalist] had finished viewing the physical evidence that was provided by the District Attorney's office, it was packaged back up, and it's my understanding that it's now back in the hands of the Stanislaus County Sheriff's Department." (RT 1625.) Thus, Appellant was prejudiced by this misconduct.

VIII(d): Prosecutorial misconduct for failure to disclose evidence by Melissa Fader that she alleged that Appellant had raped her.

Melissa Fader testified that, after they had returned to the apartment and were dividing the robbery proceeds, Appellant came into the bathroom and forced her to have sex. (RT 1610.) Ms. Fader testified she did not want to do

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theories.

it, but Appellant said "You're gonna." (RT 1611.)[55]

This surprise testimony necessitated a defense request that the jury be excused and a motion for a mistrial. (RT 1619.) As the defense counsel stated, "it was clear from the testimony of this particular witness that Mr. Palmisano was aware this witness was going to testify that my client raped her on the evening of the event." (RT 1623.)

The prejudice of this testimony was obvious, as stated by defense counsel:

> That is highly prejudicial to my client. He's not charged with rape. No one ever suggested in any way, in any police report, in any individual personal conversation with me, or in any other manner that they knew that when that witness got on that stand, she was gonna testify to a forcible rape by my client on her person. That totally was hidden from me. And that alone should be grounds for mistrial.
>
> I didn't object at the time because I didn't want to draw any more attention to it. But it's clear from the line of questioning that Mr. Palmisano used to get to that point, he knew what was coming, and he didn't tell me anything about it. There's nothing—there was never any police report concerning any conversation with Nellie Thompson that she had been told about the rape.
>
> So all of these things have been hidden from the defense, and for those reasons, justice demands a mistrial.
> (RT 1623.)

The motion for a mistrial was denied because the Court was "not convinced and do (sic) not believe that Mr. Palmisano intentionally

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[55] Fader testified she had never told anyone the details about this incident before. (RT 1610.)

sandbagged the defense with his information." (RT 1624.) But the facts do not support this interpretation, given the pattern of questioning leading up to the incident,[56] and it is clear that Appellant was prejudiced by this misconduct.

VIII(e): The prosecutor improperly commented on Appellant's right to remain silent by mentioning his "lack of remorse."

At the closing argument of the penalty phase, the prosecutor stated "Here's another aggravating factor. Evidence of the defendant's remorse which is nonexistent." (RT 2502.) This was an indirect comment on Appellant's right to remain silent. For this reason, it was also an improper aggravating factor. Coupled with the next argument, which discusses double-counting and improper counting of aggravating factors, this error contributed to the untrustworthiness of Appellant's verdict.

VIII(f): The prosecutor improperly double-counted aggravating factors and counted factors that were not proper.

At the beginning of the prosecutor's final argument at the penalty phase, he briefly discussed the mitigating evidence in a dismissive manner. Then the prosecutor listed many duplicative and improper aggravating factors that likely caused the jury to vote for death. The prosecutor listed as aggravating factors the following:

1) "An aggravating factor is the fact that Sherman Robbins was a 67

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[56] *See, e.g.* RT 1515, 1614-1615, 2143.

year old man." (RT 2500.)

2) "An aggravating factor is the fact that at the time he was murdered, Sherman Robbins was a diabetic." (RT 2500.)

3) "An aggravating factor at the time he was murdered, Sherman Robbins had a useless left hand. He could not even draw his own insulin for his diabetes." (RT 2501.)

4) "The robbery, okay, you can't count that twice but the fact that the robbery occurred inside of a person's home rather than out on the street, that's an aggravating factor." (RT 2501.)

5) "A circumstance of this case is all that Sherman Robbins was trying to do at the time that he was murdered...was trying to help folks out." (RT 2501.)

6) "You may consider as a factor in aggravation the fact that Sherman's hands were tied behind his back at the time that he was murdered and that he was helpless on that account." (RT 2502.)

7) "You may consider [as an aggravating factor] what the last ten or fifteen minutes of that man's life were like." (RT 2502.)

8) "As far as we know, the last thing he ever heard was 'Get right with God. I'll be back in a minute,' and then his longest minute started. That's an aggravating factor." (RT 2502.)

9) "Here's another aggravating factor. Evidence of the defendant's remorse which is non-existent." (RT 2502.)[57]

10) "Here's another circumstance of the offense that you can consider [as an aggravating factor] as you go through the weighing process. You can consider the impact of this crime not only on Sherman Robbins 'cause Sherman Robbins had himself a really ugly last ten or fifteen minutes of his life and with luck has gone on to a better world. But you may also consider the impact on his family." (RT 2503.)

11) "You may consider [as an aggravating factor] the impact on his brother, Bill Robbins, and his wife Alvina." (RT 2503.)

12) "You may consider [as an aggravating factor] the impact on Sharon Robbins and her husband Sherman's nephew Gary." (RT 2503.)

13) "That experience for those people mopping up his blood off of the floor, off of the couch, off of wherever it splattered in that room, that's a factor in aggravation." (RT 2504.)

14) "And there's a factor in aggravation for Sharon Robbins. Sharon Robbins, on the morning of the 22nd of March of 1994...walks in and she sees that he's lying dead on the couch." (RT 2504.)

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[57] This is also discussed *supra* as an improper reference to Appellant's right to remain silent.

The prosecutor made specific reference to the weighing decision that had to be made by the jury at the completion of this listing of aggravating factors: "I'm asking you to go into the jury deliberation room, weigh the factors in mitigation, which are nearly nonexistent, against the factors in aggravation, and bring back the appropriate verdict." (RT 2505.)

In a "weighing" state such as California, where the jurors are asked to determine whether the factors in aggravation are outweighed by those in mitigation, any improper loading of the scales with improper aggravating factors seriously compromises the penalty phase verdict. The United States Supreme Court has held that the weighing process may be impermissibly skewed if the sentencing jury considers an invalid factor. (*Stringer v. Black* (1992) 503 U.S. 222, 232, 112 S. Ct. 1130). Additionally, double-counting has a tendency to skew the process so as to give rise to the risk of an arbitrary, and thus unconstitutional, death sentence. (*United States v. McCullah* (10th Cir. 1996) 76 F.3d 1087, 1111 ("there may be a thumb on the scale in favor of death '[i]f the jury has been asked to weigh the same aggravating factor twice'"). With improper counting, or double-counting of aggravating factors, there is no way to tell if the errors contributed to an unreliable verdict, or if the jury would have voted for life without the improperly-counted aggravation.

The argument was also impermissible on the basis that the "aggravating

factors" were unconstitutionally vague. Ensuring that a sentence is not so infected with bias or caprice is the "controlling objective when we examine eligibility and selection factors for vagueness." (*Tuilaepa v. California* (1994) 512 U.S. 967, 973, 114 S. Ct. 2630).

Additionally, the argument was improper because in many of the factors the jury was asked to consider factors in aggravation that were elements of the crime itself, robbery-murder. Almost all of the 14 aggravating factors listed above fall into this category. Thus, there was improper double-counting of the aggravating factors which also served as elements of the crime itself.

VIII(g): The cumulative effect of these instances of prosecutorial misconduct deprived Appellant of a fair trial.

The effect of these individual instances of prosecutorial misconduct must be seen in the aggregate. Even if any one of them alone did not render the verdict unreliable or the trial unfair, their cumulative effect was to deprive Appellant of a fair trial.

B) Legal Argument.

It has long been recognized that misconduct by a prosecutor may be grounds for reversing a conviction. (*Berber v. United States* (1934) 295 U.S. 78, 85-88.) Part of this recognition stems from a systematic belief that a prosecutor, while an advocate, is also a public servant "whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that

justice shall be done." *Id.*, at 88.

It is the responsibility of the trial court to ensure that final argument is kept within proper and accepted bounds. (*United States v. Young* (1985) 470 U.S. 1, 6-11.) That responsibility must be discharged with full awareness that "the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct." (*Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1399(*en banc*)).

Decisions concerning penalty phase prosecutorial misconduct, like those regarding other aspects of a capital trial, have been predicated by the maxim that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida* (1977) 430 U.S. 349, 357.) This difference has required the courts to ensure, by means of procedural safeguards and a heightened degree of judicial scrutiny under this super due process standard, that the death penalty is not the product of arbitrariness or caprice. "To pass constitutional scrutiny under this heightened standard, the death penalty must not be applied in an arbitrary or capricious manner. Rather, there must be 'an individualized determination whether the defendant in question should be executed, based on the character of the individual and the circumstances of the crime.'" (*Adamson v. Ricketts* (9th Cir. 1988) 865 F.2d 1011, 1021(*en banc*)).

Consequently, "[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances, and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law." (*Coleman v. Brown* (10th Cir. 1986) 802 F.2d 1227, 1239.) The avoidance of arbitrariness in the jury's exercise of its discretion also requires that jurors be "confronted with the truly awesome responsibility of decreeing death for a fellow human..." (*Lockett v. Ohio* (1978) 438 U.S. 586, 598.)

The United States Supreme Court has made it quite clear that the prosecutor may not "attach the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process." *Zant v. Stephens* (1983) 462 U.S. 862, 885. It has also been held that it is "clearly improper for a prosecutor to urge the imposition of death because of the race, religion, sex, or social status of the victim." (*Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383, 1409(*en banc*). *See also Derden v. Wainwright* (1986) 477 U.S. 168, 181-82 ("the prosecutor's argument may not manipulate or misstate the evidence, or implicate other specific rights of the accused such as the right to counsel or the right to remain silent")).

A prosecutor's improper closing argument violates the due process

clause of the Fourteenth Amendment if it was so prejudicial that it "infected the trial with unfairness." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637.) Whether a prosecutor's argument is an impermissible comment on the defendant's right not to testify is reviewed *de novo.* (*United States v. Johnston* (5th Cir. 1997) 127 F.3d 380, 396; *United States v. Martinez* (5th Cir. 1998) 151 F.3d 384, 391.)

The cumulative effect of these egregious errors in the prosecution's arguments was that they "infected the trial with unfairness." (*Darden v. Wainwright,* 477 U.S. 168, 181 (1986); *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974)). Thus, even if this Court holds that any one of the errors alone was not sufficient to create this fundamental unfairness, the proper framework for the analysis is to examine the argument as a whole, as the jury heard it, and not simply to test the individual claims separately.

IX.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO INSTRUCT THE JURY THAT THE FINDING OF FIRST DEGREE MURDER WITH SPECIAL CIRCUMSTANCES WAS NOT ITSELF AN AGGRAVATING FACTOR IN THE DETERMINATION OF PENALTY.

A. Facts in Support.

Pursuant to factor (a) of Penal Code section 190.3, the trial court

instructed the jury that, in determining penalty, it shall consider "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." (RT 2482; CT 868.) That instruction was misleading. It suggested that the jury could consider the fact of Appellant's first degree murder conviction with special circumstances as an aggravating "circumstance[] of the crime," because the defendant's conviction could certainly be viewed as a "circumstance[] of the crime," and the special circumstance findings established the "existence of any special circumstance found to be true."

B. Legal Argument.

1. Instructing the Jury That the Finding of First Degree Murder with Special Circumstances Was Itself Not an Aggravating Circumstance Was Necessary to Avoid Erroneous Inflation of the Case in Aggravation.

The jury should have been told that it could examine only the facts and circumstances of Appellant's criminal conduct, not the conviction and finding of special circumstances in themselves.

In *Odle v. Vasquez* (N.D.Cal. 1990) 754 F.Supp. 749, 761, the federal district court discussed the importance of the trial judge's having instructed the jury, "The fact that you have previously found Mr. Odle guilty beyond a reasonable doubt of the crimes of murder in the first degree is not in itself an aggravating circumstance." According to the district court, this instruction

clarified any ambiguity arising from the bare language of section 190.3(a) as to whether the jury was to view the defendant as having an aggravating circumstance against him simply as a result of the guilty verdict. Appellant's jury, however, was not given such an instruction.

2. Appellant Was Prejudiced by the Instructional Error

The Court's error was of constitutional dimension. The Eighth and Fourteenth Amendments to the United States Constitution require that a death penalty statute meaningfully distinguish between those few cases in which a death sentence is appropriate and the many cases in which it is not. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (concurring opinion of White, J.); *McCleskey v. Kemp* (1987) 481 U.S. 279, 305-306; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) Further, the defendant's right to a fundamentally fair proceeding under the Due Process Clause of the Fourteenth Amendment is violated by the jury's consideration of irrelevant evidence in support of aggravation.

Appellant's death sentence must therefore be reversed because the omission was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Similarly, under the harmlessness standard for an error of state law, there is a "reasonable possibility" that the misinstruction affected the verdict. (*People v. Brown* (1988) 46 Cal.3d 432,

447.) The jury's finding of an additional, but erroneous, aggravating circumstance may well have tipped the scale in favor of death.

3. The Instruction Erroneously Instructed The Jury To Double Count The Special Circumstances And Failed To Define What Constituted The Special Circumstances.

The court's instruction required the jury to consider *both* the "circumstances of the crime" *and* the "special circumstances," because the court employed the conjunctive "and" when it enumerated the aggravators to be considered. (RT 2482; CT 864.) Yet the findings of the guilt phase jury that the special circumstances were proved was simply a reflection of its consensus about the circumstances of the crime. The special circumstances were in no sense distinct from the circumstances of the crime. By focusing the jury's attention on these duplicative factors rather than the single set of facts surrounding the case, the aggravating effect of the circumstances of the crime was artificially increased.

This defect in the Court's instructions created an intolerable risk that the jury would make an arbitrary and unreliable penalty determination. This result violated the constitutional requirement that a capital sentencing procedure "guide[] and focus[] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death" (*Jurek v. Texas* (1976) 428 U.S. 262, 273-274,

96 S.Ct. 1759), so as to avoid "the arbitrary and capricious infliction of the death penalty" (*Godfrey v. Georgia, supra*, 446 U.S. 420, 428.)

In *People v. Melton* (1988) 44 Cal.3d 713, this Court recognized the risk that "a jury given no clarifying instructions might conceivably double-count any 'circumstances' which were also 'special circumstances,'" pursuant to the statutory language that "tells the penalty jury to consider the 'circumstances' of the capital crime *and* any attendant statutory 'special circumstances.'" (*People v. Melton, supra,* 44 Cal.3d 713, 768.) This Court concluded that "the robbery and the burglary [that occur in a single incident of criminal activity] may not each be weighed in the penalty determination *more than once* for exactly the same purpose." (*Ibid.*) In Appellant's case, the Court's instruction employed the statutory language that this Court observed was susceptible to an improper interpretation by the jury. (RT 2482; CT 864; CALJIC No. 8.85.)

Appellant respectfully disputes this Court's conclusion in *Melton* that "the possibility of actual prejudice seems remote" when a jury considers the aggravating effect of *both* the "circumstances of the crime" and the "special circumstances." (*People v. Melton, supra,* 44 Cal.3d 713, 768.) This Court in *Melton* reasoned that, "[e]xercising common sense, [the jury] was unlikely to believe it should 'weigh' each special circumstance twice on the penalty

'scale.'" (*Id.* at 769.) This Court's conclusion fails to take into account that the jurors were engaged in a "weighing" of the various circumstances.

In *People v. Brown, supra*, 40 Cal.3d 512, rev'd. on other grounds *sub nom California v. Brown* (1987) 479 U.S. 538, this Court discussed the weighing process: "[T]he word weighing is a metaphor for a process which by nature is incapable of precise description. The word connotes a mental balancing process, but certainly not one which calls for a mere mechanical counting of factors on each side of the imaginary 'scale,' or the arbitrary assignment of 'weights' to any of them. Each juror is free to assign whatever moral or sympathetic value he deems appropriate to each and all of the various factors he is permitted to consider . . . ." (*Id.* at 541.)

This Court's recognition that each juror assigns whatever value he deems appropriate to "each and all of the various factors he is permitted to consider" underscores the likelihood that a juror, in his discretion, may double or triple count the circumstances of the defendant's crime when permitted to do so by the court's instruction. Thus, the risk of prejudice from an instruction that expressly permits double-counting the circumstances of the crime (see *People v. Melton, supra,* 44 Cal.3d 713, 786) cannot be viewed as harmless.

4. The Prosecutor's Argument Exploited These Instructions By Further Inflating The Factors In Aggravation In Violation Of Appellant's State And Federal Constitutional Rights To A Fair Trial, Due Process Of Law, A Fair Penalty Determination And Protection Against Cruel And Unusual

Punishment.

This Court has repeatedly rejected claims of reversible error in this regard where the defense did not request an instruction against double counting, and there was no misleading argument by the prosecutor suggesting the same facts should be weighed twice, once under each rubric. (*People v. Cain* (1995) 10 Cal.4th 1, 68; *People v. Proctor* (1992) 4 Cal.4th 499, 550; *People v. Fauber* (1992) 2 Cal.4th 792, 858; *People v. Ashmus* (1991) 54 Cal.3d 932, 997.) Here, as is next discussed, there was a misleading prosecutorial argument on the point. Thus, the error cannot be deemed harmless.

In his argument to the jury, the prosecuting attorney explicitly named numerous aggravating factors without ever indicating whether these aggravating factors were components of the special circumstances, or were other aggravating factors in addition to the special circumstances. The prosecutor stated that "[a]n aggravating factor is the fact that Sherman Robbins was a 67 year old man." (RT 2500.) He also stated that an additional aggravating factor was that he was a diabetic. (*Id.*) Another "aggravating factor at the time he was murdered, Sherman Robbins had a useless left hand." (RT 2500-2501.) Additionally, the prosecutor stated that "[y]ou may consider as a factor in aggravation the fact that Sherman's hands were tied behind his

back at the time that he was murdered and that he was helpless on that account." (RT 2502.) Also, "[y]ou may consider what the last ten or 15 minutes of that man's life was like....As far as we know, the last thing he ever heard was 'Get right with God. I'll be back in a minute,' and then his longest minute started. That's an aggravating factor." (RT 2502.) And another aggravating factor: "As far as we know, the last thing he ever heard was 'Get right with God.' I'll be back in a minute,' and then his longest minute started. That's an aggravating factor." (RT 2502.) Also: "Here's another aggravating factor. Evidence of the defendant's remorse which is nonexistent." (RT 2502.)

The prosecutor listed additional duplicative and illusory aggravating factors: "Here's another circumstance of the offense that you can consider as you go through the weighing process. You can consider the impact of this crime not just on Sherman Robbins 'cause Sherman Robbins had himself (sic) last ten or 15 minutes of his life and with luck has gone to a better world. But you may also consider the impact on his family. You may consider the impact on his brother, Bill Robbins, and his wife Alvina. You may consider the impact on Sharon Robbins and her husband Sherman's nephew Gary." (RT 2503.)

And another one: "That experience for those people mopping up his

blood off of the floor, off of the couch, off of wherever it splattered in that room, that's a factor in aggravation." (RT 2504.) Additionally: "[a]nd there's a factor in aggravation for Sharon Robbins. Sharon Robbins, on the morning of the 22nd of March of 1994, drops a kid off at school which is nearby 519 Nebraska and heads over there to see if Sherman's okay. And she notices there are two newspapers in the driveway, and that's a little odd, and she notices the door is open and that is odd. And she walks in and she sees that he's lying dead on the couch. She knows he's dead. She can tell by the color of him. She knows he's dead." (RT 2505.)

These arguments created an intolerable risk that the jury would make an arbitrary and unreliable penalty determination. It was violative of the constitutional requirement that a capital sentencing procedure "guide[] and focus[] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death" (*Jurek v. Texas, supra,* 428 U.S. 262, 273-27) so as to avoid "the arbitrary and capricious infliction of the death penalty" (*Godfrey v. Georgia, supra,* 446 U.S. 420, 428.)

5. The Erroneous Argument Was Not Waived.

This issue presents a pure question of law based on undisputable facts and may be raised for the first time on appeal, even though it was not objected

to at trial. (*People v. Welch* (1999) 5 Cal.4th 228, 235; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.) Moreover, constitutional claims may be considered when presented for the first time on appeal when the asserted error fundamentally affected the validity of the judgment, or important issues of public policy are at issue. (*Hale v. Morgan, supra,* 22 Cal.3d 388; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173.)

6. Conclusion.

The jury's penalty determination was skewed in favor of death in violation of appellant's constitutional rights to due process and to be free of "the arbitrary and capricious infliction of the death penalty." (See *Godfrey v. Georgia, supra,* 446 U.S. 420, 428; United States Constitution, Fifth, Eighth and Fourteenth Amendments.) Neither the Court's other instructions nor the arguments of counsel remedied the problem by explaining that the jury should avoid multiple use of those facts. Accordingly, the judgment of death must be reversed.

The multiplication of the aggravating effect of the circumstances of the crime resulted in a penalty determination unfairly weighted toward death. The possibility that Appellant's jury decided that he deserved execution based on an illusory duplication of aggravating circumstances deprived appellant of due process (see *Evitts v. Lucey* (1985) 469 U.S. 387, 401, 105 S. Ct. 830; *Hicks*

v. Oklahoma (1979) 447 U.S. 343, 346) and a reliable penalty determination. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304.) The instruction also denied Appellant equal protection of the laws guaranteed him by the Fourteenth Amendment to the United States Constitution and article I, section 7, of the California Constitution. This Court has held that Penal Code section 654 precludes multiple punishment for a robbery and burglary conviction resulting from the same incident. (*People v. Miller* (1977) 18 Cal.3d 873, 885.) By a parity of reasoning, equal protection of the law should deny to the State the use of multiple facets of the crime as aggravators in the same episode.

It cannot be concluded beyond a reasonable doubt that the errors concerning the double counting of aggravating factors coupled with the prosecution's argument did not affect the penalty determination. The judgment of death must be reversed. (See *Chapman v. California, supra*, 386 U.S. 18, 24.)

X.

THE PENALTY PHASE INSTRUCTIONS WERE DEFECTIVE AND DEATH-ORIENTED IN THAT THEY FAILED TO PROPERLY DESCRIBE OR DEFINE THE PENALTY OF LIFE WITHOUT POSSIBILITY OF PAROLE

Neither CALJIC No. 8.88 nor any other instruction given in this case

informed the jurors that a sentence of life without possibility of parole meant that appellant would *never* be considered for parole. Appellant submits that the trial court had a *sua sponte* duty to instruct on the true meaning of this sentence.

The trial court is obligated to instruct on its own motion on all principles of law closely or openly connected with the case. (*People v. Wilson* (1967) 66 Cal.2d 749.) "Life without possibility of parole" is a technical term in capital sentencing proceedings, and it is commonly misunderstood by jurors. The failure to define for the jury "life without possibility of parole" thus violated due process by failing to inform the jury accurately of the meaning of the sentencing options. The failure also resulted in an unfair, capricious and unreliable penalty determination and prevented the jury from giving effect to the mitigating evidence presented at the penalty phase in violation of the Sixth, Eighth and Fourteenth Amendments. (See *Caldwell v. Mississippi* (1985) 472 U.S. 320.)

Although this Court has rejected this argument in the past (see, e.g., *People v. Gordon* (1990) 50 Cal.3d 1223, 1277; *People v. Thompson* (1988) 45 Cal.3d 86, 130-131 [proposed instruction on the meaning of life without parole found to be inaccurate and not constitutionally required]), the Court should reconsider its decisions based on recent United States Supreme Court

rulings.

In *Simmons v. South Carolina* (1994) 512 U.S. 154, 168-169, the United States Supreme Court held that where the defendant's future dangerousness is a factor in determining whether a penalty phase jury should sentence a defendant to death or life imprisonment, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. The plurality relied upon public opinion and juror surveys to support the common sense conclusion that jurors across the country are confused about the meaning of the term "life sentence." (*Id.* at 169-170 and fn. 9.)

The *Simmons* opinion has been repeatedly reaffirmed by the United States Supreme Court. In 2001, the Court reversed a second South Carolina death sentence based on the trial court's refusal to give a parole ineligibility instruction requested by the defense. (*Shafer v. South Carolina* (2001) 532 U.S. 36.) The Court observed that where "[d]isplacement of 'the longstanding practice of parole availability' remains a relatively recent development, . . . 'common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.'" (*Id.* at 52 [citation omitted].)

Most recently, in *Kelly v. South Carolina* (2002) 534 U.S. 246, the

Court again reversed a South Carolina death sentence for this same error, even though the prosecutor did not argue future dangerousness specifically and the jury did not ask for further instruction on parole eligibility. As the Court explained, "[a] trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part." (*Kelly, supra,* 534 U.S. at 256.)[58]

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[58] The Supreme Court opinions make it quite clear that there was an inference of future dangerousness in this case sufficient to warrant an instruction on parole ineligibility. In *Kelly* the Court ruled that "[e]vidence of future dangerousness under *Simmons* is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences or be described in other terms." (*Kelly, supra*, 534 U.S. at 254 [footnote omitted].) In that case, the Court found that future dangerousness was a logical inference from the evidence and injected into the case through the state's closing argument. (*Id.* at 250-251; see also *Shafer, supra*, 532 U.S. at 54-55; *Simmons, supra*, 512 U.S. at 165, 171 (plur. opn.) [future dangerousness in issue because "State raised the specter of . . . future dangerousness generally" and "advanc[ed] generalized arguments regard the [same]"]); *id.* at 174 (Ginsburg, J., concurring); *id.* at 177 (O'Connor, J., concurring).

As Justice Rehnquist argued in his dissent from the *Kelly* decision, "the test is no longer whether the State argues future dangerousness to society; the test is now whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society." (534 U.S. at 261 (Rehnquist, J., dissenting) The rule is invoked, "not in reference to any contention made by the State, but only by the existence of evidence from which a jury might infer future dangerousness." (*Ibid.*)

In this case, the evidence raised an implication of future dangerousness.

The state in *Simmons* had argued that the petitioner was not entitled to the requested instruction because it was misleading, noting that circumstances such as legislative reform, commutation, clemency and escape might allow the petitioner to be released into society. (512 U.S. at 166.) In rejecting this argument, the United States Supreme Court stated that, while it is possible that the petitioner could be pardoned at some future date, the instruction as written was accurate and truthful, and refusing to instruct the jury would be even more misleading. *(Id.* at 166-168.)

This Court has erroneously concluded that *Simmons* does not apply in California because, unlike South Carolina, a California penalty jury is specifically instructed that one of the sentencing choices is "life without parole." (*People* v. *Arias, supra*, 13 Cal.4th at 172-174.) Empirical evidence, however, establishes widespread confusion about the meaning of such a sentence. One study revealed that, among a cross-section of 330 death-qualified Sacramento County potential venire-persons, 77.8% disbelieved the literal language of life without parole. (Ramon, Bronson & Sonnes-Pond, *Fatal Misconceptions: Convincing Capital Jurors that LWOP Means Forever* (1994) 21 CACJ Forum No.2, at 42-45.) In another study, 68.2% of those surveyed believed that persons sentenced to life without possibility of parole can manage to get out of prison at some point. (Haney, Hurtado & Vega,

Death Penalty Attitudes: The Beliefs of Death Qualified Californians (1992) 19 CACJ Forum No. 4, at 43, 45.) The results of a telephone poll commissioned by the *Sacramento Bee* showed that, of 300 respondents, "[o]nly 7 percent of the people surveyed said they believe a sentence of life without the possibility of parole means a murderer will actually remain in prison for the rest of his life." (*Sacramento Bee* (March 29, 1988) at 1, 13).[59] In addition, the information given California jurors is not significantly different from that found wanting by the United States Supreme Court.

In the instant case, jurors were instructed that the sentencing alternative to death is life without possibility of parole, but they were never informed that life without possibility of parole meant that the defendant would not be released. In *Kelly*, the Court acknowledged that counsel argued that the sentence would actually be carried out and stressed that Kelly would be in prison for the rest of his life. The Court also recognized that the judge told the jury that the term life imprisonment should be understood in its "plain and ordinary" meaning. (*Kelly, supra*, 534 U.S. at 257.)

Similarly, in *Shafer*, the defense counsel argued that Shafer would "die in prison" after "spend[ing] his natural life there," and the trial court instructed

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[59] See also Bowers, *Research on the Death Penalty: Research Note* (1993) 27 Law & Society Rev. 157, 170; *Simmons, supra*, 512 U.S. at 168, fn. 9.)

that "life imprisonment means until the death of the defendant." (*Shafer, supra*, 532 U.S. at 52.) The Court nevertheless found these statements inadequate to convey a clear understanding of parole ineligibility. (*Id.* at 52-54.)

In *Simmons*, the Court reasoned that an instruction directing juries that life imprisonment should be understood in its "plain and ordinary" meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular state defines "life imprisonment." (*Simmons, supra*, 512 U.S. at 170.) Here, the instruction that the sentencing alternative to death was life without possibility of parole did not adequately inform the jurors that a life sentence for appellant would make him ineligible for parole.

The Supreme Court's rejection of South Carolina's "plain and ordinary meaning" argument in the *Simmons* case should be instructive when applied to California's statutory language of "life without possibility of parole." The principle to be derived from the Court's reliance in *Simmons* on *Gardner v. Florida, supra*, 430 U.S. 349, is that the Constitution will not countenance a false perception to form the basis of a death sentence, whether that perception is brought about as a result of incorrect instructions or by inaccurate societal beliefs regarding parole eligibility,.

Further, the inadequate instruction violated the principles of *Caldwell*

v. Mississippi, *supra,* 472 U.S. 320, as interpreted in *Darden v. Wainwright* (1986) 477 U.S. 168, 183, fn.15, because it "[misled] the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should for the sentencing decision." Without specific instructional guidance on the meaning of life without parole that addressed and overrode the belief so commonly held among jurors that "without the possibility of parole" is legal jargon for "life until someone decides otherwise," the jurors undoubtedly deliberated under the mistaken perception that the choice they were asked to make was between death and a limited period of incarceration. (See *Simmons*, *supra*, 512 U.S. at 170.) The effect of this false choice was to reduce, in the minds of the jurors, the gravity and importance of their sentencing responsibility. Because of their probable distrust of "life imprisonment," the decision of the jury was unfairly simplified.

The prejudicial effect of the failure to clarify the sentencing options is clear. There is a substantial likelihood that at least one of the jurors[60] concluded that the non-death option offered was neither real nor sufficiently severe and chose a sentence of death not because the juror deemed such

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[60] See *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 937 (Gould, J., concurring) ["in a state requiring a unanimous sentence, there need only be a reasonable probability that 'at least one juror could reasonably have determined that . . . death was not an appropriate sentence,'" quoting *Neal v. Puckett* (5th Cir. 2001) 239 F.3d 683, 691-692].)

punishment warranted, but because he or she feared that Appellant would someday be released if they imposed any other sentence.[61] Given the existence of evidence in this case from which the jurors would infer future dangerousness, they should have been clearly instructed that a sentence of life without the possibility of parole meant that Appellant would never be eligible for parole – not just that they should "assume" that a sentence of "life without parole," if imposed, would be carried out.

It is fundamental that a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." (*Lockett v. Ohio, supra,* 438 U.S. at 605.) Had the jury been instructed forthrightly that Appellant could not be paroled, there is a reasonable probability that at least one juror would have decided that death was not the appropriate penalty. (*Wiggins v. Smith* (2003) 539 U.S. 510, 537; *Chapman*

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[61] California jury surveys show that perhaps the single most important reason for life and death verdicts is the jury's belief about the meaning of the sentence. In one such study, the real consequences of the life without possibility of parole verdict were weighed in the sentencing decisions of eight of ten juries whose members were interviewed; also, four of five death juries cited as one of their reasons for returning a death verdict the belief that the sentence of life without parole does not really mean that the defendant will never be released. (C. Haney, L. Sontag, & S. Costanzo, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 Journal of Social Issues 149 (1994), at 170-171).

v. California, supra, 386 U.S. at 24.) It certainly cannot be established that the error had "no effect" on the penalty verdict. *Caldwell v. Mississippi, supra*, 472 U.S. at 341.) Accordingly, the judgment of death must be reversed.

XI.

APPELLANT WAS DENIED DUE PROCESS AND A RELIABLE SENTENCING DETERMINATION BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON THE MEANING OF THE WORDS "AGGRAVATING" AND "MITIGATING."

Appellant's conviction and death sentence were unlawfully and unconstitutionally obtained in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and corresponding provisions of the California Constitution because the trial court's failure to instruct the jury on the meaning of "aggravating" and "mitigating" denied Appellant due process, a fair trial and a reliable sentencing determination.

Although the central issue for the jury to decide at the penalty phase of Appellant's trial was whether "the aggravating circumstances are so substantial in comparison with the mitigating circumstances" to warrant the imposition of the death penalty (*People v. Brown* (1985) 40 Cal.3d 512, 535 fn. 19, *rev'd on other grounds*, 479 U.S. 538 ; CALJIC 8.88), the trial court never told the

jury what those words meant as they were used in the court's instructions. Although "aggravation" is a word that is commonly used in the English language, and "mitigation" less so, when used in the penalty phase of a capital prosecution they have a technical meaning peculiar to Eighth Amendment law.

The purpose of aggravating and mitigating factors in capital sentencing is to assess the seriousness of a capital crime in comparison to other capital crimes. Without instructional definition of these terms, there is a reasonable likelihood that a juror might fail to recognize that a fact is not aggravating unless it renders a murder more deserving of punishment by death than an "ordinary" murder. The failure of the trial court to define these terms violated due process of law. Where the trial court fails to properly define the terms by upon which a sentence of death is based, the Eighth Amendment's guarantee of a reliable verdict is abridged.

XII.

THE DEATH SELECTION PROCESS USED TO CONDEMN APPELLANT TO DEATH VIOLATED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS

Appellant's judgment and confinement are illegal and were obtained in violation of his rights under the California Constitution and his federal Fifth, Sixth, Eighth and Fourteenth Amendment rights to heightened reliability in the sentencing process, protection from double jeopardy, trial by jury, assistance

of counsel, presentation of a defense, a fair and impartial jury, a reliable penalty determination, equal protection, and due process, because the death selection factors upon which the jury was instructed were unconstitutionally vague, unreliable, and failed to channel the jury's discretion; the trial court instructed the jury on the factors without any effort to narrow or define any of the vague and overbroad language; the instructions favored and weighted aggravating evidence, and disfavored and minimized mitigating evidence; certain definitions were inaccurate, misleading or unconstitutional; procedural safeguards present when a person is charged for an infraction were not given; and the weighing process upon which the jury was instructed was confusing and incorrect.

Facts in Support.

A. The Use of Factor (a) in Sentencing Appellant to Death Violates the Federal Constitution

Appellant's jury was instructed pursuant to California Penal Code section 190.3 (a) that "[t]he circumstances of the crime of which the defendant was convicted and the existence of any special circumstance found to be true" are factors to be considered in the sentencing process. RT 2482; CT 868. No limiting construction to this factor was given.

CALJIC 8.85 and factor (a) authorized the jury to use all the evidence from the guilt phase as aggravation in the sentencing determination. *Id.* This

Court has allowed extraordinary expansions of factor (a) beyond all reasonable limitations on the concept of circumstances of the crime. (*See, e.g.*, *People* v. Nicolaus (1992) 54 Cal.3d 551, 581-582 [evidence concerning establishing defendant's scorn and hatred of religion and, in particular, the sect of Christianity to which the victim belonged was admissible under factor (a)]; *People v. Walker* (1990) 47 Cal.3d 605, 639, fn. 10 [evidence of defendant's post-offense threat to kill a witness who could link him to the murder weapon might be admissible as a circumstance of the crime even though it was made several weeks after commission of the offense]).

Although factor (a) has survived a facial Eighth Amendment challenge, (*Tuilaepa v. California* (1994) 512 U.S. 967), it was used in this case in an arbitrary, capricious and unchannelled manner, in violation of the federal guarantees of due process and equal protection of the laws.

In this case, factor (a) licensed the indiscriminate imposition of the death penalty upon no other basis than a particular set of facts surrounding a murder "were enough in themselves, and without some narrowing principles to apply those facts, to warrant the imposition of the death penalty." (*Maynard* v. *Cartwright* (1988) 486 U.S. 356, 363). Factor (a) did not provide an objective standard to channel the discretion of the jury that sentenced Appellant to death, but rather allowed each juror to impose the death penalty

based on that juror's idiosyncratic assessment of what constituted a circumstance of the crime that particularly offended the juror. One juror, for example, could have been persuaded to vote for death by the prosecutor's argument that "an aggravating factor is the fact that at the time he was murdered, Sherman Robbins was a diabetic." (RT 2500.) Another juror could have been moved by the prosecutor's contention that the victim was 67 years old, had a difficult last ten or fifteen minutes of life or that the defendant said "get right with God" to him. (RT 2502.) This is true even though these same jurors in another case could have been equally offended if a victim was killed in the prime of life, if he was not given a chance to make amends with God, or if the killing had been quick and "execution style." Coupled with the prosecution's enumeration of virtually unlimited "aggravating factors", the limitless and unprincipled use of factor (a) in this case as a basis for imposing the death sentence was unconstitutional.

Factor (a) also directed the jury to weigh the presence of any special circumstance findings. This factor necessarily is present to some extent in every capital case because there is no penalty phase without a finding of at least one special circumstance. Thus, the sentencer's discretion was weighted in favor of death solely due to the fact that a defendant has been convicted of capitally eligible murder. This scheme results in the arbitrary and capricious

imposition of death sentences.

Because a sentence of death cannot be returned in California unless the jury determines that the aggravating factors substantially outweigh those in mitigation, the Sixth Amendment requires that any aggravating factors considered by the jury in determining the sentence must be found unanimously and beyond a reasonable doubt. (*Ring v. Arizona* (2002) 536 U.S. 584). The failure of the trial court to preclude jury consideration of circumstances of the crime that were not unanimously found beyond a reasonable doubt violated Appellant's right to trial by jury and constitutes a structural error.

B. The Use of Factor (b) in Sentencing Appellant to Death Violates the Federal Constitution

Statutory sentencing factor (b) concerns the "presence or absence of criminal activity by the defendant other than the crime for which the defendant has been tried in these present proceedings which involve the use or attempted use of force or violence or the express or implied threat to use force or violence." (CAL. PENAL CODE§ 190.3 (b); CT 868; RT 2482.) Pursuant to this factor, the prosecution was allowed to present evidence of past convictions, two occurring in 1970, over a quarter of a century prior to his capital murder trial, and one from 1976 and one from 1986. (RT 2498-2499.) The 1971 conviction consisted of a single incident involving a robbery form a business; the 1976 incident was a robbery as was the 1988 incident. (RT 2499-2501.)

The criteria used to select death over life must be reliable, non-arbitrary and not vague. Factor (b) did not provide an objective standard to channel the sentencer's discretion, but rather allowed each juror to impose the death penalty based on that juror's idiosyncratic assessment of what constitutes violent criminal conduct. Absent instructions defining the elements of the relevant criminal conduct, reliance on factor (b) as a basis for imposing the death sentence was unconstitutional. Moreover, no instruction was given advising the jury that only conduct violating a penal code provision could be deemed "criminal activity." Nor were any instructions given that identified the conduct that could be considered possible aggravation under factor (b), that named the possibly relevant crimes, or that defined the elements of such crimes and explained the need to find each element proven. Even though the prior convictions were for robberies, no guidance offered as to what might be sufficient to constitute "force" or "violence" under factor (b). In effect, what was to be deemed "criminal activity involving . . . force or violence" was left to each juror to decide with no guidance. The result was an aggravating factor too vague, overbroad and ill-defined to satisfy constitutional standards.

Moreover, because California law requires a unanimous finding in all other contexts in which a jury is entrusted to determine a defendant's alleged

criminal activity (including non capital sentencing enhancements), equal protection and due process, and Eighth Amendment reliability standards, required an instruction that prior criminal activity could be weighed in aggravation only upon a unanimous finding beyond a reasonable doubt that the defendant committed the alleged crime. Such a finding was also required under the Sixth Amendment. (*Ring v. Arizona* (2002) 536 U.S. 584).

C. The Use of Factors (d), (g) And(h) in Sentencing Appellant to Death Violated the Federal Constitution.

Statutory sentencing factor (d) involves "[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." (CAL. PENAL CODE § 190.3, subd. (d); RT 2483.) Factor (g) concerns "[w]hether or not defendant acted under extreme duress or under the substantial domination of others." (CAL. PENAL CODE § 190.3 (g); RT 2483.) Appellant's jury was instructed to consider these factors in determining his sentence. (CT 869; RT 2483.) The inclusion of the adjectives "extreme" and "substantial" in these potential mitigating factors acted as unconstitutional barriers to consideration of mitigation. (*Lockett* v. *Ohio* (1978) 438 U.S. 586.)

There is a substantial -- and impermissible -- risk that the jury would understand these factors to be aggravating, or would interpret the language to mean that mental or emotional disturbance, duress, and impaired capacity due

to drug use at the time of the crime could not be given mitigating weight unless it were extreme or substantial. In fact, the prosecutor made this argument to the jury. (RT 2494: "Was he under the influence of extreme mental or emotional disturbance?") The prosecutor also argued that there was no mitigation in this case, even though he acknowledged that the Appellant was under some form of methamphetamine intoxication. (RT 2495.)

These words, "extreme" and "substantial," acting as instructional commandments on the jury, rendered factors (d) and (g) unconstitutionally vague, overbroad, arbitrary, capricious, and incapable of principled application. (*Maynard* v. *Cartwright* (1988) 486 U.S. 356; *Godfrey* v. *Georgia* (1980) 446 U.S. 420.) The jury's consideration of these factors, in turn, introduced constitutionally impermissible unreliability into the sentencing process, in violation of the Eighth and Fourteenth Amendments.

Factor (h) involves "[w]hether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication." (CAL. PENAL CODE § 190.3 (h); CT 869; RT 2483.) There is a substantial and impermissible risk that the jury would understand the temporal language in factors (d) and (h) -- i.e, at the time of the offense -- to mean that evidence otherwise related to such

factors could not be given mitigating weight if it did not influence the commission of the crime. Inferences which do "not relate specifically to [the defendant's] culpability for the crime he committed" may nevertheless be mitigating under the Eighth Amendment. (*Skipper* v. *South Carolina* (1986) 476 U.S. 1, 4-5; *Tennard v. Dretke* (2004) 124 S. Ct. 2562 [rejecting contention that evidence of low IQ does not constitute constitutionally relevant mitigation unless there is a nexus between the condition and the capital offense]. There is a substantial likelihood that Appellant's jury concluded that emotional disturbance and mental impairment evidence must be contemporaneous with the crime to be considered as mitigating, and therefore refused to consider constitutionally relevant defense evidence on that basis.

D. Failure to Delete Inapplicable Factors

The trial court instructed the jury on all of the statutory sentencing factors, even though some of the factors were clearly inapplicable. Factor (e), for example, concerns the victim's consent to the homicidal act, and factor (f) concerns a defendant's belief in the moral justification for the act. Obviously, neither factor, which can only be considered in mitigation under state law,[62] had any relevance in this case. The trial Court's failure to delete from the jury

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[62]*See, e.g., People v. Whitt* (1990) 51 Cal.3d 620, 654 [factors (d), (e), (f), (h), and (k) "can only mitigate"].

instructions those factors that were inapplicable was a source of confusion, capriciousness, and unreliability. As instructed, the jury was permitted to aggravate Appellant's sentence on the basis of factors that should have played no role in the sentencing process. The murder at issue in the present case was not rendered more heinous than an ordinary murder by the fact that Ms. Robbins did not consent to the homicidal act, or by the fact that Appellant had no reasonable belief that his actions were morally justified. Yet, the instructions improperly suggested otherwise.

It is improper to instruct the jury on inapplicable mitigating factors because those extraneous instructions inject irrelevant considerations into the jury's deliberations, and are prejudicial. This danger is heightened by the instruction's failure to explicitly designate which factors are mitigating and which are aggravating, as discussed below.

In addition, the failure to delete unsupported factors systematically denigrated the mitigation that was presented. The effect is to artificially diminish the significance of the mitigating evidence that is before the jury. In no other area of criminal law are instructions given as to matters unsupported by the evidence. The effect here was to permit individual jurors to decide whether or not an enumerated factor was relevant. Such *ad hoc* determinations of relevancy, permitting consideration of factors not anchored in evidence,

undermine the reliability of the sentencing process.

The failure to delete inapplicable factors deprived Appellant of his right to an individualized sentencing determination based on permissible factors relating to his background and character, and to the crime and undermined the requirement of heightened reliability in the death determination.

E. Failure to Designate Aggravating and Mitigating Factors

Appellant's trial counsel requested the following instruction:

> The permissible aggravating factors which you may consider are limited to those aggravating factors upon which you have been specifically instructed. Therefore, the evidence which has been presented to you regarding defendant's background which does not fall into one of the limited aggravating factors may only be considered by you as mitigating evidence .
> (CT 861.)

The defense also requested a version of CALJIC 8.85 that "delineate[d] between circumstances in aggravation and circumstances in mitigation." (CT 871; RT 2473.) This requested instruction included the third, fourth and fifth paragraphs of Court's Instruction No. 40. (CT 871.) These paragraphs in the instruction "implement[] the defendant's 8th and 14th Amendment guarantees to due process against cruel and unusual punishment by informing the jury that...mitigation is not limited to the enumerated factors, but includes any mitigating information that may convince it to impose a sentence less than death." (RT 2474.) "It also correctly informs the jury that mercy, sympathy

and sentiment are relevant in giving weight to the mitigating factors." (RT 2474.)

The trial court rejected this and struck the third, fourth and fifth paragraphs of the instruction. (CT 871; RT 2476.) The penalty phase instructions as given presented a unitary list of factors, and did not indicate which statutory factors are considered aggravating and which are considered mitigating. (RT 2481-2489.) This Court, however, has held that factors (d), (e), (f), (g), (h), (j), and (k) may be given only mitigating weight, and may not be used in aggravation. (*People* v. *Hardy* (1992) 2 Cal.4th 86, 207; *People* v. *Hamilton* (1989) 48 Cal.3d 1142, 1184.) Thus, the proposed instruction was a correct statement of California law.

The failure to instruct the jury that certain circumstances could only be considered in mitigation and given mitigating weight was error. Without the requested instruction, the jury was given inadequate, misleading, and erroneous guidance as to how it should evaluate the statutory factors essential to its penalty determination. The unitary list allowed the jury complete, unchannelled discretion to decide whether and for what reasons Appellant should die. It also allowed the jury to consider in aggravation factors such as mental or emotional disturbance, alcohol and drug impairment at the time of the crime, and background and character evidence, which may constitutionally

only be considered in mitigation. (*See Zant* v. *Stephens* (1983) 462 U.S. 862, 885. Further, the statutory factors intended only as potential mitigators, when viewed by an unguided jury as aggravating circumstances are too impermissibly vague to satisfy the Eighth Amendment and Due Process. Compounding the error, the prosecutor argued that, apart from the factors in aggravation, the other factors were mitigating or neutral, and that there was no mitigation. (RT 2495-2497.) The instructions, combined with the prosecution's argument, resulted in a sentencing decision which is unreliable, in contravention of the Eighth and Fourteenth Amendments.

This error was compounded because, in the instruction listing the sentencing factors, factors (d), (e), (f), (g), (h), and (j) were each introduced by the phrase, "[w]hether or not." Thus, there is a reasonable likelihood that the jury concluded that the absence of these mitigating factors constituted aggravation. (*Mills* v. *Maryland* (1988) 486 U.S. 367).[63]

The failure to designate aggravating and mitigating factors further violated the federal guarantee of equal protection of the law because, in

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[63] *See also* C. Haney & M. Lynch, *Comprehending Life and Death Matters; A Preliminary Study of California's Capital Penalty Instructions*, 18 LAW & HUMAN BEHAVIOR 411, 422-424 (1994) [empirical study shows that the failure to inform the jury which factors are exclusively mitigating, or to delete inapplicable factors, results in the jury transforming lack of mitigation into aggravation].

noncapital sentencing, the factors are separately designated. (Cal. Rules of Court 421 and 423.) The two classes are similarly situated and there is no compelling state interest in maintaining this disparate treatment.

Furthermore, there is a reasonable likelihood that the jurors viewed Appellant's methamphetamine abuse as weighing on the scale of death. By permitting the jury to attach the "aggravating" label to conduct that actually should militate in favor of a lesser penalty, the trial court violated Appellant's Eighth Amendment rights. (*Zant* v. *Stephens* (1983) 462 U.S. 862, 885.)

F. The Instructions Failed to Limit the Aggravating Evidence to Those Factors Enumerated in the Statute.

California Penal Code section 190.3 lists the factors that the jury shall consider in reaching its penalty verdict. Under California law, the sentencer cannot consider nonstatutory aggravation. (*People v. Boyd* (1985) 38 Cal.3d 762, 772-776). The guilt phase evidence, however, included several instances of nonstatutory aggravating evidence: use of illegal drugs, possession of stolen property, and Appellant's parole status. The penalty phase instructions told the jury to consider the evidence from the guilt phase in its penalty deliberations. (CT 868; RT 2482.)

There is a substantial likelihood that such instructions failed to limit aggravation to those factors enumerated by the Legislature. The instructions refer to "the circumstances of the crime of which the defendant was convicted

in the present proceeding" and "the presence or absence of criminal activity by the defendant other than the crime for which the defendant has been tried in these present proceedings which involve the use or attempted use of force or violence" without defining those terms. "Circumstances" and "criminal activity" are terms of art, referring generally to statutory definitions in the California Penal Code. Jurors cannot be expected to know what evidence constitutes a "circumstance" or "criminal activity" that can properly be considered. This probability was heightened when the prosecutor, in final argument at the punishment phase, listed many circumstances of the crime that he argued were in and of themselves aggravating.

As a result, the instructions failed adequately to channel and guide the jury's discretion, permitted the introduction of unreliable evidence, and permitted the arbitrary and capricious imposition of the death penalty in violation of the Sixth, Eighth and Fourteenth Amendments.

G. Errors in Instructing on Mitigation

Appellant's jury was never given an instruction that defined a "mitigating circumstance." (RT 2482-2492.) CALJIC No. 8.88, which was normally given at the time, was omitted.[64] In place of a definition of

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[64] CALJIC 8.88 defined a mitigating circumstance as follows: "[a] mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be

"mitigating circumstances," the Court stated the following: "The list of circumstances which you may consider in penalties continues as follows: In determining the penalties continuing as follows:" (RT 2483) and factors (d) through (k) were then given. (RT 2483-2484.) The jury thus had neither a definition of what a mitigating circumstance was and, more seriously, because the normally mitigating factors were not identified as such, but as "circumstances which you may consider in penalties" the jury may well have thought that factors (d) through (k) could only be considered in aggravation. The repetition of "penalties" was in no way reasonably designed to alert the jurors that these were mitigating and not aggravating factors. The lack of a definition of mitigation was insufficient to inform the jury of the full scope of evidence that must be considered in determining whether to impose death or life and was reasonably likely to be understood as limiting the mitigating evidence the jury should consider.

This Court has assumed that "mitigating" is a commonly understood term necessitating no further definition, but the assumption is refuted by empirical evidence. The same empirical evidence indicates that one of the primary misconceptions harbored by jurors concerning mitigation is that it

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considered as an extenuating circumstance in determining the appropriateness of the death penalty."

relates only to the circumstances of the crime.[65] Thus, the lack of a definition of mitigation given in this case, and the terming of mitigating factors as "penalties" was substantially likely to have been understood as either limiting the jury's consideration of them as aggravators only or limiting the jury's consideration solely to the circumstances of the crime, in violation of Appellant's Eighth Amendment right to have the jury consider any and all evidence that "might serve 'as a basis for a sentence less than death'" even if unrelated to the capital crime. (*Tennard v. Dretke*, *supra,* 124 S. Ct. at 2571, *quoting Skipper v. South Carolina* (1986) 476 U.S. 1, 7 n.2). The trial court's failure to provide the jury with an adequate understanding of this critical concept undermined the reliability of the ensuing death judgment, failed to channel the jury's discretion, and resulted in the non-consideration of relevant mitigating evidence.

The trial court's failure to so instruct the jury undermined the reliability of the ensuing death judgment, failed to channel the jury's discretion, and resulted in the non-consideration of relevant mitigating evidence in violation of Appellant's Eighth and Fourteenth Amendment rights.

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[65] *See* Haney & Lynch, *Comprehending Life and Death Matters; A Preliminary Study of California's Capital Penalty Instructions*, 18 LAW & HUMAN BEHAVIOR 411, 422-424 (1994); Haney et al, *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, 50 J. OF SOCIAL ISSUES., No.2 (1994).

The trial court also failed to instruct the jury affirmatively to consider all sympathetic mitigating factors and non-statutory mitigation, and thereby violated Appellant's right to an individualized and reliable sentencing determination. The trial court also failed to adequately instruct the jury on the appropriate role that sympathy for Appellant and his family could play in their deliberations.[66] (*See Penry v. Lynaugh* (1989) 492 U.S. 302; *Hitchcock* v. *Dugger* (1987) 481 U.S. 393.

In addition, the trial court failed to specifically instruct the jury that the "no sympathy" admonition of CALJIC 1.00, which was given at the guilt phase, (CT 782) did not apply to the penalty phase. This further undermined Appellant's right to a reliable and individualized sentencing determination. In addition, the instruction that stated that "You must not be influenced by mere sentiment, conjecture, sympathy..." (RT 2486) actually told the jury erroneously that they could not consider sympathy for the defendant, which violated his right to have an unfettered consideration of all mitigating factors. (*Penry v. Lynaugh* (1989) 492 U.S. 302; *Hitchcock* v. *Dugger* (1987) 481 U.S. 393.)

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[66] As read to the jury, the "sympathy" instruction read as follows: "If the mitigating evidence gives rise to compassion or sympathy for the defendant, the jury may, based upon such sympathy or compassion alone, reject that as a penalty." (RT 2484.) The written instruction read "reject death as a penalty." (CT 871.) This was confusing at best.

H. Errors in Weighing Process, Failure to Inform the Jury Regarding Co-defendants' Sentences, and Failure Adequately to Channel the Jury's Discretion.

i) Failure in weighing process.

The trial judge instructed the jury under CALJIC No. 8.88, which provided:

> In determining which penalty is to be imposed upon the defendant, you shall consider all of the evidence which has been received during any part of the trial of this case except as you may hereafter be instructed. You may consider and take into account and be guided by the following factors if applicable:
> ....
> Mitigating circumstances that I have read to you for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of these factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case, but a juror should not limit his or her consideration of mitigating circumstances to these specific factors.
> (RT 2482, 2484.)

The jury was thus not even told before the final arguments that they must weigh mitigating circumstances against aggravating circumstances. This was a particularly serious problem in light of the prosecutor's enumeration of many "aggravating circumstances" such as: 1) "that Sherman Robbins was a 67 year old man" (RT 2500); 2) "that Sherman Robbins was a diabetic" (RT 2500); 3) "that at the time he was murdered, Sherman Robbins had a useless

left hand" (RT 2501); 4) "the fact that the robbery occurred inside of a person's home rather than out on the street" (RT 2501); 5) that "all Sherman Robbins was trying to do at the time that he was murdered...was trying to help folks out" (RT 2501); 6) " that Sherman's hands were tied behind his back at the time that he was murdered and that he was helpless on that account" (RT 2502); 7) "what the last ten or fifteen minutes of that man's life were like" (RT 2502); 8) "As far as we know, the last thing he ever heard was 'Get right with God. I'll be back in a minute,' and then his longest minute started. That's an aggravating factor" (RT 2502); 9) "Evidence of the defendant's remorse which is non-existent" (RT 2502);[67] 10) " the impact of this crime... on his family" (RT 2503); 11) "the impact on his brother, Bill Robbins, and his wife Alvina" (RT 2503); 12) "the impact on Sharon Robbins and her husband Sherman's nephew Gary" RT 2503; 2513) "That experience for those people mopping up his blood off of the floor, off of the couch, off of wherever it splattered in that room" (RT 2504); 14) "Sharon Robbins, on the morning of the 22nd of March of 1994...walks in and she sees that he's lying dead on the couch" (RT 2504.)

Only later, in the Court's final instructions, was the weighing process

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[67] This is also discussed *supra* as an improper reference to Appellant's right to remain silent.

mentioned and was the jury told that "mere mechanical counting" was not the standard. (RT 2519.)

But taken as a whole, the instructions were constitutionally inadequate to channel the jury's discretion and to provide a non-arbitrary, non-capricious sentencing decision.

Under California law, a capital sentencing jury that finds that death is not the appropriate punishment in a given case is required to return a sentence of life without the possibility of parole.[68] It is equally true that if the jury, in weighing the factors in aggravation and mitigation, finds that the former do not outweigh the latter, it is required to return a life verdict. (*See* CAL. PENAL CODE § 190.3.) Furthermore, California law permits a sentence of life without possibility of parole even in the complete absence of mitigating circumstances. (*People v. Duncan* (1991) 53 Cal.3d 955). The sentencing instructions as given in this case did not clearly educate the jury on these points. Because there is a reasonable likelihood that the jury concluded based on the instructions it did receive that a sentence of death was mandated should aggravation predominate over mitigation, Appellant's Eighth and Fourteenth Amendment rights to a reliable sentencing verdict were violated.

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[68] CAL. PENAL CODE § 190.3; *see People* v. *Allen*, 42 Cal.3d 1222, 1277 (1986); *People* v. *Brown* (1985) 40 Cal.3d 512, 541, fn. 13 (1985), *rev'd on other grounds, sub nom California* v. *Brown* (1987) 479 U.S. 538.

ii) Failure to inform jury about co-defendant's sentences.

In addition, Appellant's due process rights were violated by the trial court's failure to instruct the jury on a defense theory supported by substantial evidence. (*Evitts* v. *Lucey*, 469 U.S. 387, 401 (1985); *Hicks* v. *Oklahoma* (1980) 447 U.S. 343, 346). The Court refused to give a defense-proposed instruction that would allow consideration of a co-defendant's sentence at the penalty phase. (RT 2478.)

iii) Instructional defects.

Moreover, the instruction that was given is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the Equal Protection Clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in California and are as entitled as noncapital defendants, if not more so, to the protections the law affords in relation to prosecution-slanted instructions. Appellant can conceive of *no* government interest, much less a compelling one, served by denying capital defendants such protection. (*Plyler* v. *Doe* (1982) 457 U.S. 202, 216-217, 102 S. Ct. 2382).

In addition, the slighting of a defense theory in the instructions has been held to deny not only due process but the right to a jury trial, because it

effectively directs a verdict as to certain issues in the defendant's case.[69] Thus the defective instruction violated Appellant's Sixth Amendment rights as well.

The instruction at issue was also defective because it implied that if the jury found the aggravating evidence "so substantial in comparison with the mitigating circumstances", death was *ipso facto* the permissible and proper verdict. That is, it impliedly told the jury that if aggravation was found to outweigh mitigation, a death sentence was compelled. It is clear, however, that under California law the penalty jury may return a verdict of life without parole even if the circumstances in aggravation outweigh those in mitigation. *People* v. *Brown*, 40 Cal.3d 512, 538-541(1985). As framed, then, the instruction had the effect of improperly directing a verdict should the jury find mitigation outweighed by aggravation.

Moreover, even if the instruction did not constitute a directed verdict of death if the jury found aggravation outweighed mitigation, it is clear that it failed affirmatively to tell the jury that it could return a life-without-parole verdict even if the circumstances in aggravation outweighed those in mitigation. There is a reasonable likelihood that the jury impermissibly

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[69] *Zemina* v. *Solem*,(D. S. D. 1977) 438 F. Supp. 455, 469-470, *aff'd and adopted* (8th Cir. 1978) 573 F.2d 1027, 1028; *see Cool* v. *United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].

interpreted the instructions as requiring a sentence of death should it be found that aggravating factors predominated over any mitigating circumstances. Since the defect in the instruction deprived Appellant of an important procedural protection that California law affords noncapital defendants, it deprived Appellant of due process of law. (*Hicks* v. *Oklahoma*, 447 U.S. at 346; *see Hewitt* v. *Helms* (1983) 459 U.S. 460, 471-472).

I. Failure to Require Written Statement of Findings

California Penal Code section 190.3 provides the framework for the trier of fact (a jury in this case) to determine whether to sentence a person to death or life in prison. The jury was instructed to take into account factors (a)-(k) and to base the sentencing decision on their relative weight. (*See* CALJIC No. 8.85 (5th ed. 1988); CT 868-869; RT 2482-2483, 2519.) These factors were not identified as either mitigating or aggravating; thus, a factor that may justify life in prison in another case, may have been viewed by Appellant's jury as warranting death. Furthermore, the jury is expected to process an extensive body of evidence, such as the circumstances of the crime, the special circumstances, the defendant's personal, criminal, and family history, and the defendant's state of mind at the time the crime was committed. The jury then had determine whether such evidence constitutes aggravating or mitigating factors and, finally, determine the weight to be accorded to the various factors.

Under California law, there is no requirement that the jury provide a written statement of its findings concerning the presence or absence of aggravating and mitigating circumstances. Thus, Appellant's jury provided no record of what its sentencing decision was premised upon. The complicated weighing process is fraught with ambiguities and unreviewable discretion which is concealed beneath a stark verdict: "We, the jury . . . find the appropriate penalty for the defendant, Daniel Lee Whalen, to be death..." (CT 902; RT 2525.)

Such a verdict does not allow for *meaningful* appellate review of the sentencing process, a constitutionally indispensable ingredient of a death penalty scheme under the Eighth and Fourteenth Amendments. (*See Gregg* v. *Georgia* (1976) 428 U.S. 153, 195, 198; *Proffitt* v. *Florida* (1976) 428 U.S. 242, 250-251, 253, 259-260).

Although the trial judge is required by California Penal Code section 190.4 (e), to make findings in determining whether to overturn a jury's death judgment, the judge retains limited power to do so. And while the judge's explanation of findings stated on the record provide some insight as to his considerations in upholding the jury's findings, it sheds no light whatsoever on the appropriateness, consistency, propriety, or strength of the jury's actual reasons. Because the actual responsibility for fixing the penalty lies with the

jury, the fact that the judge while independently reviewing the evidence, is able to articulate a rational basis for the sentencing decision to kill affords no assurance that the jury did so. And yet it is "the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards." (*Godfrey* v. *Georgia* (1980) 446 U.S. 420, 437.) California Penal Code section 190.4 (e) effectively empowered the sentencing jury with unchecked sentencing discretion.

Further, in *non-capital* felony proceedings, the trial court must state the reasons for its sentencing choice. (*See* CAL. PENAL CODE §1170, subd. (c); *People* v. *Lock* (1981) 30 Cal.3d 454, 459). It is only when an accused's life is at stake that the California Supreme Court excuses the sentencer from providing written findings. Such disparate treatment of similarly situated individuals constitutes a denial of Appellant's Fourteenth Amendment right to equal protection.

In a capital sentencing proceeding, the sentencing process is highly subjective, (*see Turner* v. *Murray* (1986) 476 U.S. 28, 33-34), and there is a risk that an errant procedure will result in the defendant's death. Because a statement of findings and reasons would alleviate that risk, yet would pose only a minimal burden on the state, due process also requires the sentencer to make such a record.

The guarantees of the Eighth and the Fourteenth Amendments require "heightened reliability in the death determination." (*Ford* v. *Wainwright* (1986) 477 U.S. 399, 414; *Beck* v. *Alabama* (1980) 447 U.S. 625). It is the jury, as the technical and actual sentencing authority, which must be held to this constitutional obligation of proffering a verdict reflecting this constitutional principle of "heightened reliability." The requirement of written findings not only fortifies the record for appellate review, but also alerts the jury to the gravity of the task at hand by forcing accountability regarding each factor considered in reaching a conclusion of death as the appropriate penalty. In requiring an explicit statement of their findings, the jurors are discouraged from imposing a purely subjective and arbitrary sentence, thus, increasing the reliability of their decision. The constitutional purpose of written findings is advanced by ensuring that the jury's determination of death is predicated on a rational ground and that any irrational decision can be uncovered and corrected.

Written findings on aggravating factors is further required to ensure that Appellant's Sixth Amendment right to a jury trial was not violated. Because the finding of substantial aggravating factors is a prerequisite to a death sentence under California law, the Sixth Amendment's jury trial guarantee attaches to the determination of whether aggravating factors exist and whether

they are substantial enough to support a death sentence. Without written findings, it is impossible to know whether the jury's death sentence was improperly premised on aggravating factors found by less than a majority of the jurors, or on factors for which the jurors were impermissibly not required to find proven beyond a reasonable doubt.

Without written findings, it is simply impossible to discern what the jurors relied on in reaching their decision and if they in fact considered all aspects of the evidence presented before them in mitigation of the penalty to be imposed. The jurors in this case could well have engaged in a simple numerical counting of the mitigating and aggravating factors, as the sole admonishment that this was improper was hidden in a lengthy recitation of instructions and lengthy final arguments, one of which urged them to do just that. An incomplete record in capital sentencing is constitutionally inadequate: "there must be full disclosure of the basis for the death sentence so that capital sentencing is rationally reviewable." (*Gardener* v. *Florida* (1977) 430 U.S. 349, 359).

Empirical research has established the inability of capital jurors to discern correctly which factors cannot properly be considered in aggravation.[70]

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[70] *See* Haney & Lynch, *Comprehending Life and Death Matters; A Preliminary Study of California's Capital Penalty Instructions*, 18 LAW & HUMAN BEHAVIOR 411, 422-424 (1994).

The guarantee of meaningful appellate review under the Eighth and Fourteenth Amendments cannot be satisfied under California's death penalty statute as it currently stands.

J. Failure to Instruct on the True Meaning of Life Without Parole.

At the penalty phase, the trial court failed to instruct the jury on the meaning of "life without parole." "Life without parole" is a technical term in capital sentencing proceedings, and is commonly misunderstood by jurors. Contemporary research establishes that many jurors -- perhaps as many as half -- do not understand that life without parole actually means no possibility of parole.[71] It is common in California cases for jurors to impose sentences of death because of the erroneous belief that a sentence of life imprisonment without the possibility of parole will result in the defendant receiving parole after a minimal time incarcerated.

The trial court's failure to give an instruction violated due process by failing to inform the jury accurately of the meaning of the sentencing options. Furthermore, failing to give the instruction violated Appellant's rights under the Eighth Amendment by depriving Appellant of a reliable penalty

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[71] *See, e.g.*, Bowers, *Research on the Death Penalty: Research Note*, 27 LAW & SOCIETY REV. 157, 170 (1993); *see also Simmons v. South Carolina*, 512 U.S. at 168, fn. 9.

determination, by not allowing the jury to give mitigating effect to the evidence presented at the penalty phase, and by preventing the jury from considering life without parole itself as a factor in mitigation. The Constitution will not countenance a false perception, whether brought about as a result of incorrect instructions or inaccurate societal beliefs regarding parole eligibility, to form the basis of a death sentence.

K. Improper multiple use and counting of aggravating facts and circumstances.

The multiple use of felony counts in this case rendered the death eligibility and death selection process arbitrary, capricious, and unfair. The murder was alleged to have occurred in the course of a robbery and that it was a murder with the use of a firearm. Many facts of the crime for which he had been convicted were argued by the prosecution as aggravating circumstances justifying the death penalty. These allegations were also used as the basis for different theories of felony murder special circumstance. This multiple use of the same facts and crimes violated the constitutional guarantee against double jeopardy, misled the jury and thereby violated Appellant's right to an impartial jury, and resulted in an unreliable sentencing determination contrary to the individualized determination required by the Eighth and Fourteenth Amendments. (*Furman* v. *Georgia* (1972) 408 U.S. 238; *Caldwell* v. *Mississippi* (1985) 472 U.S. 320). The multiple use and counting of various

facts and circumstances as aggravating factors artificially inflated the statutory factors favoring death, failed adequately to channel the jury's discretion, and rendered the death sentence in this case arbitrary, capricious, unfair, and unreliable.

L. Prejudice

The above flaws in the sentencing process, considered individually or cumulatively, constitute structural error mandating habeas relief as to the death sentence. In the alternative, the errors had a substantial and injurious influence or effect on the jury's verdict in the penalty phase of the trial.

XIII.

THE TRIAL COURT'S ERRONEOUS AND UNCONSTITUTIONAL FAILURE TO INSTRUCT ON THEFT AS A LESSER INCLUDED OFFENSE OF ROBBERY REQUIRES REVERSAL OF THE ROBBERY AND MURDER CONVICTIONS, THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE FINDING AND THE DEATH JUDGMENT.

A. Introduction

The jury was instructed that it could convict Appellant of first degree murder in Count One based upon a robbery-murder theory. (CT 798, 800; RT 2215, 2220, 2223-2225.) The jury also was instructed on a robbery-murder special circumstance (CT 798, 812; RT 2223-2224.) and the substantive crime

of robbery in Count Two. (CT 798-799, 817 ; RT 2223-2224.) The jury, however, never was instructed on the lesser included offense of theft, despite the fact that there was substantial evidence that any theft-related activity on appellant's part was conceived of and took place only *after* the fatal assault of Mr. Robbins, and therefore a reasonable jury could have found that Appellant committed theft and not robbery.[72]

The failure to instruct on theft was clear error under well-established California case law. It also deprived Appellant of his federal constitutional rights to due process, trial by jury, and reliable guilt, special circumstance and penalty verdicts (U.S. CONST., 5th, 6th, 8th, & 14th Amends.), as well as his state constitutional rights to due process and trial by jury (CAL. CONST., art. I, §§ 7 & 15.) The error requires reversal of Appellant's convictions of Counts One and Two, the special circumstance finding, and the death verdict and ensuing judgment of death.

B. The Trial Court Erred in Failing to Instruct *Sua Sponte* on Theft as a Lesser Included Offense of Robbery.

Where there is substantial evidence that an element of the charged

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[72] The court did instruct on the crime of receiving stolen property, a lesser crime to that of robbery in Count 2. (RT 2229-2230.) However, this does not excuse the failure to instruct on theft, as the activity relating to the alleged receiving of stolen property allegedly occurred after the murder of Mr. Robbins.

offense is missing, but that the accused is guilty of a lesser included offense, the court *must* instruct upon the lesser included offense, even if not requested to do so. (*People v. Breverman* (1998) 19 Cal.4th 142, 162; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055-1056; *People v. Kelley* (1992) 1 Cal.4th 495, 529-530.) "Substantial evidence is evidence sufficient to 'deserve consideration by the jury,' that is, evidence that a reasonable jury could find persuasive. [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.)

This *sua sponte* obligation is not limited

> to those offenses or theories which seem strongest on the evidence, or on which the parties have openly relied. On the contrary, as we have expressly indicated, the rule seeks the most accurate possible judgment by 'ensur[ing] that the jury will consider the full range of possible verdicts' included in the charge, regardless of the parties' wishes or tactics." (*People v. Breverman, supra,* 19 Cal.4th at 155, quoting *People v. Wickersham* (1982) 32 Cal.3d 307, 324.)

Thus, the trial court must "instruct on lesser included offenses supported by the evidence even when they are 'inconsistent with the defense selected by the defendant.'" (*People v. Barton, supra*, 12 Cal.4th at 198, fn. 7, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 717, fn. 7.)[73] In short,

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[73] Indeed, the duty to instruct "is based in the defendant's constitutional right to have the jury determine every material issue presented by the evidence" (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 351), and it exists even if the defendant expressly objects to the instruction (*Barton*, 12 Cal.4th at 195).

"*every* lesser included offense, or theory thereof, which is supported by the evidence, must be presented to the jury." (*People v. Breverman, supra,* at 155, original emphasis.)

There is no question but that theft is a lesser included offense of robbery, which includes the additional elements of force or fear. (*People v. Ortega* (1998) 19 Cal.4th 686, 694; *People v. Bradford, supra*, 14 Cal.4th at 1055.) If the intent to steal arose only after the victim was assaulted, the robbery element of stealing by force or fear is absent and the offense committed is theft, not robbery. (*People v. Bradford*, *supra*, 14 Cal.4th at 1055-1056; *People v. Kelly* (1992) 1 Cal.4th 495, 525, *cert. denied*, 506 U.S. 881; *People v. Webster* (1991) 54 Cal.3d 411, 443; *People v. Turner* (1990) 50 Cal.3d 668, 690; *People v. Ramkeesoon*, *supra*, 39 Cal.3d at 351; *People v. Green* (1980) 27 Cal.3d 1, 54.)

It is equally clear that the instruction was warranted by the evidence in this case. The testimony of Melissa Fader and Michelle Joe was that the victim was first killed and the property was then removed from the house. A defendant's testimony, even if "less than convincing" is sufficient to require instruction upon a lesser included offense *sua sponte*. (*People v. Turner*

(1990) 50 Cal.3d 668, 690.)[74]

Moreover, it bears emphasis that a rational inference of reasonable doubt – supported by the evidence – can support a jury instruction just as much as a rational inference of affirmative disproof. That is particularly so when, as here, the jurors have been read CALJIC No. 2.01, which instructs the jurors that if any interpretation of circumstantial evidence favorable to the defendant is reasonable, that is the interpretation which *must* be adopted. Intent, of course, is inherently an issue of circumstantial evidence. (*E.g.*, *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1380; *People v. Buckley* (1986) 183 Cal.App.3d 489, 494-495.) Thus, if there was a reasonable interpretation of the evidence by which jurors could have had a reasonable doubt as to appellant's intent – or the *timing* of Appellant's intent, the jurors were *required* to adopt it. That legal requirement could only be fulfilled if a

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[74] A defendant, particularly in a capital case, is entitled to have the jury instructed on the law applicable to the evidence he presents, and any doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused. (*People v. Wilson* (1967) 66 Cal.2d 749, 762-63; *see also People v. Sullivan* (1989) 215 Cal.App.3d 1446, 1452 ["disbelief of a defendant's version of the facts is not . . . a reason for rejecting a requested instruction [since] it is the jury's function to weigh the evidence and determine credibility"]; *People v. Jeffers* (1996) 41 Cal.App.4th 917.) As this Court stated in *Breverman*, a trial court may not limit its instructions on lesser included offenses to those theories the court believed have the greatest merit or conform to the defense actually presented, while ignoring other theories also supported by the evidence. (*People v. Breverman*, *supra*, 19 Cal.4th at 161-162.)

rational inference of reasonable doubt is deemed to be substantial evidence, just as much as affirmative evidence on a point.

Clearly, there was substantial evidence that the intent to steal arose only after the shooting of Mr. Robbins. And, "[s]ince there was evidence that defendant was guilty only of theft rather than robbery, the court had a *sua sponte* duty to instruct on theft as a lesser included offense." (*People v. Kelly, supra,* 1 Cal.4th at 529-530.)

The court's refusal to give the instruction places appellant in a similar situation to the defendant in *People v. Kelly*, *supra*, 1 Cal.4th at 530, a case in which this Court concluded that the trial court erred in failing to provide instructions on theft as a lesser included of robbery and reversed the robbery count, the related firearm-use enhancement, and the robbery special circumstance. The Court found it notable that that jury – just like Appellant's jury – was not given an instruction highlighting the issue of "after-formed intent." This Court distinguished *Kelly* from *People v. Turner* (1990) 50 Cal.3d 668, 690-693, where it found similar instructional error harmless since, at defense counsel's request, "the jury *was* given special instructions highlighting the issue of 'after-formed intent.'" (*People v. Turner*, *supra*, 50 Cal.3d at 691, emphasis in original.)

> In contrast to *Ramkeesoon, supra,* 39 Cal.3d 346, the special instructions in this case [*Turner*] did require the jury to confront and

> decide the issue of "after-formed intent." The jurors were told emphatically not to convict defendant of robbery or first degree felony murder, or to find the robbery-murder special circumstance true, if they believed it reasonably possible that he killed for reasons unrelated to theft and stole only as an incidental afterthought.
> (*People v. Turner, supra*, 50 Cal.3d at 692-693.)

The Court's failure to give a lesser included instruction was a violation of California law, including Appellant's state constitutional due process right to have the jury instructed on lesser included offenses when the evidence raised a question as to whether all of the elements of the charged offense were present (*People v. Barton, supra,* 12 Cal.4th at 194-195) – here, the element of "force or fear."

The erroneous failure to instruct on the lesser included offense of theft also violated Appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process and a reliable guilt determination in a capital case. Due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. (*Beck v. Alabama, supra*, 447 U.S. at 633-637; *Hopper v. Evans* (1982) 456 U.S. 605, 611.) Giving the jury the opportunity to convict on a lesser offense ensures that the jury will give the defendant the benefit of the reasonable-doubt standard. (*Beck v. Alabama, supra,* 447 U.S. at 634; *United States v. Jackson* (9th Cir. 1984) 726 F.2d 1466, 1470.) When the evidence establishes that the defendant is guilty of a serious, violent offense but leaves some doubt as to an element justifying a conviction

of a capital offense, the failure to give the jury the "third option" between conviction for capital murder or acquittal inevitably enhances the risk of an unwarranted conviction. "Such a risk cannot be tolerated in a case where a defendant's life is at stake." (*Beck v. Alabama, supra,* 447 U.S. at 637-638.)

Here, the trial court virtually compelled an all-or-nothing decision by failing to give any sort of lesser included instruction for robbery. In so doing, the court ignored the possibility that the jurors could, and apparently did, conclude that appellant completed a theft from the person of Sherman Robbins, but he had no intent to do so until *after* the shooting. Under the instructions given, if the jurors so concluded, they nevertheless could only have convicted of robbery, and found true the felony-murder theory of first degree murder, because their only other option was outright acquittal.[75] As mentioned above, the instruction on receiving stolen property did not correct this flaw.

Not only were the jurors not instructed on the only appropriate verdict under that factually-supported scenario – i.e., conviction of theft and

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[75] *See Beck v. Alabama, supra,* 447 U.S. at 634; *Keeble v. United States* (1973) 412 U.S. 205, 213; *People v. Ramkeesoon, supra,* 39 Cal.3d at 352; *People v. St. Martin* (1970) 1 Cal.3d 524, 533; *compare Schad v. Arizona* (1991) 501 U.S. 624, 647 [the "central concern" of *Beck* was not implicated because the jury "was not faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence"]; *People v. Yeoman* (2003) 31 Cal.4th 93, 130.

exoneration of a felony-murder theory of first degree murder and of the robbery-murder special circumstance – but they were not even instructed on "the 'after-formed intent' question" at the guilt phase, despite a defense request for such an instruction.

Appellant was rendered eligible for the death penalty because he was convicted of first degree murder, then, in a special circumstance retrial, with a robbery-murder special circumstance, where the jury was not permitted to consider a verdict of the lesser included non-capital offense of theft – the only legally available alternative – and the evidence would have supported such a verdict. This is manifestly unlike the situations in which the Supreme Court has limited the holding in *Beck* – *i.e.*, there is no constitutional violation where the jury is instructed on one lesser included offense supported by the evidence even if others might be warranted (*see Schad v. Arizona, supra*, 501 U.S. at 647-648), or where the jury is given no option other than a capital offense at the guilt phase of trial where the state law under which the defendant was convicted has no lesser included offense. (*See Hopkins v. Reeves* (1998) 524 U.S. 88, 94-97.) Robbery in California does have the lesser included offense of theft, and the jury was not instructed on that or any other lesser included offense with respect to felony-murder or the robbery-murder special circumstance. Thus, Appellant was given neither the full benefit of the

reasonable-doubt standard (*see People v. Flood* (1998) 18 Cal.4th 470, 479-480), nor a reliable guilt or penalty determination, in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights.

Further, by failing to give lesser included offense instructions on theft, the court prevented the jury from considering all of the issues in the case, thereby truncating Appellant's right to a fair jury trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Finally, the erroneous failure to instruct on theft as a lesser included offense of robbery also violated Appellant's right to federal due process (U.S. CONST., 14th Amend.), as it arbitrarily deprived him of a liberty interest created by state law – i.e., the right to instruction on lesser included offenses where warranted by the evidence. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488-489.)

This violation of Appellant's Fourteenth Amendment due process rights, as well as of the other fundamental constitutional rights discussed above, requires reversal unless, at a minimum, the state can establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at 24.)[76] Such a showing is impossible in the instant case,

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[76] In *Beck*, the Supreme Court reversed the death judgment without any discussion of the *Chapman* standard or any other standard of reversible error. (*See id.* at 643-646.)

because "[t]he omission of the theft instructions practically guaranteed robbery and felony-murder convictions" (*People v. Ramkeesoon, supra,* 39 Cal.3d at 352) and the true robbery-murder special circumstance finding once the jury found that *any* property was taken.[77]

XIV.

THE COURT ERRED IN DENYING APPELLANT'S MOTIONS TO STRIKE THE "NOTICE OF AGGRAVATION" AND THE PRIOR CONVICTIONS AND TO HAVE THE JURORS MAKE A SPECIAL FINDING AS TO THE FACTORS IN AGGRAVATION AND MITIGATION.

A) Facts in Support.

On October 30, 1995, Appellant moved that the Court strike the "Notice of Aggravation" filed by the prosecution pursuant to Penal Code sec. 190.3 and also moved that the prosecution give the defense pre-jury selection notice of all evidence it intended to present in aggravation at the penalty phase of the trial. (CT 679-692.) The motion also requested the striking of the prior convictions of Appellant. (*Id.*) The grounds for the motion were that "[t]he prosecution has not provided defendant's counsel with discovery of many of the facts and circumstances surrounding the incidents described in this

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[77] It is still the rule in capital cases that "[a]n error in failing to instruct on lesser included offenses requires reversal unless it can be determined that the factual question posed by the omitted instruction was necessarily resolved under other, properly given instructions." (*People v. Bradford, supra*, 14 Cal.4th at 1056; *see People v. Breverman, supra*, 19 Cal.4th at 178.

notice...the notice does not list the addresses of the witnesses the prosecution intends to call." (CT 680.) Additionally, the notice did not give specific information on Appellant's prior convictions, only that the prosecution "will rely on 'documentation and necessary testimonial evidence' to prove five prior felony convictions. The notice also states that the People are presently investigating these matters." (CT 683.) Thus, the notice provided "no knowledge of what defendant must defend against at trial and provides no limitations on the prosecution. Most significantly, it does nothing to allow defendant to prepare his case." (CT 683.)

On November 20, 1995, the Court held a hearing on this and other pre-trial motions. (RT 60, 90.) The defense argued the motion to strike the notice of aggravation, as there were not enough details about witnesses to be called. (RT 90-92.) The prosecution stated that he believed the "primary objection...goes to the Los Angeles County, Long Beach City, I believe robbery and the Toulare City robberies...The problem is those addresses are 20 years old or better depending on which case it is. We are at the moment trying to track those down." (RT 92.) The defense likened Sec. 190.3 to a discovery statute which "requires the prosecution to provide information to the defense as to what they intend to produce during that portion of the trial." (RT 93.) The Court in denying the motion ruled that there was no requirement to tell the

defense exactly the witnesses they will call. (RT 94-97.)

The Court also ruled on the motion is to strike the prior convictions and to make a special finding as to the factors in aggravation and mitigation. (RT 97.) The prosecutor moved to continue it to December 8, 1995. At that date, the Court denied the motion to have the jury make a special finding as to the factors in aggravation and mitigation on the basis that "the judge makes independent review of the evidence and determines not whether or not the jury was correct in their individual finding but whether their findings would support a jury's verdict." (RT 110.)

As to the motion on the priors, the prosecution offered evidence, the Tulare County prior and the Los Angeles County packet. The motion was denied. (RT 112.)

B) Argument in Support.

As this Court has held, "Section 190.3 has been construed as requiring pretrial notice of the actual evidence on which the prosecution intends to rely to establish aggravating factors at the penalty phase. (*Keenan v. Superior Court* (1981) 126 Cal.App.3d 576, 586-587; *see also People v. Phillips,* (1985) 41 Cal.3d 29, 72, fn. 25). This requirement has been interpreted as requiring "pretrial notice of the actual evidence on which the prosecution intends to rely to establish aggravating factors at the penalty phase." (*People v. Jennings*

(1988) 46 Cal.3d 963, 986-987.) The purpose underlying the notice provision is to afford capital defendants notice of the evidence to be used against them at the penalty phase without the necessity of having to resort to the discovery procedures used to obtain information on which the prosecution depends to establish guilt.

In Appellant's case, the "Notice of Aggravation" (CT 687-691) did not comply with this requirement. In this case, Appellant was "put on notice" that the prosecution intended to rely on "documentation and necessary testimonial evidence" to prove five prior felony convictions. (CT 683, 687-691). This inadequate notice, as defense counsel pointed out in his motion, prevented Appellant from making "any meaningful pretrial preparation for the penalty phase" (CT 683) as they did not have any details as to the locations and addresses of the proposed witnesses so that they could have their investigator talk to them. Second, it compromised the defense *voir dire*, as either the Court or defense counsel "may often feel the need to ask questions regarding specific aggravating evidence during voir dire in order to insure that jurors would not have such a reaction to that one piece of evidence that they would decide the penalty question on that piece of evidence alone." (CT 683.). In this case, had the prosecution complied with the requirements of Sec. 190.3 or if the Court had compelled compliance, specific details regarding the prospective juror'

attitudes regarding the priors could have been included in the juror questionnaires. This knowledge would have been essential in the choosing of an unbiased and impartial jury.

Since the prosecution was unwilling or unable to provide sufficient details about the priors to guard against these dangers, the Court should have either granted the motion to strike the "Notice of Aggravation" or the priors, or have ordered compliance with the notice requirements of Sec. 190.3.

XV.

THE COURT'S INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia* (1979) 433 U.S. 307, 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship, supra* at 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana*

(1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict Appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at 275.)

A. The Instructions On Circumstantial Evidence Undermined The Requirement Of Proof Beyond A Reasonable Doubt (CALJIC Nos. 2.90, 2.01, 8.83, and 8.83.1).

The jury was instructed pursuant to CALJIC 2.90 that Appellant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (CT 795; RT 2214.) These principles were supplemented by several instructions that explained the meaning of reasonable doubt. CALJIC No. 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or

> imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."
> (CT 795; RT 2214.)

The terms "moral evidence" and "moral certainty" as used in the reasonable doubt instruction are not commonly understood terms. While this same reasonable doubt instruction, standing alone, has been found to be constitutional (*Victor v. Nebraska* (1994) 511 U.S.1, at 13-17), in combination with the other instructions, it was reasonably likely to have led the jury to convict Appellant on proof less than beyond a reasonable doubt in violation of his Fourteenth Amendment right to due process.

The jury was given three interrelated instructions – CALJIC Nos. 2.01 (CT 787, RT 2208); 8.83 (CT 812, RT 2221); and 8.83.1 (CT 814, RT 2222)– that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. (CT 787; RT 2208 [sufficiency of circumstantial evidence]; CT 812; RT 2221 [special circumstances – sufficiency of circumstantial evidence]; CT 814; RT 2222 [special circumstances – sufficiency of circumstantial evidence to prove required mental state].) These instructions, addressing different evidentiary issues in almost identical terms, advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable [and] the other interpretation to be unreasonable, you

must accept the reasonable interpretation and reject the unreasonable." (CT 788, 812, 814; RT 2208, 2221, 2222.) These instructions informed the jurors that if Appellant *reasonably appeared* to be guilty, they could find him guilty – even if they entertained a reasonable doubt as to guilt. This three-times repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating Appellant's constitutional rights to due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15), trial by jury (U.S. Const., 6th, & 14th Amends.; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at 638.)[78]

First, the instructions not only allowed, but compelled, the jury to find Appellant guilty on all counts and to find the special circumstance to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra,* 397 U.S. at 364.) The instructions directed the jury to find Appellant guilty and the special circumstance true based on the appearance of

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[78] Although defense counsel did not object to these instructions, the claimed errors are cognizable on appeal. Instructional errors are reviewable even without objection if they are such as to affect a defendant's substantive rights. (Pen. Code, §§ 1259 & 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." (CT 787, 812, 814; RT 2208, 2221, 2222.) An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at 78 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty," italics added.) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless Appellant rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts."

(*Francis v. Franklin* (1985) 471 U.S. 307, 314, italics added, fn. omitted.) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, all three instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." (CT 787, 812, 814; RT 2208, 2221, 2222.) In *People v. Roder*, *supra*, 33 Cal.3d at 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. *A fortiori*, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced Appellant in another way – by requiring that he prove his defense was reasonable before the jury could deem it credible. Of course, "[t]he accused has no burden of proof or

persuasion, even as to his defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.)

There is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find Appellant's guilt on a standard that is less than constitutionally required.

B. Other Instructions Also Vitiated The Reasonable Doubt Standard (CALJIC Nos. 1.00, 2.21.1, 2.22, 2.27, and 2.51)

The trial court gave four other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 1.00, regarding the respective duties of the judge and jury (CT 781 *et. seq.*; RT 2203 *et. seq.*); CALJIC No. 2.21.1, regarding discrepancies in testimony (CT 791; RT 2211); CALJIC No. 2.22, regarding weighing conflicting testimony (CT 792; RT 2212); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (CT 792; RT 2212); and CALJIC No. 2.51, regarding motive (CT 822, RT 2225.) Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional

protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)[79]

As a preliminary matter, several instructions violated Appellant's constitutional rights, as enumerated in section A of this argument, by misinforming the jurors that their duty was to decide whether Appellant was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. For example, CALJIC No. 1.00 told the jury that pity or prejudice for or against the defendant and the fact that he has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." (CT 781 *et. seq.*; RT 2203 *et. seq.*) CALJIC No. 2.01, discussed previously in subsection A of this argument, also referred to the jury's choice between "guilt" and "innocence." (CT 787; RT 2208.) These instructions diminished the prosecution's burden by erroneously telling the jurors they were to decide between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt. They encouraged jurors to find Appellant guilty because it had not been proven that

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[79] Although defense counsel did not object to all of these instructions, Appellant's claims are still reviewable on appeal.

he was "innocent."[80]

CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the convincing force of the evidence."
> (CT 792; RT 2212.)

This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more

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[80] As one court has stated:

> We recognize the semantic difference and appreciate the defense argument. We might even speculate that the instruction will be cleaned up eventually by the CALJIC committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect *standing alone.* (*People v. Han* (2000) 78 Cal.App.4th 797, 809, original italics.)

Han concluded there was no harm because the other standard instructions, particularly CALJIC No. 2.90, made the law on the point clear enough. (*Ibid.*, citing *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739.) The same is not true in this case.

convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." The requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at 277-278; *In re Winship*, *supra*, 397 U.S. at 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (CT 792; RT 2212), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." However, CALJIC No. 2.27, by telling the jurors that "testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact" and that "[y]ou should carefully review all the evidence upon which the proof of such fact depends" – without qualifying this language to apply only to *prosecution* witnesses – permitted reasonable jurors to conclude that (1) Appellant himself had the burden of convincing them that the

homicide was not a felony murder and (2) that this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated Appellant's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

CALJIC 2.51, regarding motive, informed the jury:

> Motive is not an element of the crimes charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will, therefore, give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(CT 822; RT 2225.) As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson*, 443 U.S. at 320 (a "mere modicum" of evidence is not sufficient)). Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (*See, e.g., United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104,1108-09(motive based on poverty is insufficient to prove theft or robbery). The instruction allowed the jury to determine guilt based on motive

alone.

Similarly, CALJIC 2.21.1 and 2.21.2 lessened the prosecution's burden of proof. They authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (CT 1050-51.) (emphasis added). These instructions lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (*See People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 (instruction telling the jury that a prosecution witness' testimony could be accepted based on a "probability" standard is "somewhat suspect")).[81] The essential mandate of *Winship* – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." *See*

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[81]The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-57, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt. *But see Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 822-25(CALJIC 2.50.01 contrary to *Winship* and *Sullivan* and, under *Boyde,* 494 U.S. at 384-85, error not cured by correct reasonable doubt and presumption of innocence instructions).

Sullivan, 508 U.S. at 278; *Winship*, 397 U.S. at 364

This instruction conflicted with other instructions regarding criminal intent for finding premeditated murder by suggesting to the jurors that they need not find that premeditation in order to convict Appellant of first degree murder or, intent to kill to find him guilty of second degree murder, or to find true the special circumstances. Even though a reasonable juror could have understood the contradictory instructions to require such specific intent, there is simply no way of knowing whether any, much less all twelve, of the jurors so concluded. (*See, e.g., Francis, supra,* 471 U.S. at 322.)

Further, CALJIC 2.51 (CT 822; RT 2225) informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on Appellant to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC 2.51 deprived Appellant of his federal constitutional rights to due process and fundamental fairness. (*Winship*, 397 U.S. at 368.) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing Appellant to be convicted without the prosecution having to present the full measure of proof. (*See Beck v. Alabama*, 447 U.S. at 637-38 (reliability concerns extend to guilt phase)).

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction upon a lesser showing – that he or she must find Appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in section A of this argument.

C. The Court Should Reconsider Its Prior Rulings Upholding The Defective Instructions

Although each one of the challenged instructions violated Appellant's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence

instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC No. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].)[82] While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions

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[82] Although this Court has not specifically addressed the implications of the constitutional error contained in CALJIC Nos. 2.22, the courts of appeal have echoed the pronouncements by this Court on related instructions. (See *People v. Salas*, *supra*, 51 Cal.App.3d at 155-157 [challenge to former version of CALJIC No. 2.22 "would have considerable weight if this instruction stood alone," but the trial court properly gave CALJIC No. 2.90].

according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt.[83] "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[84] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by

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[83] *United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; *see generally Francis v. Franklin*, *supra,* 471 U.S. at 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].)

[84] A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

the other instructions which contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Appellant's jury heard separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: the oft-criticized and confusing language of Penal Code Section 1096 as set out in former CALJIC No. 2.90.[85] This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson*, *supra*, 3 Cal.4th at 943, citations omitted.) Under this principle, it cannot seriously be maintained that a single, quite imperfect instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a

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[85] As this Court has noted, the statutory language – with its references to "moral evidence" and "moral certainty" – is problematic. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503.) In combination with the instructions discussed in this argument, it is reasonably likely that CALJIC No. 2.90 allowed the jurors to convict Appellant on proof less than beyond a reasonable doubt in violation of his right to due process. (*In re Winship*, *supra*, 397 U.S. 358.)

counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

D. Reversal Is Required

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at 266-267.) Here, that showing cannot be made. The dilution of the reasonable-doubt requirement by the guilt-phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at 41; *People v. Roder*, *supra*, 33 Cal.3d at 505.)

Accordingly, the judgment must be reversed.

XVI.

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE.

The trial court instructed the jury under former CALJIC No. 2.51 (5th ed.)(Court's Instruction No. 21):

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.
> (CT 822; RT 2225.)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to Appellant to show an absence of motive to establish innocence thereby lessening the prosecution's burden of proof. The instruction violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7 & 15.)

A. The Instruction Allowed The Jury To Determine Guilt Based On Motive Alone

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. 9CT 822; RT 2225.) As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process

requires substantial evidence of guilt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104 , 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].) Here, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (Brown, J., concurring) [deductive reasoning underlying the Latin phrase "inclusio unius est exclusio alterius" could mislead a reasonable juror as to the scope of an instruction].) Accordingly, the instruction violated Appellant's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case. (U.S. Const., 6th, 8th & 14th Amends; Cal. Const., art. 1, §§ 7 & 15.)

B. The Instruction Impermissibly Lessened The Prosecutor's Burden Of Proof And Violated Due Process

The jury was instructed that an unlawful killing during the commission of robbery is first degree murder when the perpetrator has the specific intent to commit robbery. (CT 800; RT2216-2217.) Later in the instructions, the trial court defined the mental state required for robbery. (CT 817; RT 2223-2224.) However, by informing the jurors that "motive was not an element of

the crime," the trial court reduced the burden of proof on the one fact that the prosecutor's capital murder case demanded – i.e., that the jury find that Appellant had the intent to rob the victim. The instruction violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (See *Sandstrom v. Montana* (1979) 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

There is no logical way to distinguish motive from intent in this case. The only theory supporting the first degree felony murder allegation was that Appellant killed the victim Sherman Robbins in order to steal from him. Under these circumstances, the jury would not have been able to separate instructions defining "motive" from "intent." Accordingly, CALJIC No. 2.51 impermissibly lessened the prosecutor's burden of proof.

> An aider and abettor's fundamental purpose, *motive and intent* is to aid and assist the perpetrator in the latter's commission of the crime. He may so aid and assist with knowledge or awareness of the wrongful purpose of the perpetrator [citations] or he may so act because he has the same evil intent as the perpetrator. [Citations.]" (*People v. Vasquez* (1972) 29 Cal.App.3d 81, 87, italics added.)

> A person could not kidnap and carry away his victim to commit robbery

> if the *intent* to rob was not formed until after the kidnaping had occurred." [citation] . . . . Thus, the commission of a robbery, the *motivating* factor, during a kidnaping for the purpose of robbery, the dominant crime, does not reduce or nullify the greater crime of aggravated kidnaping. (*People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008, italics added.)
>
> [T]he court as a part of the same instruction also stated to the jury explicitly that mere association of individuals with an innocent purpose or with honest *intent* is not a conspiracy as defined by law; also that in determining the guilt of appellants upon the conspiracy charge the jury should consider whether appellants honestly entertained a belief that they were not committing a wrongful act and whether or not they were acting under a misconception or in ignorance, without *any criminal motive*; the court further stating, "Joint evil *intent* is necessary to constitute the offense, and you are therefore instructed that it is your duty to consider and to determine the good faith of the defendants and each of them." Considering the instruction as a whole, we think the jury could not have misunderstood the court's meaning that a corrupt *motive* was an essential element of the crime of conspiracy." (*People v. Bowman* (1958) 156 Cal.App.2d 784, 795, italics added.)
>
> In *Union Labor Hospital v. Vance Lumber Co.* [citation], the trial court had found that the defendants had entered into certain contracts detrimental to plaintiff's business solely for the purpose and with the *intent* to subserve their own interests. The Supreme Court said [citation]: 'But if this were not so, and their *purpose* were to injure the business of plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil *motive* which may inspire the doing of an act not unlawful will not of itself make the act unlawful.'" (*Katz v. Kapper* (1935) 7 Cal.App.2d 1, 5-6, italics added.)

Accordingly, it is clear that "motive" and "intent" are commonly interchangeable under the rubric of "purpose."

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the defendant was charged with child annoyance, which required that the forbidden acts be

"'motivated by an unnatural or abnormal sexual interest or intent.'" (*Id.* at 1126-1127.) The court of appeal emphasized, "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at 1127.) It found that giving the CALJIC No. 2.51 motive instruction – that motive was not an element of the crime charged and need not be proved – was reversible error. (*Id.* at 1127-1128.)

There is a similar potential for conflict and confusion in this case. The jury was instructed to determine if Appellant had the intent to rob, but was also told that motive was not an element of the crime. As in *Maurer*, the motive instruction was federal constitutional error.

C. The Instruction Shifted The Burden Of Proof To Imply That Appellant Had To Prove Innocence

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. (CT 822; RT 2225.) The instruction effectively placed the burden of proof on Appellant to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived Appellant of his federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental

Eighth Amendment requirement for reliability in a capital case by allowing Appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase].)

D. Reversal is Required

The prosecution's only theory of first degree murder was felony-murder. One of the crucial questions in this case was whether Appellant was guilty of robbing the victim Mr. Robbins, and, thus, of first degree felony-murder and the corresponding special circumstance. Whether Appellant intended to steal from the Robbins' house and, if so, when that intent arose were critical to the jury's determination as to guilt. Accordingly, this Court must reverse the judgment because the error – affecting the central issue before the jury – was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at 24.)

XVII.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court,

Appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that Appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and 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 of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2,

the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

A. Appellant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute

therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> 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." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [White, J., concurring]; *accord*, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow

those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against Appellant the statute contained twenty-six special circumstances[86] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (*See* 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage

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[86]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-two.

of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) This Court has construed the lying-in-wait special circumstance so broadly as to extend Section 190.2's reach to virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*,

72 N.Y.U. L.Rev. 1283, 1324-26 (1997).[87] It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States

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[87]The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which Appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at 52, fn. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make 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.[88] (See section E. of this Argument).

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[88] 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

B. Appellant's Death Penalty Is Invalid Because Penal Code § 190.3(a) As Applied Allows Arbitrary And capricious Imposition Of Death In Violation of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[89] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance upon it to

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pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, 33 L.Ed.2d 346, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

[89]*People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[90] or having had a "hatred of religion,"[91] or threatened witnesses after his arrest,[92] or disposed of the victim's body in a manner that precluded its recovery.[93]

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus,

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[90]*People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d 70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

[91]*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, *cert. den.*, 112 S.Ct. 3040 (1992).

[92]*People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S.Ct. 498.

[93]*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, 774 P.2d 659, 697, fn.35, *cert. den.*, 496 U.S. 931 (1990).

prosecutors have been permitted to argue as a "circumstances of the crime"aggravating factor to be weighed on death's side of the scale:

a. That the defendant struck many blows and inflicted multiple wounds[94] or that the defendant killed with a single execution-style wound.[95]

b. That the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[96] or that the defendant killed the victim without any motive at all.[97]

c. That the defendant killed the victim in cold blood[98] or that the

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[94]See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

[95]See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

[96]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

[97]See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

[98]See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

defendant killed the victim during a savage frenzy.[99]

d. That the defendant engaged in a cover-up to conceal his crime[100] or that the defendant did not engage in a cover-up and so must have been proud of it.[101]

e. That the defendant made the victim endure the terror of anticipating a violent death[102] or that the defendant killed instantly without any warning.[103]

f. That the victim had children[104] or that the victim had not yet had a chance to have children.[105]

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[99]See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[100]See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[101]See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informed others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[102]See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

[103]See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

[104]See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[105]See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

g. That the victim struggled prior to death[106] or that the victim did not struggle.[107]

h. That the defendant had a prior relationship with the victim[108] or that the victim was a complete stranger to the defendant.[109]

These examples show that absent any limitation on factor (a) ("the circumstances of the crime"), different prosecutors have urged juries to find aggravating factors and place them on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of factor (a) to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free

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[106]See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

[107]See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

[108]See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[109]See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

to find, a factor (a) aggravating circumstance on the ground that the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[110]

b. The method of killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[111]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[112]

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[110]See, e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

[111]See, e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

[112]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*,

d. The time of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[113]

e. The location of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in her own home, in a public bar, in a city park or in a remote location.[114]

The foregoing examples of how factor (a) is actually being applied in practice make clear that it is being relied upon as a basis for finding aggravating factors in every case, by every prosecutor, without any limitation

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No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

[113]See, e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

[114]See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[115]

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 principle 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].)

C. California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Trial On Each Factual Determination Prerequisite To A Sentence Of Death; It Therefore Violates The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in

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[115]The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See section C of this argument, below.)

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 impose death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, Appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 124 S. Ct. 2531 [hereinafter *Blakely*].

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, supra,* 530 U.S. at 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring, supra,* 536 U.S. at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and

compelling reasons." (*Blakely v. Washington*, *supra*, 124 S.Ct. at 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 2543.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the 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 2537, italics in original.)

As explained below, California's death penalty scheme, as interpreted by this Court, does not comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*, and violates the federal Constitution.

a. In the Wake of *Apprendi, Ring, and Blakely*, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution,

and three additional states have related provisions.[116] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

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

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[116]See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985). On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumtances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az., 2003) 65 P.3d 915.)

defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden of proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[117] 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 (RT 2482, 2484) ,"an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.*" (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against

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[117]This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

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.[118] 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.[119]

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

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[118] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.*, 59 P.3d at 460)

[119] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

[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),[120] 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 authorised by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks *Apprendi*'s instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.
>
> (*Ring*, 536 U.S. at 604.)

In this regard, California's statute is no different than Arizona's. Just

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[120] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 536 U.S. at 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 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if

murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[121] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[122] There is no meaningful difference between the processes followed under each scheme.

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 536 U.S. at 604.) In *Blakely*, the high court made it clear that, as Justice Breyer pointed

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[121]Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

[122]Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."

out, " a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.*, 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at 589-590, fn.14.) The Court has repeatedly sought to reject Ring's applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at 275; *Snow*, 30 Cal.4th at 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination

and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California* (1994) 512 U.S. 967, 972, 114 S.Ct. 2630) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (*Prieto*, 30 Cal.4th at 263; emphasis added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise,

there is nothing to put on the scale in support of a death sentence. (See, *People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d 915, 943 ("Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency."); accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *State v. Ring* (Az. 2003) 65 P.3d 915; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.[123])

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[123] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, Appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 124 S.Ct. at 2538.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[124]

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[124] In *People v. Griffin* (2004) 33 Cal.4th 536, this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, analogies

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The

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were no longer made to a sentencing court's traditional discretion as in *Prieto* and *Snow*. The Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437 [hereinafter *Leatherman*], for the principles that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation"].) (*Griffin*, *supra*, 33 Cal.4th at 595.)

In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> "Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?"

Leatherman, *supra*, 532 U.S. at 429. This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*.

Leatherman was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. *Id.*, 532 U.S. at 437, 440. *Leatherman* thus supports Appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

maximum sentence would be life without possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence would still be life without possiblity of parole unless the jury made an additional finding -- that the aggravating circumstances substantially outweigh the mitigating circumstances.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*Prieto*, 30 Cal. 4th at 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring*, *supra*, 536 U.S. at 606, quoting with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in both its severity and its finality"].)[125] 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 final 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 eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and

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[125] The *Monge* court, in explaining its decision not to extend the double jeopardy protection it had applied to capital sentencing proceedings to a noncapital proceeding involving a prior-conviction sentencing enhancement, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied 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*,] 451 U.S. at 441 (quoting *Addington v. Texas* (1979) 441 U.S. 418, 423-424, 99 S.Ct. 1804)" (*Monge v. California*, *supra*, 524 U.S. at 732 (emphasis added).)

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 any part 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; *accord*, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to Appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor –

including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[126] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. The U.S. Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring*, *supra*; *Blakely*, *supra*.)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334 [100 S.Ct.

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[126] See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51, 112 S. Ct. 466 [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

2214, 65 L.Ed.2d 159].[127]) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at 732;[128] *accord, Johnson v. Mississippi* (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding

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[127] 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.

[128] The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* (1977) 430 U.S. 349, 358, 97 S.Ct. 1197, 1204. Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954, 2964 (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington* (1984) 466 U.S. 668, 704, 104 S.Ct. 2052, 2073 (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California, supra*, 524 U.S. at 731-732.)

that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California*, *supra*, 524 U.S. at 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and certainly no less (*Ring*, 536 U.S. at 609).[129] See section D, *infra.*

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[130] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the 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.

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[129] Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[130] 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].)

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*
> (*Richardson*, *supra*, 526 U.S. at 819 (emphasis added).)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that

the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which Appellant is entitled to unanimous jury findings beyond a reasonable doubt.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are

determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at 363-364; *see also Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*Winship*, *supra*, 397 U.S. at 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 743, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value," *Speiser*, *supra*, 375 U.S. at 525, how much more transcendent is human life itself! Far less valued

interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (*See Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" *Santosky*, *supra*, 455 U.S. at 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation omitted.] The stringency of the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at 755.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson*, *supra*, 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake; see *Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly applied the *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*, 451 U.S. at 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 99 S.Ct. 1804 (1979)" (*Monge v. California, supra*, 524 U.S. at 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

Appellant is aware that this Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See *People v. Griffin* (2004) 33 Cal.4th 536, 595; *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Other states,

however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37 [833 A.2d 363, 408-409, fn. 37].)

In sum, the need for reliability is especially compelling in capital cases.

(*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at 732 ["the death penalty is unique in its severity and its finality"].) Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

3. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in *any* sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of *any* historical authority for a sentencer to impose sentence based on

aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51, 112 S. Ct. 466, [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.*, *supra*, 59 U.S. (18 How.) at 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Accordingly, Appellant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or

liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, Appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, the question whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty. Sentencing Appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) That should be the result here, too.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d at 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond

in the same way, so the death penalty is applied evenhandedly. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. at 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, *supra*, 428 U.S. at 260) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra*.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is *no* burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation

in penalty phase would continue to believe that. Such jurors do exist.[131] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*.)

6. California Law Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived Appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown*, *supra*, 479 U.S. at 543; *Gregg v. Georgia*, *supra*, 428 U.S. at 195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating

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[131] See, e.g., *People v. Dunkle*, No. S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he

has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at 269.)[132] The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Penal Code section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan, supra,* 501 U.S. at 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, for example, the written-finding requirement

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[132] 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 Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., 486 U.S. at 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[133]

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[133] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

(Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

7. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.)).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not

pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become 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 52, fn. 14.)

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*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a

particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia, supra*, 428 U.S. at 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316 fn. 21; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-eight states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v.*

Florida (1976) 428 U.S. 242, 259, 96 S. Ct. 2960) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[134]

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*, *supra*, 1 Cal.4th at 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

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[134] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The United States Supreme Court's recent decisions in *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. The application of these cases to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not

instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

9. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.

10. 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.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People*

v. Davenport (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

It is thus likely that 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.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case

depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California* (1994) 512 U.S. 967, 973 quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at 112.)

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.

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 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an

attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification 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. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In *Prieto*,[135] as in *Snow*,[136] this Court analogized the process of

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[135] "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, 30 Cal.4th at 275; emphasis added.)

[136] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, 30 Cal.4th at 126, fn. 3; emphasis added.)

determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. 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.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See sections C.1-C.5, *ante*.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike 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.6, *ante*.) These discrepancies on basic procedural protections are skewed against persons subject to loss of life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) In stark contrast to *Prieto* and *Snow*, there is no hint in *Allen* that capital and non-capital sentencing procedures are in any way analogous. In fact, the decision rested on a depiction of fundamental differences between the two sentencing procedures.

The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen, supra*, 42 Cal. 3d at 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide

jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia, supra*, 433 U.S. 584) or offenders (*Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.*)

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See section 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.)

The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen, supra*, 42 Cal.3d at 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of

pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.].) (See also *Reid v. Covert* (1957) 354 U.S. 1, 77 [Harlan, J., concurring]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [Harlan, J., concurring and dissenting, joined by Frankfurter, J.]; *Gregg v. Georgia*, *supra*, 428 U.S. at 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at 605 [plur. opn.]; *Beck v. Alabama* (1980) 447 U.S. 625, 637; *Zant v. Stephens*, *supra*, 462 U.S. at 884-885; *Turner v. Murray* (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Harmelin v. Michigan*, *supra*, 501 U.S. at 994; *Monge v. California*, *supra*, 524 U.S. at 732.)[137] The qualitative difference between a

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[137] The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or

prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply procedural safeguards used in noncapital settings to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen, supra*, at 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference – and one that was recently rejected by this Court in *Prieto* and *Snow*. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through

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innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California, supra*, 524 U.S. at 731-732.)

(j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 98, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has also been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*.)

Nor can this fact justify the refusal to require written findings by the

jury (considered by this Court to be the sentencer in death penalty cases [*People v. Allen*, *supra*, 42 Cal.3d at 1286]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Blakely v. Washington*, *supra*; *Ring v. Arizona*, *supra*.)[138]

California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

Procedural protections are especially important in meeting the acute

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[138]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.)

need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California, supra.*) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

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. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [Harrison, J., dissenting].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389, 109 S. Ct. 2969, [Brennan, J., dissenting]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at 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" (1 January 2000), published at http://web.amnesty.org/library/index/ENGACT500052000.)[139]

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 [Field, J., dissenting]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Sabariego v. Maverick*

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[139]These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

(1888) 124 U.S. 261, 291-292, 8 S.Ct. 461; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409.)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia*, *supra*, 408 U.S. at 420 [Powell, J., dissenting].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100; *Atkins v. Virginia*, *supra*, 536 U.S. at 325.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, 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, supra*, 536 U.S. at 316, fn. 21, citing the Brief for The

European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T.2001, No. 00-8727, p. 4.)

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*.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311]

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, 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."[140]

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[140] Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the

Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright, supra*; *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. Appellant's death sentence should be set aside.

XVIII.

APPELLANT'S SENTENCE OF DEATH IS DISPROPORTIONATE TO THE OFFENSE AND TO HIS PERSONAL CULPABILITY, AND CALIFORNIA'S PROCEDURES MAKING PROPORTIONALITY REVIEW AVAILABLE IN NON-CAPITAL BUT NOT CAPITAL CASES VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS.

The lack of any requirement of intra-case and intercase proportionality and of any such meaningful undertaking in this case violated Appellant's rights

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number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).)

to equal protection, U.S. Const., 14th Amend., since such review was afforded non-capital inmates at the time, and the Fifth, Sixth, Eighth and Fourteenth Amendment requirements that any death penalty not be arbitrarily or capriciously imposed, *Gregg v. Georgia,* 428 U.S. 153 (1976), that all potential mitigating factors be considered by the sentencer, and that a death-sentenced defendant receive meaningful appellate review. In addition, lack of such review violates the Eighth and Fourteenth Amendments' heightened reliability requirements for the sentencing process in a capital case.

Appellant's sentence was disproportionate to his offense and to his personal culpability, since the offense was a single-victim felony murder not involving a relationship of trust or a victim in a position of authority or unusual vulnerability. The two co-defendants both received sentences less than life, despite evidence that the crime was instigated by one of them and suggested to Appellant by one of them.

XIX.

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AMENDMENT

A few years ago, the Supreme Court of Canada placed the use of the death penalty in the United States for ordinary crimes into an international context:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan ... According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.) The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, Appellant raises this argument under the Eighth Amendment as well. (*See Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (Brennan, J., dissenting.).)

A. International Law

Article VII of the International Covenant of Civil and Political Rights

("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1992, and applies to the states under the Supremacy Clause of the federal Constitution. (U.S. CONST., art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR.[141] The United States Court of Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; *but see Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

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[141] The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (*See* 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude Appellant's reliance on the treaty because, inter alia, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (*see* RIESENFELD & ABBOT, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties* (1991) 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (*see* 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty (*see* Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582).

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on Appellant constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. He recognizes that this Court previously has rejected international law claims directed at the death penalty in California. (*People v. Ghent* (1987) 43 Cal.3d 739, 778-779; *see also id.* at 780-781 (Mosk, J., concurring); *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (*See United States v. Duarte-Acero*, *supra*, 208 F.3d at 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 (Norris, J., dissenting).) Thus, Appellant requests that the Court reconsider and, in the context of this case, find Appellant's death sentence violates international law. (*See Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

B. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular punishment for ordinary crimes – is particularly uniform in the nations of

Western Europe. (*See, e.g.*, *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (Brennan, J., dissenting.); *Thompson v. Oklahoma*, *supra*, 487 U.S. at 830 (Stevens, J., plurality opinion)). Indeed, *all* nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of August 2002) at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)[142]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Founding Fathers looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "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.'" (*Miller v. United States* (1870) 78 U.S. 268, 315 (Field, J., dissenting), quoting 1 Kent's Commentaries 1; *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227;

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[142] Many other countries including almost all Eastern European, Central American, and South American nations also have abolished the death penalty either completely or for ordinary crimes. (*See* Amnesty International's "List of Abolitionist and Retentionist Countries," *supra,* at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)

Sabariego v. Maverick (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (*Miller v. United States*, *supra*, 78 U.S. at 315-316, fn. 57 (Field, J., dissenting).)

"Cruel and unusual punishment" as defined in the Constitution is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world – including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (*See Atkins v. Virginia*, *supra*, 536 U.S. at 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world

community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Assuming *arguendo* that 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 contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (*See Hilton v. Guyot*, *supra*, 159 U.S. 113; *see also Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and Appellant's death sentence should be set aside.

XX.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Even if none of the errors in this case are found to be individually

prejudicial, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of Appellant's judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.)[143] Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The errors in this case include, *inter alia*, the erroneous and prejudicial

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[143] Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.)

"rehabilitation" of many of the jurors by the trial judge; the biased composition of Appellant's jury; the erroneous denial of defense challenges for cause against biased jurors; prosecutorial misconduct error in admitting evidence of an alleged rape; prosecutorial misconduct in closing argument; instructions which diluted the requirement of proof beyond a reasonable doubt; and instructions which invited the jury to convict solely on the basis of motive. The cumulative effect of these errors so infected Appellant's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at 643), and Appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill* (1998) 17 Cal.4th 800, 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of Appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error." (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

Aside from the erroneous exclusion of prospective jurors (Argument IV), which is reversible *per se*, the errors committed at the penalty phase of Appellant's trial include, *inter alia*, the and numerous other instructional

errors that undermine the reliability of the death sentence. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at 341.)

Accordingly, the combined and cumulative impact of the various errors in this case requires reversal of Appellant's convictions and death sentence.

CONCLUSION

For all the foregoing reasons, Appellant's conviction must be reversed and the judgment of death must be set aside.

DATED: January 12, 2012.

Respectfully submitted,

A. RICHARD ELLIS
ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I am the attorney appointed by this Court to represent Appellant, Daniel Lee Whalen, in this automatic appeal. I conducted a word count of this brief using my office's computer software (WordPerfect 12). On the basis of that computer-generated word count, I certify that this brief, excluding tables, certificates and the appendix, is 102,464 words in length.

Dated: January 12, 2012.

A. Richard Ellis
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

I, A. RICHARD ELLIS, hereby declare that I am a citizen of the United States, over the age of eighteen, an active member of the State Bar of California, and not a party to the within action. My business address is 75 Magee Ave, Mill Valley, California 94941.

On January 12, 2012 I served the within

APPELLANT'S OPENING BRIEF

on the interested parties in said action listed below, by placing a true and correct copy of the same in a sealed envelope, with 1st class postage affixed thereto, and placing the same in the United States Mail, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed at Mill Valley, California, on January 12, 2012.

A. RICHARD ELLIS

APPENDIX A

JURORS REHABILITATED AND/ OR RETAINED AND/ OR EXCUSED BY THE COURT DURING JURY SELECTION

Prospective/ Juror Name	RT/ CT	Responses to Jury Questionnaire That Indicated Propensity for Automatic Death, Automatic Life, and Other Biases.	Court and Prosecution Questioning/ Efforts at Rehabilitation	Defense Counsel's Challenge and Court's Decision
Yvonne Caselli	CT 1859-1885; RT 553-565	Strong supporter of the death penalty for all murders, and would automatically vote for the death penalty in all cases involving a conviction such as this case, reasoning "The murder was probably not necessary." Felt the death penalty was used too seldom, and admitted her inability to set aside her religious/ moral training ("eye for eye" principle) so as to apply the law per the Court's instructions. Stated "If you sin against another and take the life then prepare to lay you're your own." Would automatically vote for the death penalty in every case proceeding to penalty phase, and would automatically vote for the death penalty if defendant was found guilty of first-degree murder and the special circumstances were true. Indicated she would reject plea bargain testimony reasoning, "Plea bargaining is crap." Indicated costs would be a consideration. *Declared Victim:* Victim of mugging and residential burglary who feared violent crime on a daily basis.	To rehabilitate Caselli's statement that anyone committing a crime such as this one ought to be sentenced to death, the Court urged her to accept that she would be able to vote for LWOP after hearing all the evidence if the mitigating factors outweighed the aggravation factors. Caselli changed her response from "I really don't know at this point" to "Yes." In regards to her assertions that her principled beliefs would interfere with her objective ability to apply the law, the Court asked her if she wanted to change her answer by providing her with the substance, "...[D]o you want to change that answer?...And your answer to that is now yes that you would be able to follow the court's instructions...?" To which Caselli answered, "Yes, sir." The Court also suggested she change her earlier expressed ambiguity in her ability to accept LWOP at face value, and she acceded there as well. The Court then confronted Caselli with the rationale behind her answers suggesting cost was a consideration and interrogated her, "Well, are you going to let [your rationale] influence you in deciding which penalty to decide on?" The Court then supplied her with the conclusion, "...You're not going to put dollars before any other consideration?" To which she answered, "No, sir." The Court also prodded her to change her answers indicating she would automatically vote for death in the penalty phase of this case and all others by asking Caselli if her initial answers were wrong in both cases ("Is that a wrong answer?" and "... would that be no also?"), confusing her to the point where she said, "Just change everything." On the issue of plea bargain testimony, Caselli responded that she would "find it hard" to believe plea bargain testimony. The Court continued to question her on the issue until she agreed to listen to such testimony and be fair.	**Defense counsel challenged for cause** based on questions 12, 19, 23, 28, 29, and 32. Both defense and prosecution objected to Court's rehabilitation of Caselli. Defense counsel objected that the Court "through skillful leading questions [causes the juror] in effect to do a 180 degrees turn." Prosecutor agrees, "I think I need to join [defense's] objection... Your Honor. I think you are very skillful. That's the problem ..I wish Your Honor would be less skillful." Court denied the challenge for cause.
Jessica Jones	CT 2368-2395; RT 593-597	Strong supporter of the death penalty whose support has increased over time. Felt the death penalty was used too seldom and is never an inappropriate punishment. Would automatically vote for the death penalty for first-degree convictions. Believed in the "eye for an eye" adage and believed cost would be a consideration in favor of the death penalty.	Despite Jones' twice-repeated statement that she would vote more likely for the death penalty after listening to evidence, the Court nonetheless pressed her to concede that she would only do so if she believed the aggravation factors outweighed the mitigating ones. She was persuaded from her initial assertions of bias to proclaim, "I think I could be objective..." and ultimately to proclaim, "Yeah, I would be objective." The Court then rehabilitated her assertion that cost would be a consideration in deciding penalty by prodding her to characterize her answers as general opinion (as opposed to considerations she would exercise). The Court's inquiry resulted in Jones repeating that she would be objective and her decisions just, despite her opinionated and heavily pro-death penalty answers to the jury questionnaire.	**Defense counsel challenged for cause** based on questions 10, 12, 15, 19, 22, and 29. Court denied the challenge finding on the basis of its inquiry that Jones would fairly consider the evidence. Defense subsequently **exercised a peremptory challenge** to Jones.
Jacqueline Marchetti	CT 2398-2425; RT 2402, 2403, 2406; RT 610-611	Strong supporter of the death penalty whose support has increased over time. Felt the death penalty was used too seldom and is an inappropriate punishment only when the evidence is circumstantial. Would automatically vote for the death penalty for a first degree murder conviction, and would automatically vote for it if the conviction was based on hard evidence regardless of circumstances or mitigating evidence.	The Court explained that the death penalty was authorized but not mandatory in cases such as this one, and repeated the question asked in the jury questionnaire, "Is it your position that you are going to vote [for the death penalty] regardless of the evidence?" to which Marchetti now answered in the negative. She qualified her earlier statement as a broad one and was prodded to accept that she would not necessarily favor the death penalty in this case.	**Defense counsel challenged for cause** based on questions 15, 19, and 28. Challenge was denied. Defense subsequently **exercised a peremptory challenge.**
Robert Zabell	CT 2908-2935; RT 639-645	Strong supporter of the death penalty, who felt it was used too seldom. Would automatically vote for the death penalty in cases involving convictions of this type regardless of penalty phase evidence. Believed the death penalty should be mandatory for some crimes and should extend beyond first-degree murder. Indicated he would vote automatically for death as	To rehabilitate the answers produced by Zabell's questionnaire, the Court caused Zabell to change his unqualified answer in the affirmative to the question whether everyone convicted of a crime such as this one should receive the death penalty regardless of the evidence introduced. The Court did this by asking Zabell this question a second time with double emphasis, "Do you feel that you would *automatically* vote the death penalty *regardless* of the evidence..." The Court engaged in similar leading inquiry to change Zabell's affirmative answer to the question	**Defense counsel challenged for cause** based on questions 12, 15, 19, 28, and 87. Challenge was denied. Defense subsequently **exercised a peremptory challenge**.

		opposed to LWOP if Appellant was convicted, with no desire for additional information. Believed in the adage "an eye for an eye." Could not accept LWOP at face value and would consider costs in his decision. *Miscellaneous:* Showed signs of illiteracy/ tentative literacy.	whether the death penalty should be mandatory for any particular crime. The Court provided Zabell with an alternative interpretation of what he meant by mandatory, prompting him to agree with the Court's alternative interpretation of "mandatory" as "possible." And in regard to the issue of whether Zabell would automatically vote for the death penalty over LWOP in a case of first degree murder with a special circumstance, the Court lead Zabell to compliantly proclaim he would do so on the basis of the special circumstances, repudiating his earlier "Yes." The Court led Zabell to change his answers on several other issues including his ability to take LWOP at face value, to accept testimony from plea agreements, and to set aside feelings of pity/ sympathy and instead decide the case on the evidence.	
Ray Lindsay	CT 3629-3655; RT 3632-3636; RT 3647; RT 3652; RT 881-884	Strong supporter of the death penalty, particularly in cases of death by premeditation or in the course of another crime. Would automatically vote for the death penalty in cases involving convictions of the type at issue in this case regardless of penalty phase evidence. Feels the death penalty is not used too often. Would automatically vote for the death penalty and against LWOP. Would be unable to put the "eye for an eye" principle out of his mind to apply the principles of the Court and unable to overcome feelings of pity/ sympathy. Indicated that costs would be a consideration. *Miscellaneous:* Expressed disgust at the O.J. Simpson verdict.	In response to the Court's questioning Lindsay revealed that he would have "a little problem" with voting for LWOP as opposed to death, responding that he would "lean heavily" and "be heavily influenced" in favor of the death penalty regardless of mitigating evidence. Despite these straightforward revelations, the Court asked Lindsay if he believed he could fairly try this case at the penalty phase, to which Lindsay answered, "I think so." In regards to the issue of whether Lindsay believed the death penalty should be mandatory for any particular crime, the Court inquired into what Lindsay meant by mandatory by first asking him twice if he meant mandatory to be "automatic" and then pushing the issue even further by suggesting two alternatives of possible meaning (raising the possibility of automatic for a third time in contrast with death as a permissive punishment). The issue of cost consideration raises yet another example of the Court's aggressive rehabilitation: Lindsay clearly answered that costs would be a consideration, commenting that too much money is wasted and such expenses are unfair to victim's families. The Court instead narrated the purpose of the question and pronounced that such a factor has no place in the penalty phase, then asking Lindsay if he could promise he would not consider costs in making a life or death decision. Lindsay thereafter conceded. Similarly, although Lindsay clearly responded to the questionnaire that he would automatically vote for death over LWOP in a penalty phase of trial, the Court pressed him to clarify what he meant in light of the Court's earlier questioning. Lindsay responded, "The way the question was presented and the way you just described it seem, you know, a little bit different. But again, my answer would probably be yes..." The Court was not satisfied and pushed to rehabilitate Lindsay still further until he ultimately agreed with the Court and stated he would only do so in light of evidence produced.	**Defense counsel challenged for cause** based on questions 8, 10, 12, 13, 15, 17, 19, 20, 23, 29, 30, 32, 78, and 87. Challenge was denied. Defense subsequently **exercised a peremptory challenge**.
Steve Witt	CT 4739-4767; RT 976, 978, 980-981, 983-985	Strong supporter of the death penalty whose support grew stronger over time. Felt it was used too seldom and should be used for premeditated murder and child rape cases. Believed in the adage "an eye for an eye" and was not sure he could put this belief out of mind to apply Court instructions. Costs would be a consideration. *Miscellaneous:* Member of the John Birch Society.	The Court successfully changed Witt's answers based on rehabilitative questioning on the following issues: whether he would be able to impartially decide between death and LWOP (Witt changed his verbal responses from "Not positive" to "Yes...I will go with the rules of the court"); whether he could put the "eye for an eye" principle out of his mind and determine the appropriate penalty (Witt changed from a "not sure" written response to a verbal "Yes, Your Honor"); and whether he would be able to set aside feelings of pity or sympathy and decide the case solely on the evidence (Witt changed from a "No, not sure..." to "Yes. Your Honor"). Witt then informed the Court his personal problems would interrupt	**Defense counsel challenged for cause** based on Witt's statement that he would not be able to pay full attention to the case. Witt stated he would give the case five hours a day and the challenge was denied.

			his thinking, to which the Court answered, "I'm sure they will."	
Frank Gatto	CT 4558-4585; RT 1001-1006, 1009-1011	Strong supporter of the death penalty who has remained as such over time. Wrote twice that he favored the death penalty. Indicated that the death penalty should be a possible punishment for a crime with possible results of a death and a crime that results in a death. Felt the death penalty should be mandatory for a crime resulting in cruel/ sadistic murder. Believed in the adage "an eye for an eye."	The Court reconciled Gatto's somewhat inconsistent responses to questions 12 & 13 by leading Gatto to acknowledge his answer to the former was more of a personal opinion and was distinct from his capabilities to perform an impartial role on the jury. In regard to the issue whether Gatto believed the death penalty should be automatic in such a case, Gatto informed that his answer was "...yes." Pressed for further elaboration, Gatto stated, "... I would feel very strongly about that person receiving the death penalty."	**Defense counsel challenged for cause** based on Gatto's responses that that he would not be able to set aside his personal preference for the death penalty to fairly weigh evidence in the penalty phase. The Court rejected the challenge.
Mami Aligire	CT 4320-4345; RT 1044- 1053	Supporter of the death penalty and believer of adage "an eye for an eye." Firmly stated that all persons convicted of a crime such as this one should receive the death penalty regardless of penalty phase evidence, explaining, "Yes. The operative word is "convicted" He's been found guilty of first-degree murder, special circumstances. What more needs to be said." Felt the death penalty is an appropriate punishment for a repeat offender, serial murderer, and child abductor or assaulter. Expressed reservations at taking LWOP at face value, expecting reassurances that in no instance would such sentence be overturned. *Declared Family Victim*: Aligire's cousin was fatally shot in the back seat of his car in 1981 in Oklahoma.	The Court explained the two phases of trial and the role of aggravation and mitigation factors. Aligire replied to the Court's inquiry by stating that in a case in which special circumstances were found to be true, she would consider automatically voting for the death penalty without considering penalty phase evidence and that it would be difficult for her to vote for LWOP even if she found that the evidence in mitigation outweighed aggravation evidence. Despite her initial clarity, the Court continued to press her, leading her to concede that "...the death penalty would be most appropriate, but I would be willing to consider any mitigating information..." Similarly, in relation to Aligire's statement on the jury questionnaire that she believed the death penalty should be mandatory for particular crimes, the Court asked her if she meant "mandatory" to imply "he should automatically receive the death penalty?" Aligire responded with a "Yes." The Court, unsatisfied, pressed the issue further, asking, "There should be no possibility of [LWOP]?" Aligire replied, "Yes, absolutely." The Court then particularized its inquiry, "Okay. But you don't feel apparently that the death penalty should be mandatory under the circumstances shown by this case as you know it?" Aligire conceded, "I think all of the evidence would have to prove that to be true." Her confusion however slight becomes clear as she soon says, "Yes, I could say the death penalty," and ultimately concluded, "But like I said, I tend to probably go more for the death penalty in those circumstances." The Court asked, "Regardless of your personal feelings about the death penalty, do you believe that you could follow the Court's instructions....?" Aligire conceded, "Yes." The Court also clarified that an LWOP sentence could not be overturned and a death penalty sentence could at most obtain a new trial. After its elaboration, the Court asked Aligire, "...does that answer your concerns?" She replied, "Um-hmm." The Court confirmed Aligire's belief that she could remain fair and impartial despite her personal experience.	**Defense counsel challenged for cause** (challenging Aligire's ability to be fair and impartial) and the Court denied the challenge. Defense counsel asked no questions. (The answers were so biased against the defense that the prosecutor joked, "I think we found a foreman for Ernie [Spoke's, defense attorney]...This lady.")
Cleo Parella	CT 4859-4885; RT 1095, 1097-1102	Among the most extremely pro-death biased answers of the entire panel. Indicated she "would always impose [the death penalty] regardless of the evidence." Explained her views on the death penalty as "take a life/ pay the price." Affirmatively stated that all persons convicted of a crime such as this one should receive the death penalty, and clarified her position as "non-negotiable." Thought the death penalty was used too seldom and it should be mandatory for first-degree murder, or even for victim deaths resulting from assault. Believed the death penalty appropriate for any planned murders, and inappropriate only in cases not resulting in death. Indicated unwillingness to consider mitigating evidence. Believed in "eye for an eye" principle, and admitted her inability to put this adage out of mind. Revealed she was unwilling to accept	The Court rehabilitated Parella's biased answers to the jury questionnaire and led her to change her prior responses, prodding her by asking, "So you didn't understand?" Parella thus followed the Court's suggestions and declared she had no hesitation about her ability to be fair and impartial in deciding the correct penalty. The Court seemingly accepted this statement in lieu of the inflexible bias she revealed in the questionnaire. The Court similarly led Parella to change her responses on the issues of her ability to keep the "eye for and eye" adage out of her deliberations and her ability to accept LWOP at face value. She changed her "non-negotiable" written position that persons convicted of crimes such as this one should receive death to an oral position of "[I'm] open now." She also changed her position on allowing cost considerations to influence her decision and reluctantly agreed to consider mitigating factors if the Court allowed such factors in. When questioned by defense counsel Parella initially revealed she would not, as a hypothetical defendant, feel comfortable with someone of her mind set on the death penalty sitting on the jury, deeming it "...a risk."	**Defense counsel challenged for cause**. The Court denied the challenge based on Parella's answers in court, reasoning Parella assured the Court of her ability to follow the Court's instructions and that she "did not fully understand the original answers given."

C.H.		LWOP at face value and stated costs would be a consideration in her decision. Stated she "would in every case automatically vote for the death penalty rather than [LWOP]..." Indicated she favored the death penalty as punishment for first-degree murder and that this may be unfavorable to the defendant. *Miscellaneous:* Expressed disgust at O.J. Simpson verdict.	C.H.	
[redacted] (Juror)	CT 5638-5641; RT 590-591	Supporter of the death penalty for some time. Implied the death penalty is appropriate in all cases in which the defendant was guilty. Ambiguous on her belief in the "eye for an eye" adage.	*Voir dire* was a non-existent one page. [redacted] was not asked about her views on the death penalty at all.	C.H. [redacted] was briefly asked about the rape, but inquiry lacked adequate specificity based on prosecutor's failure to divulge details to defense about the alleged rape by one of co-defendants. (This prevented a challenge for cause based on [redacted]'s experience.) C.H.'s
	CT 5650, 5630, 5652	*Declared Crime Victim:* Raped and assaulted in 1990. Divorced from husband because he had became "very physically aggressive." Received threats and was still "very fearful" of him at time of trial.		
	CT 5653, 5654, 5803-5804; RT 590-591 C.H.	*Opinion Regarding Mental Health Testimony:* Stated she "[r]ead a lot of books" on psychiatry/ psychology and was somewhat familiar with terms related to this field. [redacted] believed psychiatric opinions were sometimes valid and sometimes not, and wrote, "[S]ome things don't need to be analyzed- feel some psychiatric reasoning is hogwash." Admitted she had herself consulted with a psychiatrist/ psychologist/ counselor. Believed such experts should play a part in the criminal justice system depending on the particular case ("[S]ome people do have mental (valid) problems, some are excuses people use.")	C.H. [redacted] was never questioned on her opinions regarding mental health testimony.	
	CT 5654; RT 590-591	*Personal Experience w/ Alcohol/Drug Abuse:* Stated father was a drug addict and alcoholic. Familiar with both and their effect on human behavior, "when you grow up with it every day you see the sad effects." Believed people became dependant on such substances because they are "unable to deal with life situations..."	C.H. [redacted] was never asked about the subject of alcohol/ drug abuse.	
P.E.				
[redacted] (Juror)	CT 5668-5671, 5674; RT 2526; RT 693-695, 697	Supporter of the death penalty, who believed persons under certain circumstances should get the death penalty, and it's appropriate "if a person I found to be a cold-blooded killer or premeditated with actual intent to kill..." Did not believe the death penalty should be extended to crimes other than first-degree murder with special circumstances, and believe it inappropriate in accidents. Revealed premeditation was a crucial factor to her deliberation when asked what she would want to know about defendant before making decision. Would not automatically vote for the death penalty. Revealed confusion over meaning of special circumstances and	The Court asked leading questions of mostly the "do you understand" variety.	Defense counsel never attempted to clarify [redacted]'s views regarding the death penalty or its acceptable parameters. Defense asked no questions at all, but passed her for cause. P.E.'s

L.H.	CT 5684	narrow view of mitigating evidence. *Personal Experience w/ Alcohol/Drug Abuse:* Wrote "when [she] was young [her] father used to drink very much and [her] parents divorced..." Believed people became dependent on such substances because they are "very ignorant and they feel they have no reason to live... very depressed people."	L.H.	
[redacted] (Juror)	CT 5698-5699; RT 815	Supporter of the death penalty who would consider it as a penalty. Explained her rationale in its favor: "if the crime was violent and done without care." Her views had not changed over the years.	The Court explained the two phases of trial and received [redacted]'s assurance that she would not decline to find guilt in the first phase to avoid reaching the second phase. Concluded her written answer was a result of misunderstanding a "convoluted question."	
	CT 5710-5711; RT 816-818	*Declared Family Victim:* "[F]ather was robbed and assault[ed] and died as a result" in April 1994. Others attributed his death to natural causes but [redacted] L.H. indicated "we think it was due to the assault." L.H.	L.H. In *voir dire* questioning [redacted] revealed her father had been gambling when hit over the head and subsequently was missing for three weeks. [redacted] explained, "And he was hit over the head, thrown out, his wallet was taken,... And it was –to us, it was a robbery... My father was in bad health. So the trauma of just being robbed, maybe pushed out of the car, could have caused the heart attack, where we think that the assault did." Immediately after [redacted]'s narration of this trauma, the Court asked the leading question: "... I just wanted to make sure that in your mind that that has nothing to do with this case, and you wouldn't?" [redacted] replied, "Oh, no." L.H.	L.H. Defense counsel did not ask any questions and passed [redacted] for cause. L.H.
P.W.	CT 5714	*Personal Experience w/ Alcohol/Drug Abuse:* Familiar with effects because of "the changes [her] daughter went through while on drugs."	P.W.	Defense counsel asked no questions related to substance abuse.
[redacted] (Juror)	CT 5728-5730, 5733, RT 789-793	Supporter of the death penalty who believed some crimes are beyond human tolerance and whose views had not changed over time. Believed the death penalty was used too seldom and believed a person convicted of a crime similar to this one should receive the death penalty depending on circumstances at the time of the crime. Felt the death penalty should be mandatory for crimes such as "horrendous, cold-blooded, torture" where a victim was left a "vegetable" for life, regardless of mitigating evidence. Indicated the death penalty would be appropriate based on "prior record of the criminal" and "type of crime & deaths..." Believed the death penalty inappropriate only in cases of accidental death. Also indicated that she wouldn't be interested in any evidence personal to the defendant in reaching a decision. Revealed that costs would be a consideration and the appellate process should be limited, explaining "I believe there should be a limit as to how far and how long this could be done."	Court inquired into the scope of [redacted]'s statement that she would consider circumstances at the time of the crime in her deliberation, to confirm that she would consider other penalty phase evidence as well. Brief inquiry into her belief that torture validates a death penalty to clarify that she meant the death penalty to be an option, not mandatory. The Court also instructed [redacted] that she could not consider costs in her decision. P.W. Prosecution inquired into only the issue of plea bargain testimony, confirming that [redacted] could listen to such evidence without bias. P.W.	Defense did not ask any P.W. questions and passed [redacted] for cause. Prosecution also passed [redacted] for cause. P.W.
	CT 5744	*Personal Experience w/ Alcohol/Drug Abuse:* Familiar, "to a point" with alcohol/ drugs and their effects. Believed people became addicted to such substances because of "weakness in personality."	P.W.'s No inquiry by the Court as to [redacted]'s opinions on substance abuse. P.W.	No inquiry by defense as to [redacted]'s opinions on substance abuse.
	CT 5737, 5750		*Voir dire* failed to conduct basic inquiry into unanswered questions.	

L. G-H.		*Miscellaneous:* Left many questions on questionnaire unanswered, drawing line through space in lieu of answering. Wrote the questionnaire made her uncomfortable by inquiring into issues "...no one's business but [her own]."	G-H.'s	G.H's
[redacted] (Juror) C.P.	CT 5758-5760, 5673; RT 826-830 CT 5774	Supporter of the death penalty in cases where the factual evidence proved "beyond a shadow of doubt malicious crime & murder was committed" and in cases of criminals with a history of violent crime who present a great threat to society. Viewed the death penalty in the latter case as "a human and civic duty to protect those who cannot protect themselves." Believed the death penalty should be mandatory for any "brutal murder [and] murder involv[ing] brutal sexual crimes." Believed the death penalty inappropriate only when "facts are not proven and when murder is not committed." Revealed costs would be a consideration. Indicated some criminals would say anything for a plea agreement. *Personal Experience w/ Alcohol/Drug Abuse:* Extensive contacts with substance abusers, including: an uncle by marriage who was a recovering alcoholic; a brother-in-law who was a "speed freak;" and a cousin's ex-husband who was also a recovering alcoholic. Familiar with effects and listed several reasons for such addiction.	In response to [redacted]'s indication of a mandatory death penalty for "brutal murder" the Court inquired whether she meant it should be an optional punishment, and buttressed its inquiry, "In other words, you would have to know the circumstances of any particular case before you would decide..." [redacted] C.H. ceded to this leading questioning, retracting her earlier assertion it should be mandatory. The Court similarly led [redacted] to change her mind in regards to her ability to refrain from considering cost in her decision. G.H.'s G.H Prosecution confirmed [redacted]'s ability to fairly evaluate plea bargain testimony.	Defense asked only about [redacted]'s ability to take LWOP at face value, to which inquiry she agreed she could put out of her mind the possibility of a change in laws.
[redacted] (Juror)	CT 5788-5795, 5804, 5811; RT 919-935	Strong supporter of the death penalty who supported it in cases of premeditated crime involving past criminal history and admitted she had "not much tolerance for crime." She was "sick and tired of appeals & paroles & shortened time served." Would support a mandatory death verdict for cases similar to this one regardless of evidence introduced in the penalty phase, on the reasoning "[he] was armed and invaded a home with robbery planned...he was armed in case he needed the gun." She stated she would be able to have an open mind and base her decision only on the evidence but "would have a hard time...if it were a cold-blooded act." Believed the death penalty was used too seldom and that too many prisoners are released on parole or appeals, wasting tax money. Stated that cost would be a consideration and expressed frustration at the use of tax money to pamper inmates. Indicated the death penalty should be both a possible and mandatory punishment "...for murder, violent crimes, & perhaps rape under certain circumstances." Felt it was an appropriate punishment in cases of "murder- brutal child abuse, convicted rapist w/ repeated offenses." Found the death penalty inappropriate in cases including "any possibility of doubt...self-defense or accidental." Believed in the "eye for an eye" adage sometimes, based on her religious conviction, her "upbringing & moral being." She indicated uncertainty in her ability to	The Court explained the two phases of the trial and the role of aggravation and mitigation factors. The Court reminded [redacted] that Appellant had yet to be found guilty. In response to the Court's inquiry, [redacted] revealed she would have hesitancy in voting for LWOP if she felt the evidence indicated towards it in the penalty phase, and admitted she would not impose either death nor LWOP in such case automatically. Clarified her prior written statement that certain cases warranted mandatory death penalty after the Court posed two alternatives: "...did you mean that it should automatically be imposed if a person is found guilty of it, or did you mean that it should be an available penalty?" Court similarly urged [redacted] to clarify her prior written statement of uncertainty in her ability to put aside her personal feelings, leading her to declare to the Court she could follow its instructions. The Court also prodded her to concede that her repeated consideration of tax money in such cases were merely general concerns by asking, "Those were your feelings in general?" to which she replied, "Yes." The Court inquired into [redacted]'s bias against drug use, leading her to say, "It would cause me to wonder whether or not to believe them if they were on drugs at the time." The Court replied, "Sure. It would cause anybody to question whether or not to believe that person. The question I have to you is drugs so big a thing to you that merely the fact that it's shown that this person was taking drugs is gong to cause you to automatically be prejudiced against that person so that you could not fairly evaluate the testimony?" [redacted] responded, "No. Not automatically." C.P. C.P. C.P. C.P. C.P. C.P.	Defense counsel and prosecution pass [redacted] for cause. C.P. Defense counsel confirms that that the mere fact of drug use would not tiger prejudice in [redacted] mind. Explains the role of special circumstances and the history of LWOP, and confirmed her ability to take LWOP at face value. C.P.

B.S.	CT 5799-5800 CT 5799 CT 5804, 5807-5808 CT 5810	set aside her personal feelings to follow the Court's instructions. Straightforward about her "disgust with violent crime, appeals, and actual time served." Further revealed her bias with the following three statements: "...I simply have a problem with compromising penalty for first-degree murder;" "I don't believe it is right to avoid ultimate punishment by plea bargain;" and "My sympathy or pity would be reserved for the victim & family." *Declared Victim:* Revealed she had observed "young males break into a neighbor's home," and was herself a victim of a car burglary. *Connections To Law Enforcement:* Knew Jim Horn and Him Calvillo, Stanislaus Co. Sheriff's Dept. Phipps was also a member of Neighborhood Watch. *Personal Experience w/ Alcohol/Drug Abuse:* Knew a neighbor who "drank throughout the day- every day- hides containers, etc." Stated "I don't tolerate alcoholics/ drug addicts." Indicated that evidence of alcohol abuse or illegal drug use would make it difficult for her to be fair in deciding the case, stating, "Yes. Have no use for illegal drugs. Tie it in with crime sometimes. A person has a right to choose to take or not to take drugs." *Miscellaneous:* Strong feelings about the O.J. trial, declaring it an "Outrage!! A farce! Money played a big factor!"	B.S.	
[redacted] (Juror) L.K.	CT 5818-5819; RT 955-957 CT 5834, 5837 B.S.	Supporter of the death penalty who believed it is "appropriate if the evidence can prove that an individual has murdered someone," "[I]f a murder has been committed during a crime and when someone purposely seeks out and murders another." Believed it inappropriate only in cases of accidental death. His views have not changed in course of 52 years. *Personal Experience w/ Alcohol/Drug Abuse:* Familiar with effects of alcohol; "I have seen members of my family destroyed as a result of alcohol." Someone close to [redacted] also had a problem with drugs.	[redacted] was questioned on *voir dire* only about his attitudes towards plea bargains. B.S. No inquiry was made into [redacted]'s personal experience with substance abuse. B.S. L.K.	Defense counsel and prosecution pass [redacted] for cause. B.S. B.S. Defense inquired into [redacted]'s position, to reveal that he worked for the Federal Government (water contracts). Defense counsel also confirmed [redacted]'s opinion that the death penalty should be an option, but not mandatory.
[redacted] (Juror)	CT 5848, 5851; RT 809-812 CT 5859, 5861-5862; RT 808 CT 5864	Would consider the death penalty as a punishment and believed in "eye for an eye" adage. *Connections to Law Enforcement:* Great uncle was retired police officer. Cousin arrested for car theft and sentenced to prison, where she visited him. *Personal Experience w/ Alcohol/Drug Abuse:* Familiar with effects of drugs and alcohol on people and believed it a weakness.	Court confirmed [redacted]'s willingness to fairly listen to plea bargain testimony. Prosecution confirmed [redacted]'s willingness to impose the death penalty. L.K. L.K. Court confirmed that [redacted] barely knew her great-uncle and she would not be biased based on this connection to law enforcement.	Defense counsel and prosecution pass [redacted] for L.K. cause. Defense counsel asks no questions.

S.R.

[redacted] (Juror) J.A.	CT 5878-5880, 5889; RT 936-937 CT 5860, 5890 CT 5889, 5897 CT 5894	Would consider the death penalty as a punishment, and felt it appropriate "[i]f a murder is committed with no provocation." *Declared Family Victim:* Brother's home was robbed. Father had his truck stolen. *Connections to Law Enforcement:* Had extensive contacts with district attorneys (and was acquainted with employees of their office) , policemen (brother-in-law) Don Stahl and brother-in-law policeman in Oakdale), and lawyers. A member of Neighborhood Watch. *Personal Experience w/ Alcohol/Drug Abuse:* Familiar with alcohol and drugs and their effect on people. Believed people became addicted to such substances because of "their inability to cope with the challenges life presents them."	S.R. The Court confirmed that [redacted] connections to law enforcement would not cause her to be impartial and fair, asking "And none of those things would... tend to make you side with the D.A.'s office in this case?" [redacted] answered, "No." S.R. S.R.	Defense counsel and prosecution pass [redacted] for cause. S.R. Defense counsel reaffirmed that [redacted] would not hesitate to vote not guilty because of her relationship with her brother-in-law Don.
[redacted] (Juror) M.C.	CT 5910-5911 CT 5919 CT 5924	Supporter of the death penalty who felt it should be mandatory "when a life is taken and... permitted by law." Believed in "eye for an eye" adage and deemed it applicable "if someone is killed and the circumstances (evidence) warrant..." *Connection to Law Enforcement:* [redacted] knew Cliff, deputy sheriff in court building. J.A. *Personal Experience w/ Alcohol/Drug Abuse:* Familiar with alcohol and drugs and their effect, had opinions about the cause of such addictions. Her brother was an alcoholic.		
[redacted] (Juror)	CT 5938-5940, 5943-5945 CT 5954	Supporter of the death penalty to the extent she felt testimony and evidence proved against defendant. Felt the death penalty should be mandatory for robbery-murder such as involved in Appellant's case, writing "...to take another person's life and to rob that person and kill them is wrong and they should pay for their crime." Believed the death penalty should also be mandatory for repeated sex offenders. Believed it was used too seldom and that it is appropriate when "people have harmed others repeatedly with no remorse." Deemed the death penalty inappropriate only in cases in which defendant had not physically harmed any person. Indicated costs would be a consideration and clarified, "I still feel that convicted persons causing bodily harm that have repeated offense (sic) should be given the death penalty." Distrusted plea bargains on the rationale that a person who commits a crime should be tried and by entering a plea bargain is trying to "use the system to get out of trouble" and is "usually guilty." *Personal Experience w/ Alcohol/Drug Abuse:*		

C.E.		Observed people drunk but did not have an opinion as to the causes.	C.E.	
[redacted] (Juror)	CT 5968-5970, 5973; RT 843- 846	Supporter of the death penalty to the extent "...a person is found guilty and there's no doubt and the crimes (sic) bad enough..." Felt the death penalty was used too seldom "...otherwise there would not be so many people in prison!" Stated the death penalty should be mandatory "for murder, only if it's not in self-defense." Also felt it appropriate in cases of cold-blooded murder and inappropriate only "when it's self-defense." Indicated costs would be a consideration in her decision. *Connection to Law Enforcement:* Knew Dave Heald, a homicide detective sergeant. [redacted]' uncle was also a policeman. C.E.'s *Personal Experience w/ Alcohol/Drug Abuse:* Familiar with the effect of alcohol and drugs on people: "[U]s people usually do stupid or crazy things when the (sic) get drugs or alcohol in their systems."	Court confirmed that [redacted] did not intend the death penalty as a mandatory punishment by asking, "...[D]id you mean by that the death penalty should be an optional penalty for a conviction of murder?" [redacted] replied "Yeah." The Court C.E. similarly clarified [redacted]'s response on the issue of costs as a consideration by C.E.'s explaining her the law and asking, "So you won't consider that subject at all; is that correct?" [redacted]s replied "Yeah." C.E. C.E. Prosecution inquired into the issue of plea bargain testimony, confirming that [redacted] would not disregard such testimony on that basis alone. Prosecution asked [redacted], C.E. "Are you kind of shy?" She replied "Yeah." Prosecution then confirmed [redacted]s C.E.'s ability to maintain and deliver her opinions.	Defense counsel and prosecution passed [redacted]s for cause. C.E. Defense counsel asked [redacted]s C.E. no questions..
Dennis Moon	RT 434-441	Stated that the death penalty should be mandatory for premeditated murder. *Family Violence:* Indicated his brother-in-law beat a man to death. *Juror Acquaintance:* Indicated he knew another prospective juror Scott Cole.	The Court explained the two phases of the trial and then leadingly asked Moon, "...[A]re you *automatically* going to vote for the death penalty *without hearing anything else just based on the crime* the defendant is charged with it he's found guilty (emphasis added)? To which Moon compliantly answered "No." The Court proceeded from this initial inquiry to prod Moon to clarify his response: "No when you said [the death penalty] should be mandatory [for premeditated murder], did you mean everyone who's convicted should be put to death regardless of the circumstances, or did you mean it should be a possible penalty for that particular crime?" Moon answered, "A possible penalty." The Court inquired into circumstances. Moon revealed he had only a little personal knowledge of the circumstances, that he was not present at the crime, and that his brother-in-law was presently in jail and not yet convicted. He responded this circumstance would in no way influence his decision in this case. The Court inquired into Moon's relationship with Cole, yielding Moon's conveyance that Cole was not his supervisor, they were only acquainted casually and not socially, and saw him only 2-3 times a year. Moon stated that he would not either tend to agree or disagree with Cole's position. Moon affirmed that he would be able to function as a juror in tandem with Cole.	Neither the defense nor prosecution challenged Moon for cause. Defense counsel inquired whether Moon knew the victim killed by his brother-in-law, Moon answered in the negative. Moon revealed his brother-in-law's last name to be Brown, and stated he had not been alerted to the possibility to being a witness. Prosecution followed up with a few more questions on this issue.
Julie O'Kelly	RT 442-450	Indicated her belief that everyone convicted of crime such as this one ought to receive the death penalty, reasoning, "If they kill someone just because they are there, it should be used. It should also be considered for them." In response to a question asking what she would want to know about defendant before deciding the punishment, she wrote "I don't think I'd want to know anything about it." Stated that cost would be a consideration in her decision.	The Court explained the phases of trial, then asked O'Kelly if her affirmative answer meant that she would automatically vote for the death penalty in this case if Appellant was found guilty, regardless of the evidence. O'Kelly replied her decision would not be automatic, but rather would depend on the circumstances. Upon questioning she conveyed her ability to listen to the evidence and her refusal to automatically vote for either death or LWOP without first hearing the circumstances. The Court then urged her to concede that she would be able to hear evidence regarding Appellant's background in the penalty phase and consider all evidence in her decision. The Court also informed O'Kelly that cost could not be a consideration, leading her to concede she could follow this instruction. Court proceeded to the issue of plea bargains, supplying O'Kelly with packaged statements she could either accept or not: "And so	Both defense counsel and prosecution passed O'Kelly for cause.

		Victim of Crime: Indicated she was fearful after being mugged. "I looked at everyone like they were going to attack me and take what I have." *Personal Experience w/ Alcohol/Drug Abuse:* Indicated either she or someone close to her had a problem with alcohol, explaining the use of alcohol would make it difficult for her to decide the case, "where [her] decision could be swayed to be partial to an alcoholic sympathy." *Acquaintance with Witness:* Rick Sasso	what you really meant by that is if someone were to enter a guilty plea and express remorse... that might be a factor that you would consider?" O'Kelly affirmed this statement made by the Court, and denied that she would hold a lack of a plea bargain against a defendant. Prosecution questioned O'Kelly to receive her assurance that she would not tend to disbelieve a witness who entered into a plea bargain. The Court rehabilitated O'Kelly's fear by providing her with a conclusory question: "Nonetheless, regardless of the fact that you are fearful of that situation, that's not going to influence you in deciding this case?" O'Kelly answered in the negative. The Court questioned O'Kelly in relation to her indicated alcohol bias, yielding her to state that she would not automatically vote for the death penalty or LWOP based on whether the victim or defendant was an alcoholic, respectively. Prosecution questioned O'Kelly, "You know Rick Sasso?" She replied, "I know him from school. I've been out of school for 14 years. That's the last time I seen him." She stated they were acquaintances, not close friends, that she hadn't heard anything about him over the years, and that she had not formed an opinion at that time that would cause her to judge him as either truthful or not.	Defense counsel asked O'Kelly whether the fact that a witness was an alcoholic would lead her to give greater credence to their testimony O'Kelly denied any such inclination.
Diane Oliver	RT 450-458	Stated her belief that everyone convicted of a crime such as this one should receive the death penalty regardless of evidence in the penalty phase, reasoning "Yes, he did it then he's guilty." Stated she was "not sure" if she would hesitate for vote for first-degree murder or special circumstance just to avoid the penalty phase. *Miscellaneous*: Stated her boyfriend has had problems with the court system and she didn't believe the result was fair.	The Court explained the two phases of trial and then asked Oliver whether she would "...automatically vote toe impose the death penalty without listening to any of the other evidence?" She changed her answer after the Court's preceding clarification and replied, "No." She replied that she would have to hear the evidence before making a determination to impose either the death penalty or LWOP, and would be able to impose either of the two sentences. The Court led Oliver to change her uncertain answer to the question whether she would hesitate to find against defendant in the guilty phase to avoid reaching penalty by asking her to reevaluate the question in lieu of her discussion with the Court thus far. Oliver reveled nonetheless her remaining doubts, as she responded to the Court in the following dialogue. The Court asked "In other words, you would find the defendant guilty or not guilty based on the evidence regardless of what would happen the next phase of the trial; is that correct?" Oliver responded, "Yeah, I guess." Unsatisfied, the Court pressed, "Yes?" yet Oliver still omitted to affirm yes, choosing instead to nod her assent. The Court inquired into the issue of her boyfriend's experience, "You don't think that that would affect your decision as a juror in this case?" Oliver responded that it would not nor would she tend to favor either side based on the experience. Prosecution inquired into the issue as well, revealing that pot was involved but her boyfriend was ultimately convicted for methamphetamine, that she did not meet him until after his conviction (on bail). Prosecution confirmed that Oliver had never been arrested on a drug charge and that she did not know much about methamphetamine and would base her decision on knowledge given her in this case alone.	Oliver was passed for cause. Defense counsel inquired to ascertain Oliver's comprehension of LWOP and received her asserted capability to take it at face value.

Thomas Pereira (Excused)	RT 458-466	Believed that the death penalty should be mandatory for particular crimes, reasoning, "Yes, I feel it should be in black and white." Indicated the plea bargain witnesses would lead him to reject their testimony on the rationale "Yes, thy could be trying to give false immunity or a better deal." *Miscellaneous:* Difficulty with reading/ writing and retention of subject matter.	The Court pressed Pereira to elaborate on his belief that the death penalty should be mandatory for particular crimes, precisely rape. The Court then took care to distinguish that belief as irrelevant to this case because of the nature of crime involved here, leading Pereira to affirm that he would not automatically vote for death in a case such as this one. Pereira also conveyed his ability to listen to evidence and follow the Court's instructions. The Court convinced him to change his written opinion on plea bargains, supplanting his response by inquiring, "In other words, that's not going to influence you one way or the other in deciding the case; is that correct?" Pereira responded "Right." Court inquiry revealed the Pereira had problems with reading and writing, and that he "...can't remember...name[s]." The Court distinguished Pereira's difficulty with names from his ability to remember the substance of what people say/do, and revealed his willingness to ask for help reading and matching names to persons viewed in court. Prosecution questioned Pereira to reveal his difficulty at distinguishing between Michelle and Melissa at trial, and difficulty at reading a big stack in short time period.	Defense counsel initially passed for cause and prosecution challenged for cause. Challenge was denied. In addressing the Court the prosecution mentioned prior convictions, compelling defense to challenge for cause. Pereira was excused. Defense counsel inquired to ascertain Pereira's ability to take LWOP at face value.
Terrance Silva	RT 466-469	Indicated the death penalty should be mandatory for first-degree murder, kidnapping involving victim death, and treason.	The Court inquired into the scope of "mandatory," asking "...[W]hen you say mandatory did you mean by that any person who is convicted of that crime should automatically be put to death regardless of the circumstances?" Silva answered, "No. There's always special circumstances." The Court's questioning led Silva to affirm that he would listen to the evidence before arriving at a decision. Prosecution inquired to affirm that Silva's military experience would have no effect on his decision.	Defense and prosecution passed Silva for cause. Defense counsel inquired into Silva's opinion on alcohol and drug addiction to no avail.

Clifford Smith (Excused)	RT 470-474	Stated that everyone convicted of a crime such as this one should automatically receive the death penalty regardless of the evidence in the penalty phase. Expressed inability to take LWOP at face value.	The Court explained the two trial phases. The Court then tediously attempted to compel its desired answer (namely that Smith would deliberate and not automatically impose the death penalty) by elaborating the details of the trial phases and penalty phase in particular and hand-holding Smith through a series of questions leading to a conclusion that he would listen to penalty phase evidence and make his decision based on this decision. However, Smith nonetheless buttressed his written pro-death bias in dialogue with the Court, "[I]f a person is convicted of a crime, a serious crime, like murder, I believe that the book should be thrown at them. I think they should be prosecuted to the fullest extent of the law." Court then inquired into Smith's views on LWOP, seeking to change his mind and instead confused him to the point where he responded in the affirmative when asked if he would be able to follow the Court instruction to put his reservations about LWOP out of his mind, but seconds later recanted, telling the Court, "No. That's not correct. I would say something (indicating he would express his belief that LWOP could not be taken at face value)."	Defense counsel challenged Smith for cause on the basis of his inability to take LWOP at face value. The Court granted the challenge and excused Smith.
Janis Flaumenhaft	RT 522-524	Would consider the death penalty if guilt for first-degree murder was proved. When asked whether the death penalty should be mandatory in certain cases, replied "part of me says yes."	Court made no inquiry into this juror's responses.	No challenges for cause made. Defense counsel inquired into Flaumenhaft's feelings towards the death penalty, revealing he could not think of any circumstances in which the death penalty should be mandatory. However,

				Flaumenhaft revealed he would consider imposing the death penalty whereas he would only "possibly" consider imposing LWOP.
Matthew Figures (Excused)	RT 525	Opposes the death penalty.	Responded to the Court's inquiry, Figures reaffirmed that there were no circumstances in which he would vote for the death penalty. The Court asked again, "...If the evidence...showed that this crime was exceedingly vicious...under no circumstances do you believe that you could impose the death penalty; is that correct?" Figures responded, "I don't believe I could."	Prosecution challenged Figures for cause and the Court dismissed him.
Gary Fainter (Excused)	RT 526	N/A	N/A	Defense stipulated to a hardship. Fainter excused.
Ronald Evans (Excused)	RT 527-532	Indicated that everyone convicted of a crime such as this one should receive the death penalty regardless of evidence in penalty phase, reasoning "Yes. If you use a shotgun and you plan to kill." In the following answer stated that he would listen to evidence and instructions, claiming, "I feel I'm always open to the evidence."	Court inquires into the inconsistencies in Evans' answers, to which he replied, "I believe in the death penalty in cases where it's warranted...by law." Revealed a predisposition for guilt, "I don't feel that a shotgun shooting in the form of a robbery was accidental." In response to question, "...[Y]ou're saying that if you believe that the defendant intentionally kills this person with a shotgun during a robbery on purpose that you would automatically vote for the death penalty regardless of any other evidence; is that correct?" Evans replies, "Good possibility, yes." Court continues the inquiry, explaining the phases of trial, and leading Evans to concede he would fairly and impartially "listen to both sides and make up [his] mind from that" in the penalty phase.	Defense stipulated to economic hardship. Evans excused.
Thomas Desimone (Excused)	RT 532-542	In response to question whether he believed in the "eye for an eye" adage, checked boxes indicating both yes and no.	Court questioned Desimone regarding whether he was exposed to information in the Bee, Desimone confirmed he did not recall anything to render him opinionated	Prosecution challenged Desimone for cause because of

		Connection to Law Enforcement: Presently a counselor at the Department of Corrections. (8.5 years) *Miscellaneous:* Desimone was neighbors with defense counsel 10 years ago.	about the case. He promised to disregard any recollections and decide the case on evidence alone. Court also inquired into Desimone's acquaintance with defense counsel, resulting in Desimone proclaiming his impartiality notwithstanding. The Court also confirmed his ability and willingness to vote for either punishment after hearing the evidence in the penalty phase. Prosecution led Desimone to reveal that past violent history would be an aggravating factor in his decision. Also led him to admit he did not recall meeting Appellant: "I can honestly say I'm sure he was there but I cannot recall him individually." (During this inquiry Appellant conveyed to the Court that he had met Desimone in the guidance center). Prosecution also inquired into Desimone's socialization with defense counsel, revealing they had spent the Fourth of July together.	his prior contact with Appellant and the Court dismissed him. Defense counsel inquired into Desimone's ambiguous "eye for an eye" response, yielding Desimone's response, "That an eye for an eye is not a cut and dry attitude. Does not apply across the board for me."
David David	RT 542-546	In response to question whether he believed in the "eye for an eye" adage, checked boxes indicating both yes and no.	Court generally inquired into David's comprehension of the two phases of trial, his ability to hear the evidence and vote for either the death penalty or LWOP, and his impartiality notwithstanding that some people in the general juror pool were "familiar faces."	No challenges for cause made. Defense counsel inquires into David's ambiguous "eye for an eye" response by asking, "…[d]o you believe in [it]?" David responded "No."

Ninette Copp (Excused)	RT 546-547	*Declared Family Victim:* Indicated to the Court that her "mother's home was broken into and she was raped at knife point."	Conveyed her inability to listen to the evidence and judge Appellant's case based on court proceedings.	Defense counsel challenged Copp for cause and the Court excused her.
Scott Cole (Excused)	RT 548-550	Indicated that he would automatically disregard plea bargain testimony, reasoning: "A lot of times witness is not telling the truth. Just anything to help him or herself."	The Court pursued the issue of plea bargain testimony by asking, "Is it your feeling…that under any circumstances you're not going to consider the testimony of that witness because of the fact they had a deal?" Cole replied, "…yeah. That's the way I believe."	Prosecution challenged Cole for cause based on his responses on the issue of plea bargain testimony and the Court excused him.
Linda Climer (Excused)	RT 551-553	*Declared Victim:* Was molested as a child and her home was twice burglarized.	Court obtained Climer's assurances she could remain impartial in this case despite her previous victim history. Climer then narrates to the Court her inflexible employment situation.	Prosecution and defense stipulate to hardship; Climer is excused.
Manuel Cadena (Excused)	RT 566-569	Supporter of the death penalty who would vote for it regardless of evidence in the penalty phase.	Revealed to the Court that he believed in the death penalty for certain crimes and that his views had not changed (he had always felt this way). The Court then proceeded to try and rehabilitate Cadena despite his clear statement of belief in automatically imposing the death penalty in the penalty phase, asking with emphasis added, "Do you believe that *regardless* of what evidence is going to presented in that phase of the trial *regardless* of what you hear at that time that you're still going to vote for the death penalty *regardless* of what the evidence is?" Cadena answered, "Yes." The Court continued to press on despite Cadena's disqualifying responses, asking "So you don't care in other words what the evidence is in that second phase of trial, you feel that you're going to cote for the death penalty anyway?" Cadena answered "Right." The Court persevered, "That would be under any circumstances?"	Defense counsel challenged Cadena for cause based on his propensity for automatic death; the Court reluctantly excused him.
Billy Bryan	RT 569-573	Supporter of the death penalty.	Bryan explained to the Court that if a person intentionally takes a life then his own life should be forfeited. Court affirmed that Bryan would willingly listen to evidence in the penalty phase and would be prepared to vote for	Defense and prosecution pass Bryan for cause.

			either the death penalty or LWOP.	Defense counsel inquired into Bryan's past jury experience revealing that the two juries he sat on reached verdicts.
Barbara Hampton (Excused)	RT 670-685	Supporter of the death penalty. Indicated that everyone convicted in a case such as this one should receive the death penalty regardless of evidence in the penalty phase, explaining, "Yes. If they have a loaded gun, commit a robbery my estimate is they intend to use it." Stated that the death penalty should be mandatory for certain cases, reasoning, "I feel if a murder is committed and guilt is evidence then it should be mandatory especially for the young and innocent and the elderly." Indicated costs would be a consideration in her decision, reasoning "Yes. Incarceration costs are enormous now and will only grow." *Prior Experience w/ Law Enforcement:* Served as a juror three times, of which one case was a murder case. Hampton's nephew went through the police academy. Hampton's brother was convicted on drug charges and remained incarcerated (5 years).	After questioning by the Court and an explanation of the two phases of trial, Hampton stated. "But I had told you that I believe in [the death penalty] but that I would have to hear all of the evidence." On the issue of the death penalty as mandatory, the Court asked. "...[D]id you mean that anyone who is convicted of such a crime should automatically receive the death penalty?" Hampton responded, "If they're found guilty, yes" and indicated when she said mandatory that's exactly what she meant. The Court then tailored the inquiry to this case, asking if Hampton would automatically vote for the death penalty if Appellant were convicted. She responded in the negative, but expressed confusion when the Court altered the scope of the questioning, asking if the death penalty should always be imposed in all cases. Hampton subsequently conceded to the Court's persistence, stating "...I would have to hear all of the evidence and the circumstances." The Court also led Hampton to clarify her position on the costs of incarceration by recasting her answer as a general opinion. Revealed uncertainty as to her ability to fairly listen to plea bargain testimony. Hampton revealed that her prior juror experience in the murder case was "upsetting and remained so for such time." She confirmed that "...[I]t was pretty bad but I think I can be fair." Also denied that her nephew would influence her in this case. Indicated that she didn't feel her brother's trial was fair based on the evidence. Finally, the Court inquired into Hampton's answer to the	The Court excused Hampton after she revealed it would be difficult for her to be fair due to her likely sympathy for the elderly victim. In response, defense counsel said to the Court, "She certainly had difficulty understanding what you were talking about."

		Declared Family Victim: Hampton's niece was injured in a violent crime.	questionnaire indicating similarity in age would keep her from being fair and impartial. Hampton admitted her inability to be impartial.	
Gale Fordmellow	RT 686	Stated she would never under any circumstances impose the death penalty regardless of the evidence.	Court asked Fordmellow: "You…said you would never under any circumstances impose the death penalty regardless of the evidence?" Fordmellow replied, "That's true." The Court repeated, "That's true. There is no crime that you can think of and no person that you can think of who committed that crime which you would vote the death penalty?" Fordmellow replied, "Not even if it was a member of my own family." The Court replied, "All right. You're excused…"	Court excused Fordmellow without taking the effort at rehabilitation, such as was taken with the numerous jurors who showed a reverse propensity.
Mozella Evans	RT 687-693	Supporter of the death penalty who felt it should be mandatory for cases of intentional murder.	Evans explained his feelings about the death penalty to the Court, ""When he murders somebody deliberately. You set out to kill him…I think you should be put to death." The Court explained the phases of trial, then asking, "…[A]re your feelings such that you believe that the death penalty should be mandatory? In other words, that you would automatically vote for it?…[D]o you feel that if the evidence showed that the crime was premeditated that you would automatically vote for the death penalty?" Evans replied, Yes, sir." The Court followed, "And that would be regardless of whatever evidence was introduced during the penalty phase…things about the defendant's background?" Evans replied, "No, would have no bearing on it." The Court continued, "So he could bring in any kind of evidence that he wanted about how tough life he'd had and so forth and so on and you would not take that into consideration?" Evans replied, "No." Immediately after defense counsel challenged for cause based on Evan's disqualifying responses, the Court allowed prosecution to ask Evans a question. Prosecution informed Evans that it was the law to consider aggravation and mitigation factors and posed the	Defense challenged for cause based on Evan's repeated inflexibility to consider mitigating factors in the penalty phase, and renewed the challenge based on questions 15 and 29. Challenge denied. Defense counsel followed the prosecutions inquiry by re-confirming Evan's support for the death penalty in cases of premeditated fires-degree murder, and re-confirming Evan's propensity for automatic death.

			question: "If [the judge] told you that was the law could you follow that law regardless of your feelings?" Evans replied "Yes." Following defense counsel's inquiry, prosecution intervened and informed Evans, "[D]o you understand that that's not the law as it presently exists?" Evans replied, "Yes" and indicated she would be able to follow the law as it presently exists regardless of her opinion. The Court followed the prosecution's lead and led Evans to state "Yes, sir. I'd follow your instructions." The Court pursued, "And that your views will not influence your decision and tend to make you vote for the death penalty even though the instructions say otherwise?" Evans conceded, "No. I would tend to follow your instructions."	*Note, the Court accepted prosecution's rationale that the jury questionnaire asked personal opinions of the jurors and if they indicated to the Court that they could put aside such opinions to follow the law, challenge for cause should not exist. Crucial in this rationale is the stern conveyance to jurors that whatever their personal opinions may be, the law compels impartial deliberation of all evidence. The Court did not apply this rationale to rehabilitate other jurors, namely those with a propensity to oppose the death penalty.

P.E.

[redacted]	RT 693-698 P.E.	In response to the question whether she would automatically vote for the death penalty for convictions such as in this case, [redacted] answered "Well, it might have been special accidental circumstances where an individual may be found innocent."	The Court explained the two phases of trial and the role of aggravation/ mitigation evidence. [redacted] conveyed P.E. her comprehension and affirmed her ability to follow the Court's instructions regardless of her own opinions. The Court also explained plea bargain testimony and expert witness opinion on psychology, confirming that [redacted] P.E. had a problem with neither. P.E. Prosecution confirmed [redacted]s ability to impartially listen to plea bargain testimony.	Defense counsel and prosecution pass [redacted] for cause. P.E.
Neva Clark (Excused)	RT 698	Opposed the death penalty.	The Court asked Clark, "...[Y]ou...said will never under any circumstances impose the death penalty regardless of the evidence?...Is that the way you feel?" Clark replied, "Yes." The Court responded, "Okay. In other words, there is no crime so horrible and there is no criminal so depraved that you would ever impose the death penalty; is that correct?" Clark confirmed, "Not for me to do it, no." The Court wrapped up it's questioning after these three questions, stating "All right. You're excused ma'am. Thanks."	The Court excused Clark.
Haydee Carpenter	RT 699	Supporter of the death penalty. Indicated it should be mandatory in cases such as this one.	Carpenter revealed that English was not her first language and impeded her comprehension.	Defense counsel stipulated; Carpenter was excuse for cause.
Lisa Bryant	RT 700-704	Opposed the death penalty. Explained her views on the death penalty: "I do not believe that anyone human has the right to decide if another human being deserves to die.	The Court asked Bryant no questions. Prosecution made inquiries, and Bryant confirmed her ability to vote for the death penalty if the evidence compelled it.	Defense counsel passed Bryant for cause. Prosecution challenged for cause. Court denied the challenge.
Dennis Shiver	RT 766-774	Explained his views on the death penalty: "Under certain circumstances I would consider the death penalty."	Prosecution explained to Shiver the two phases of trial and inquired whether he would be able to vote for the death penalty if the aggravation factors outweighed the mitigation factors in the penalty phase. Shiver responded "I really can't say...There's a possibility, yes. Possibility no." The Court interjected, clarifying the hypothetical inquiry. The Court ultimately asked Shiver, "Would you	Defense counsel passed Shiver for cause. Prosecution challenged for cause. Court denied the challenge.

			be able to vote for the death penalty?" Shiver responded, "Yes, I would."	Defense counsel led Shiver to agree that he would impose the death penalty based on aggravating factors in certain cases. Asked Shiver, "If you believe death is correct would you vote for death?" Shiver responded, "Yes."
Gregory Silva (Excused)	RT 774-777	Indicated he would automatically support death in convictions such as this case "If [he] believe[d] it was no accident." Indicated the death penalty should be mandatory for "[o]nly murder."	Court explained to Silva the two phases of trial and received from him confirmation of his ability to vote for either the death penalty or LWOP and his ability to listen to the evidence. Court also ascertained that Silva did not intend mandatory to mean as such, but rather that the death penalty should be an available punishment for murder convictions. Also confirmed that the cost of the appellate process would not be a consideration in Silva's decision. Silva then revealed this employment conflict (that his employer would only pay up to 10 days for jury duty).	Defense and prosecution stipulated for employment hardship. Court excused Silva.
Sandra Stockman	RT 778-780	Explained her views on the death penalty: "Should be used if person proved to be guilty beyond a reasonable doubt."	Court confirmed that Stockman did not believe the death penalty should automatically be imposed on all guilty defendants, but rather should depend on the evidence. Prosecution confirmed that Stockman had no opinion about plea bargain testimony.	Defense and prosecution passed Stockman for cause.

Patrick Stripling (Excused)	RT 780-781	*Declared Family Victim:* Stripling's uncle was stabbed and killed during a robbery and he believed this might have some effect.	Court inquired whether Stripling would be able to be fair and impartial as a juror under the circumstances of his uncle's death. Stripling replied, "I don't believe I could."	The Court excused Stripling.
Albert Thompson (Excused)	RT 781-783	*Declared Family Victim:* Son was killed in an alcohol-related car accident (manslaughter).	Thompson explained his inability to be fair and impartial based on his son's death, reasoning "So anything that would be drug influenced or alcohol where the person had a choice to use it or not used it would probably affect my judgment." After further inquiry into the issue of his bias under the circumstances of his victim history, Thompson narrated, "...[B]ut if a person accused of doing the crime had used that as was in the case of the automobile accident that the alcohol was a situation that made it less of a serious thing in some views, I though legally, then I'd have some difficulty."	Defense counsel and prosecution challenge for cause. The Court excused Thompson.
Larry Vessel	RT 784-788	Supporter of the death penalty. Indicated that everyone convicted of a crime such as this one should receive the death penalty regardless of evidence in the penalty phase, explaining "If he kills someone in the first-degree you should receive the death penalty." Stated he felt the death penalty should be mandatory in cases of first-degree murder.	The Court explained the two phases of trial to Vessel and confirmed he would have no hesitancy in voting for either the death penalty or LWOP. The Court asked Vessel, "So would it be fair to say then that you would not automatically vote for the death penalty just because the defendant was convicted of the crime?" Vessel answered "No." The Court continued with its leading questions as to the issue of Vessel's intent as to the scope of a "mandatory" death penalty for certain crimes. The Court asked, "In other words, you didn't mean by that that anybody convicted of a crime should automatically be put to death. You meant that it should be considered?" Vessel answered "Yes."	Defense counsel challenged based on questions 12, 15 and 19. Court denied the challenge. Neither defense counsel nor prosecution asked Vessel any questions.

Allen Vogel (Excused)	RT 788-789	Indicated medical problem.	Vogel revealed a recent hospitalization incident and that he was currently taking medication for high blood pressure.	Defense counsel stipulated and the Court excused Vogel for hardship.
Moises Serna	RT 794-798	Supporter of the death penalty who indicated he would automatically vote for it in convictions such as in this case regardless of evidence in the penalty phase. Serna indicated cost would be a consideration in his decision, reasoning "Yes. Keeping some who would do you harm if this person had a chance."	Court explains the two trial phases and the role of aggravation and mitigation factors. Then asked Serna, "If you listen to all of the evidence and you felt that the mitigation factors, that is those factors indicating that defendant should not be put to death, outweighed those indicating that he should, would you have any hesitancy in voting for LWOP?" Serna replied, "Yes." Serna then explained, "...And if somebody did something they knew what they were doing, you know, why blame something else...They should have thought about that before." Serna, in this statement and others following, made clear to the Court her reservations about believing intoxication as an excuse by the defendant. The Court continued questioning Serna, leading him to concede that he would not automatically vote for either the death penalty or LWOP. The Court then instructed Serna costs could not be a consideration in his decision.	Defense counsel challenged Serna on questions 12, 15 and 32. Prosecution passed for cause. The Court denied the challenge. Neither defense counsel nor prosecution asked any questions of Serna.
Marsha Cook (Excused)	RT 803-804; 861-862	Indicated she needed to be with her uncle. *Connection to Law Enforcement:* Stated.	The Court learnt Cook needed to go to Escalon everyday to see her uncle. Court confirmed that Cook would remain impartial despite the fact of a friend/ relative in law enforcement.	Defense counsel stipulates and the Court excused Cook.

Beverly Delaplane-Abuzaid	RT 804-805	*Connection to Law Enforcement:* Employed by law enforcement (Detective), was in the office when the case happened and put the police report together.		The Court excused Delaplane-Abuzaid.
Lori Harden	RT 806-808	*Connection to Law Enforcement:* Stated.	The Court inquired into Harden's stated bias towards the District Attorney. Harden admits that she would automatically presume the defendant guilty without needing to first assess the evidence true beyond reasonable doubt.	The Court excuses Harden.
Meta Harper	RT 819-822	Explained her views on the death penalty: "If a person premeditatedly took another life, that is wrong, and what right do they have to live and be supported by society for the rest of their natural lives?" Indicated costs would be "*only* a consideration (emphasis added)."	The Court confirmed Harper's willingness to remove cost as a consideration in her deliberations. Prosecution confirmed that plea bargain testimony would not be offensive to Harper.	Defense counsel and prosecution pass Harper for cause. Defense counsel confirmed that Harper would not automatically impose the death penalty in all cases of premeditated killing.
Lynn Grimm	RT 822-826	Believed the death penalty should be mandatory for murder, reasoning, "Yes, I believe if you want to go around killing people, you should get the same as you gave." *Connection to Law Enforcement:* Previously arrested and charged on a "confidential crime."	The Court confirmed that Grimm intended the death penalty as an optional punishment for murder, not a mandatory one. The Court also confirmed Grimm's willingness not to consider costs in making her decision. The Court confirmed Grimm's feeling that she was fairly treated and that her incident would not influence her in deciding this case. Prosecution discovered the incident took place outside the country (and not through his office).	Defense counsel and prosecution passed Grimm for cause. Defense counsel reaffirmed Grimm's ability to exclude costs from her decision.

James Foster	RT 805, 831-841	Indicated that the death penalty should be imposed for convictions in cases such as this one, clarifying, "I cannot comment upon this...until I hear the evidence." *Connection to Law Enforcement:* Revealed names of several associations with retired members of law enforcement along with the fact that his father was part of the police reserve. *Other:* Foster admitted to knowing witness Detective Giles New.	The Court explained the two phases of trial to confirm Foster's willingness to listen to the evidence before voting for either the death penalty or LWOP. The Court inquired into the questions left unanswered on Foster's questionnaire, asking them aloud in court. Foster revealed he did believe in the "eye for an eye" adage and that he would be able to apply the law per the Court's instructions. The Court also confirmed that costs would not be a consideration in Foster's decision The Court discovered that Foster had feelings against psychology/psychiatry testimony. Foster explained, "I feel there's too many excuses for –they use too many excuses for why people do things," but confirmed his ability to listen to such testimony and be fair regardless. The Court confirmed that Foster's connections to law enforcement would not influence his ability to remain impartial in this case. Prosecution inquired into Foster's relationship with a Detective Giles New, revealing that he knew New from school and because New was a reserve policeman about the same time as Foster's dad. Discovered that Foster did not know the Giles New involved in this case, but instead knew his father. Prosecution confirmed Foster's ability to be impartial despite that New was the son of someone Foster knew.	Defense counsel and prosecution pass Foster for cause. Defense counsel inquired into a question unanswered on Foster's questionnaire, related to "eye for an eye" adage. Foster confirmed that he didn't elaborate because of his desire to be fair.
Norma Dugent	RT 847-850	Indicated that illegal drug use would make it difficult to decide the case, reasoning, "Yes. I think although you may use drugs you may still know exactly what you're doing." *Declared Victim/ Family Victim:* Indicated she had had a bad experience when she was 13, and had a friend who died as a result of a	The Court confirmed Dugent's ability to remain uninfluenced, impartial and fair regardless of her prior personal experiences. Dugent assured the Court that she could remain fair to a person that used drugs. Prosecution reaffirmed Dugent's ability to remain impartial despite the involvement of methamphetamine in the case. Prosecution also confirmed Dugent's Friends outside experience would not affect her judgment.	Defense counsel and prosecution passed Dugent for cause.

		varmint round shot. *Connection to Law Enforcement:* Revealed her uncle was convicted of trespassing and assault and that she didn't feel the outcome was fair. Used to volunteer with Friends Outside.		
Reta Desomma (Excused)	RT 805; RT 851-853	Indicated she would always impose the death penalty regardless of the evidence.	The Court explained the two phases of trial and then posed a hypothetical case of numerous mitigation factors to evaluate Desomma's capability to refrain from imposing the death penalty. Desomma revealed it would be difficult for her to believe mitigation factors due to the fact she herself"...grew up in a slum area, and [she] brought [her]self out of it."	Defense counsel challenged Desomma and prosecution stipulated to the challenge. The Court excused Desomma.
Jackaline Cottrell	RT 804; RT 854-861	Indicated the death penalty should be mandatory for "premeditated, in particular vicious crimes against children." *Connection to Law Enforcement:* Stated.	The Court explained the two phases of trial and confirmed Cottrell's ability to vote for either punishment after listening to all the evidence. The Court confirmed that although Cottrell may favor automatic death for defendants found guilty of killing children, she acknowledged that this was not such a case and would apply the Court's instructions. Court confirmed that Cottrell would remain impartial despite the fact of a friend/ relative in law enforcement and despite that somebody was arrested/ charged with a "confidential" crime. Prosecution confirms that Cottrell would impartially evaluate plea bargain testimony.	Defense counsel and prosecution passed Cottrell for cause. Defense counsel explained the law establishing LWOP and confirmed that Cottrell would be able to impose LWOP in appropriate circumstances.

Gerald Kelch	RT 808	Stated to the court he had problems filling out the questionnaire.	The Court inquired to find that Kelch had a hearing and reading problem and felt under-qualified to be a juror.	The Court excused Kelch.
Dennis Penkow	RT 906-918	Supporter of the death penalty. Indicated he supported automatic death penalty for all those convicted of a crime such as this one regardless of evidence in the penalty phase. Supported mandatory death for "murder during robbery or rape." Admitted he would automatically vote for the death penalty against LWOP if Appellant was convicted of first-degree murder with a special circumstance, explaining, "Yes. An eye for an eye." Indicated that costs would be a consideration.	Court confirmed Penkow's willingness to decide the case based on the evidence alone. The Court explained the two phases of trial and the role of aggravation and mitigation factors, and confirmed Penkow's willingness to impose either the death penalty or LWOP after listening to the evidence. As to the issue of a mandatory death penalty for particular crimes, the Court asked, "Did you mean by that to say, sir, that you feel that anybody who was convicted of that crime shall automatically be put to death without any further consideration, or did you mean that that should be an available penalty?" Penkow conceded, "I think it should be an available penalty." As to Penkow's statement that he would automatically impose the death penalty on Appellant if convicted of first-degree murder with a special circumstance, the Court asked, "After having had out discussion...is that still your answer...?" Penkow replied, "Yes." The Court said, "Well, okay. I'm going to have to go into that a little bit more with you then...The question seeks to ask whether you would automatically vote for death over LWOP without considering these other factors?" Penkow replied, "Oh, I would probably consider the facts." The Court also led Penkow to concede that he would be willing to set aside his personal feelings and follow the Court's instructions. After defense counsel challenged Penkow for cause, the Court went through each of the challenged questions, rehabilitating Penkow on most of them. The Court then inquired into Penkow's opinion that similarity in age between his mother and father would keep him from being fair and impartial because of sympathy towards the victim. Penkow admitted he did not feel he could be fair to Appellant.	Defense counsel challenged for cause based on questions 12, 15, 16, 18, 19, 27, 28, 29, 37, 53, 78, 81, 86, 87, 101, 107, 117. 120, and 122. The Court excused Penkow based on his response to question 86. Defense counsel reassured Penkow of the California law regarding LWOP and confirmed his ability to take it at face value.

Leslea Russo	RT 938-941	*Declared Family Victim:* Stepsister was murdered in 1983. *Connection to Law Enforcement:* Indicated she knew people at the Modesto Police Department (probation). Indicated she knew Detective Marvin Harper.	The Court inquired into Russo's stepsister's murder, revealing that her sister's throat was slashed in town on McHenry. The Court asked, "...Anyway, this was not during a robbery or anything ..." Russo replied "No." The Court then asked, "And that would not influence you in deciding this case?" Russo replied, "No." On the issue of Russo's connection to law enforcement, the Court asked, "And none of those relationships leads you to believe that you could not be fair and impartial in this case; is that correct?" Russo replied "Right." The Court also confirmed that Russo would not be influenced because of her acquaintance with Detective Harper.	Defense counsel and prosecution passed Russo for cause. Defense counsel reaffirmed that Russo's acquaintance with Detective Harper would not impede her impartiality nor propensity to vote not guilty.
Sheila Sexton	RT 942-944	Indicated the death penalty should be mandatory for "[c]old blooded murder, perhaps." *Declared Family Victim:* "Boyfriend's brother was murdered. Two friends been molested. Might have been victim of domestic violence."	On the issue of imposing a mandatory death penalty for particular crimes, the Court asked, "Well, when you said that did you mean that in every case the death penalty should be imposed in that situation, or did you meant that that should be an available penalty?" Sexton answered, "Available penalty." The Court then confirmed that Sexton's membership in the Catholic Church would not prevent her from imposing the death penalty. The Court also convinced her to accept LWOP at face value. The Court confirmed that Sexton would be able to remain impartial and fair in this case despite her personal experiences.	Defense counsel and prosecution passed Sexton for cause.

Darilyn Sharp	RT 945-955	Explained her views on the death penalty, "I believe if somebody purposely killed another person unless in self-defense they deserve the death penalty. Purposefully equals not by accident." Indicated that she did not believe in the eye for and eye concept. Stated that the death penalty should be mandatory for "premeditated murder." Revealed that the issues of self-defense and accident were important to her determination of guilt. *Connection to Law Enforcement:* Uncle is highway patrolman.	The Court explained the two phases of trial and the role of special circumstances, aggravation, and mitigation factors. Sharp affirmed that she would be willing to impose either the death penalty or LWOP in the appropriate case. On the issue of imposing a mandatory death penalty for particular crimes, the Court asked, "But you don't mean in every case should be imposed?" Sharp replied, "Well, yeah, if they went out and just shot somebody in cold blood." The Court prodded, "Well, the question is do you think it should automatically be imposed without hearing anything else about the case?...So...are you saying that...you think that you should just stop there and not get onto the next phase and not hear any other evidence about the defendant and other circumstances surrounding the crime?" Sharp replied, "If there was more to hear, yeah, I'd want to hear more." Court confirmed that Sharp's uncle's position would not influence her in this case.	Defense counsel and prosecution pass Sharp for cause. Defense counsel concocted a hypothetical designed to ensure Sharp understood the role of aggravation and mitigation factors and understood that self-defense and accident were not a part of the penalty phase. Defense then confirmed that Sharp would be willing to impose either the death penalty or LWOP in the appropriate case.
Elizabeth Thompson	RT 958-961	*Connection to Law Enforcement:* Indicated she knew Ed Bertola, CHP, a prison guard and a corrections officer near Fresno.	The Court explained the two phases of trial and the role of aggravation and mitigation factors,. The Court confirms that E. Thompson would not disregard plea bargain testimony solely for that reason. The Court confirmed that E. Thompson's law enforcement connections did not influence her impartiality.	Defense counsel and prosecution passed E. Thompson for cause.

Geraldine Thompson	RT 962	Stated she felt the death penalty should be mandatory for "[a]bduction, murder, and molestation of a child."	The Court asked G. Thompson, "Did you mean when you said that the death penalty should be an available punishment for that or did you mean that any person who is found guilty of that crime to be put to death regardless of any other circumstances?" G. Thompson replied, "I think it should be available for that."	Defense counsel and prosecution pass G. Thompson for cause.
Yun Tune	RT 963	Indicated a difficulty with understanding English.	Tune stated, "I cannot understand, you know, all –sometime confusing to me, some words."	Defense counsel stipulated and the Court excused Tune.
Carmen Zamora (Excused)	RT 964-966	Did not answer questions on the jury questionnaire related to the death penalty or her views.	Court asked Zamora why several questions on the questionnaire were left unanswered. Zamora answered, "Just didn't feel like answering them…I'm not pretty good in writing." The Court then inquired about Zamora's failure to write about the death penalty, she replied, "…I don't believe in the death penalty or anything like that." The Court responded, "You don't believe in the death penalty at all?" Zamora said, "Not for me to say, No, sir." The Court countered, "So you, under no circumstances, could you vote to impose the death penalty; is that correct?" Zamora answered "No." The Court asked, "No matter who the defendant was?…No matter what kind of crime he committed?" Zamora replied, "No." and "No."	Prosecution challenges for cause and defense counsel said, "I have no questions." The Court excused Zamora.
Barbara Doyle (Excused)	RT 1021-1022	*Declared Family Victim:* About 19 or 20 years ago Doyle's brother was shot and killed while in his friend's home and the assailant was convicted of murder.	The Court inquired into whether Doyle would be able to listen to the evidence and base her decision in this case solely on evidence.	Defense counsel stipulated and the Court excused Doyle.
Mary Castro	RT 1023-1031	Indicated the death penalty should be mandatory for particular crimes, explaining. "I feel if you commit a crime serious enough to be considered for the death penalty and this law says if you commit this crime then yes."	The Court explained the role of special circumstances and the two phases of trial and confirmed Castro's willingness to impose either the death penalty or LWOP in the appropriate case. The Court asked, "There's no feeling in your mind that you would quit listening to the evidence?" Castro replied, "No. No. I would listen to everything." On the issue of the death penalty being mandatory for particular crimes, the Court informed	Defense counsel and prosecution pass Castro for cause.

		Connection to Law Enforcement: Indicated that she had open to Detective William Heyne.	Castro, "...[T]here is no crime presently in our law for which the death penalty is mandatory...In that sense. You understand that...In other words, any murder crime that you commit, there are still two options of punishment...You understand that?...Do you have any problem with that concept?....Okay. And do you feel that there are any crimes for which the life without possibility of parole should not be an option?" Castro submitted to the Court throughout its leading inquiry. The Court also confirmed that Castro would not seek to avoid the penalty phase of trial. The Court then explained the nature of plea bargain testimony and asked, "Understanding that[,] is it your feeling that you would automatically disregard the testimony of any such witness or would you *have to* listen to the witness' testimony and evaluate (emphasis added)?" Castro replied, "I have to listen to it. But what are you saying? What—I didn't understand about those questions in that category." (This clearly shows that Castro submitted to the Court's leading inquiry without comprehending it). The Court also confirmed Castro's willingness to listen to psychological/ expert testimony. Castro confirmed that she had spoken to the Detective only about her husband's case and that she would not tend to either believe or disbelieve his testimony on that basis.	
Terry Campbell	RT 1032-1033		The Court confirmed that Campbell did not intend to affirm the statement she belonged to an organization either for or against the death penalty (Campbell said, "That was a mistake.")	Defense counsel and prosecution pass Campbell for cause. Defense counsel inquired into Campbell's job as a probate examiner/ court investigator.

				She admits coming into contact with law enforcement and that her ex-spouse is the assistant jury commissioner.
Albert Camara (Excused)	RT 1033-1042	Indicated that the death penalty should be mandatory for "[f]irst-degree murder anything having to do with children." Indicated that costs would be a consideration. Indicated that he would reject plea bargain testimony, explaining, "Yes. They would be hard to believe." *Declared Family Victim:* A friend's daughter was found bound in the Delta River approximately 12 days ago." (Camera knew the girl's mother). *Personal Experience w/ Alcohol/Drug Abuse:* Indicated that evidence of illegal drug use would make it difficult fro him to be fair, reasoning, "Yes. I don't like what drugs do." *Miscellaneous:* Indicated that he doesn't "handle stress well since [his] last two hear attacks in 1989."	The Court asked Camara, "...[D]id you mean to say that anyone convicted of those crimes should automatically [be] put to death or did you mean that the death penalty should be an available punishment?" Camara replied, "Death penalty should be an available punishment." The Court explained the two trial phases and the role of aggravation and mitigation factors. The Court then confirmed that Camara would be able to listen to all the evidence and vote for either the death penalty or LWOP and that he would be able to put aside the "eye for an eye" principle" and apply the Court's instructions. Camara also confirmed that he would abide by the instruction to disregard costs and would be able to evaluate plea bargain testimony per the Court's instructions. The Court confirmed that Camara would remain able to decide this case on the merits despite his personal experience. The Court confirmed that Camara would remain able to impartially evaluate evidence involving drug abuse. Camara revealed that he was taking heart/ blood pressure medication and believed that sitting on the jury would be stressful, rationalizing, "But I don't know what the effects will be...I can't say that I would be able to	Defense counsel stipulated and the Court excused Camara.

			[handle it]."	
Audrey Balmain (Excused)	RT 1043-1044	*Declared Family Victim:* Balmain's sister-in-law was murdered by a break-in robbery in 1986 or 1987.	The Court confirmed that Balmain was close to her sister-in-law and led her to admit, "I cannot be unbiased."	The Court excused Balmain.
Jerry Welch	RT 1131-1137	Stated that the death penalty should be mandatory for convictions in cases such as this one regardless of penalty phase evidence, explaining, "Yes. He pulled the trigger. He goes to jail." Indicated that the death penalty should be mandatory for child molesters and murderers.	The Court explained the two trial phases and the role of aggravation and mitigation factors. When the Court asked Welch if he could agree to listen to the evidence in the penalty phase, Welch replied, "Well, I don't know…I've always in my later years figured that if a guy's done ac rime he should do the time no matter what it was." The Court attempted to clarify the decision process in the penalty phase and asked, "Now do you think that you would be able to listen to that evidence and make that decision fairly and impartially?" Welch answered, "I probably could." The Court confirmed that Welch implied the death penalty to be an available, not mandatory, penalty, and confirmed his ability to impartially evaluate plea bargain testimony.	Defense counsel and prosecution pass Welch for cause. Defense counsel asks Welch no questions.
Billie Costa (Excused)	RT 1137	Indicated that she would "never under any circumstances impose the death penalty regardless of the evidence."	The Court agrees to stipulation.	Defense counsel initiates a stipulation and prosecution joins. The Court excuses Costa.

Rose Rodriguez (Excused)	RT 1140, 1142	Indicated he would never impose the death penalty.	The Court agrees to stipulation. The Court asked Rodriguez, "And you can't think of any horrible crime or horrible person against whom the death penalty would be—could be conceivably be imposed; is that correct?" Rodriguez replied, "No, no." The Court responded, "All right. You're excused."	Defense counsel initiates and Reza is excused for cause.
Spencer Reza (Excused)	RT 1140, 1142-1143	Indicated he would not put away passion, prejudice, sympathy, or bias in a murder case. Indicates that merely being found guilty would lead him to vote for death.	The Court agrees to stipulation. The Court asked Reza, "…[I]f you found the defendant in this case guilty of the crime of murder and found the special circumstances to be true. That would be the end of it as far as you're concerned?" Reza replied, "As far as I'm concerned, yes." The Court responded, "All right. You're excused."	Prosecution stipulated and Reza was excused for cause.
Jim McMahon (Excused)	RT 1140, 1143-1144	Indicated he would "[a]lways impose the death penalty regardless of the evidence."	The Court agrees to stipulation. McMahon stated to the Court, "I'm a very strong believer in the death penalty, yeah." The Court confirmed McMahon would automatically impose the death penalty regardless of evidence in the penalty phase.	Prosecution stipulated and McMahon was excused for cause.
Joseph Linan (Excused)	RT 1139, 1150-1151	Indicated that he suffered from high blood pressure and takes medication.	The Court agrees to stipulation. Revealed to the Court that serving on the jury would be stressful and emotional.	The Court excused Linan based on his medical hardship.
Jim McGuire (Excused)	RT 1144-1149	Indicated his believe that everyone convicted of a crime in a case such as this one should receive the death penalty regardless of the penalty phase evidence, reasoning, "Yes. It's difficult to imagine a defensible excuse for having taken the life of another human being while robbing them in their own home." Indicated he would do his best to put the "eye for an eye" adage out of his mind and follow the Court's instructions. *Personal Experience w/ Alcohol/Drug Abuse:* Stated, "Yes, I have a low tolerance for illegal drug	The Court explained the two trial phases and the role of aggravation and mitigation evidence. McGuire confirmed his ability to vote for either the death penalty or LWOP in the penalty phase and his ability to disregard the "eye for an eye" adage to apply the law per the Court's instructions. McGuire admitted that he felt he could not be fair if the case revealed drug use.	The Court excused McGuire based on his bias against illegal drug use.

		use." *Miscellaneous:* Indicated he had a civil suit pending.	The Court asked McGuire, "Is there anything about that [the civil suit] that –I mean, that's going to keep you from concentrating on this case in the meantime?" McGuire replied, "Possibly. It's difficult to say."	
Deborah Gasser (Excused)	RT 1152	Indicated she "would always…[impose the death penalty] regardless of the evidence."	The Court confirmed that gasser would vote for the death penalty regardless of penalty phase evidence. Gasser confirmed, "I think we should use it [the death penalty] more often, yes."	The Court excused Gasser.
Douglas Smith	RT 635	Indicated that under certain circumstances he would tend not to believe the testimony of a law enforcement officer and in certain circumstances it would be difficult for him to fairly evaluate such testimony.		The Court excused D. Smith without making any effort at rehabilitation.