COPY

S055856

THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT COPY

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. Orlando Romero, Jr., & Christopher Self, Defendants and Appellants.	Riverside Superior Court No. CR 46579

APPELLANT ROMERO'S OPENING BRIEF

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

HONORABLE RONALD L. TAYLOR, JUDGE

Michael P. Goldstein
Cal. State Bar No. 60358
P.O. Box 84
Alameda, CA 94501
(510) 521-8527
mpgoldstein@earthlink.net

Attorney for Appellant

DEATH PENALTY

S055856

THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Riverside Superior Court
v.	)	No. CR 46579
Orlando Romero, Jr., & Christopher Self,	)	
Defendants and Appellants.	)	

APPELLANT ROMERO'S OPENING BRIEF

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

HONORABLE RONALD L. TAYLOR, JUDGE

Michael P. Goldstein
Cal. State Bar No. 60358
P.O. Box 84
Alameda, CA 94501
(510) 521-8527
mpgoldstein@earthlink.net

Attorney for Appellant

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Pages

STATE STATUTES

TABLE OF AUTHORITIES

Pages

JURY INSTRUCTIONS

TABLE OF AUTHORITIES

TEXTS AND OTHER AUTHORITIES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. Orlando Romero, Jr., & Christopher Self, Defendants and Appellants.	No. S055856 Riverside Superior Court No. CR 46579

APPELLANT ROMERO'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, §1239.) The appeal is taken from a judgment that finally disposes of all issues between the parties.

STATEMENT OF THE CASE

A Fifth Amended Felony Complaint filed January 14, 1994, charged Jose Munoz, Daniel Chavez, Appellant Orlando Romero, and Christopher Self, in various combinations, with 28 offenses allegedly committed in Riverside County between October 8 and December 7, 1992. (CT 1: 143–154 [Clerk's Transcript, vol. 1, pp. 143–154].) On January 20, 1994, following a preliminary hearing, a magistrate held appellant to answer on 24 counts. (CT 1: 169.) The pleading on which appellant was tried was an amended

information filed April 26, 1995, which named him, Chavez, and Self as defendants, but not Munoz, who had entered into a plea bargain in exchange for his testimony. (CT 4: 821–834; 3SCT [Third Supplemental Clerk's Transcript] 45: 12906–12909.) The allegations against appellant involved 21 counts, as set forth in the following table. (CT 4: 821–834.)

Count	Offense or Other Allegation	Victim
I	Murder (Pen. C. § 187)	Joey Mans
	- Armed principal (12022(a)(1))[1]	
	- During robbery (190.2(a)(17)(i))	
	- Murdered 2 others (Jones, Aragon) (190.2(a)(3))	
II	Murder (187)	Timothy Jones
	- Armed principal (12022(a)(1))	
	- During robbery (190.2(a)(17)(i))	
	- Murdered 2 others (Mans, Aragon) (190.2(a)(3))	
III	Murder (187)	Jose Aragon
	- Armed principal (12022(a)(1))	
	- During robbery (190.2(a)(17)(i))	
	- Murdered 2 others (Jones, Aragon) (190.2(a)(3))	

[1]Numbers in this table are Penal Code sections. The section 12022(a)(1) allegations involved enhancements. The remaining special allegations pertained to special circumstances.

IV	Robbery (211)	William Meredith
	- Armed principal (12022(a)(1))	
V	Attempted murder (664/187)	Ken Mills
	- Armed principal (12022(a)(1))	
VI	Aggravated mayhem (205)	Ken Mills
	- Armed principal (12022(a)(1))	
VII	Attempted robbery (664/211)	Ken Mills, Vicky Ewing
	- Armed principal (12022(a)(1))	
VIII	Shooting at occupied vehicle (246)	Ken Mills, Vicky Ewing
	- Armed principal (12022(a)(1))	
IX	Attempted murder (664/187)	Paulita Williams
	- Armed principal (12022(a)(1))	
X	Attempted murder (664/187)	"Pint" [Randolph Rankins][2]
	- Armed principal (12022(a)(1))	
XI	Burglary (459)	[Magnolia Interiors]
XII	Felony vandalism (594(b)(2))	[Magnolia Interiors]
XIII	Kidnap for robbery (209(b))	Alfred Steenblock
	- Armed principal (12022(a)(1))	

[2]Bracketed information comes from elsewhere than the cited pleading. The alleged victim in Count X is named at RT 34: 5253; the premises in Counts XI and XII, at RT 45: 6945; and the victim in Count XVII, at RT 5: 8252.

XIV	Robbery (211)	Alfred Steenblock
	- Armed principal (12022(a)(1))	
XV	Robbery (211)	Albert Knoefler
	- Armed principal (12022(a)(1))	
XVI	Robbery (211)	Jerry Mills, Sr., Jerry Mills, Jr.
	- Armed principal (12022(a)(1))	
XVII	Receiving stolen property (firearms) (496)	[Jerry Mills, Sr.]
XX	Receiving stolen property (ammo pouch) (496)	John Feltenberger
XXI	Kidnap for robbery (209(b))	Robert Greer
	- Armed principal (12022(a)(1))	
XXII	Robbery (211)	Robert Greer
	- Armed principal (12022(a)(1))	
XXIII	Robbery (211)	Roger Beliveau
	- Armed principal (12022(a)(1))	

Counts XVIII and XIX charged Self, but not appellant, with the attempted murder and robbery of John Feltenberger. (CT 4: 831.)

Appellant pleaded not guilty to all charges and denied all special-circumstance and enhancement-triggering allegations on April 28, 1995. (CT 4: 836–837.)

On September 15, 1995, the trial court granted Chavez's motion for severance from Self and Romero for trial. (CT 4: 917; RT 2: 88.) On the same day, the court granted a defense request, concurred in by the prosecution, for separate juries for Romero and Self. (RT 2: 89–90.) The court ruled on

other motions, not pertinent to this appeal, on January 11 and 16, 1996. (CT 5: 1084–1085, 1102; RT 11: 2074–2085, 2104.)

Selection of appellant's jury began January 16, 1996. (CT 5: 1102.) On March 14, 1996, the trial court denied a motion to sever the murder counts from the remaining charges. (CT 6: 1205, 1216–1222; RT 29: 4683–4692.) On March 19, 1996, the court denied appellant's motion to exclude evidence of the details of Munoz's and Self's attempted murder of off-duty police officer John Feltenberger from being heard by his jury, ruling that it was relevant to the charge of receiving property stolen from Feltenberger. (RT 30: 4696–4718.) The jury was sworn, and opening statements were made, March 20, 1996. (CT 6: 1233.) The prosecution rested its case against appellant on April 17, 1996, and the defense rested without presenting evidence. (CT 6: 1348.) Jury deliberations began on April 25th and concluded on April 29th. (CT 6: 1369; 8: 1714.) The jury found appellant not guilty on Counts XIII and XIV, kidnaping Alfred Steenblock for robbery and robbing him, but guilty of all other charges. The jury found true all additional allegations related to the counts on which it convicted appellant, i.e., that a principal was armed during each offense, and that the murders were committed in the course of robberies and that appellant was guilty of more than one murder. (CT 8: 1724–1732.) Self's jury found him guilty on all counts charged against him (I–XIX) and found the related allegations true. (CT 8: 1715–1723.)

On May 2, 1996, the court denied motions for new juries for the penalty phase, for the reopening of voir dire, for the exclusion or limitation of victim-impact evidence, and for the exclusion of certain incidents of alleged misconduct proposed to be introduced as aggravation. (CT 8: 1880.) The penalty phase began with opening statements on May 6. (CT 8: 1887.) The

prosecution presented testimony for four days, sometimes before both juries and sometimes not and rested May 13. (CT 8: 1885, 1886A–1886B, 1890–1895.) Two days of defense presentation of evidence ended on May 20, followed that day by rebuttal, and both sides rested. (CT 8: 1928–1930.) Deliberations by appellant's jury began on May 22 and ended on May 24, with penalty verdicts of death on each of the three murder charges, i.e., counts I, II, and III. (CT 8: 1956, 1961; 9: 2025, 2028–2029.) The Self jury reached the same result. (CT 9: 2030.)

The trial court denied appellant's motion for a new trial or for modification of the death sentence on August 28, 1996. (CT 9: 2157.) The court imposed judgment of death on each of the three murder counts the same day, as well as sentences on the non-capital counts totaling four consecutive life terms plus 15 years, 8 months imprisonment.[3] (RT 55: 8243, 8246 et seq.; 3SCT 45: 13164A–13164C.)[4]

---

[3]Count IV (robbery) was the base term, for which the court imposed the upper term of five years, plus a one-year enhancement for an armed principal (Pen. C. § 12022(a)(1)). (RT 55: 8246, 8248.) All unstayed sentences on remaining counts were consecutive; all other enhancements were for an armed principal. The sentence on Count V (attempted murder) was for life imprisonment plus a one-year enhancement. (RT 55: 8248–8249.) The sentence for Count VII (attempted robbery) was eight months; IX and X, (attempted murder), life for each with a one-year enhancement for each; XI (burglary), eight months; XII (vandalism), eight months; XV (robbery), one year; XVI (robbery), one year; XX (receiving stolen property), eight months; XXI (kidnap for robbery), life plus one-year enhancement; XXIII (robbery), one year. Sentences were also imposed for Counts VI, VIII, XVII, and XXII, but they were stayed pursuant to Penal Code section 654. (RT 55: 8249–8254; see also 3SCT 45: 13164A–13164C.)

[4]Record citations in the text and in the preceding footnote are to the reporter's transcript of the sentencing hearing and to the amended abstract of

(continued...)

Codefendant Daniel Chavez was tried subsequently in a non-capital trial on two of the murder counts, three of the robbery counts, and a charge of kidnaping for the purpose of robbery (corresponding to counts I–II and XIII–XVI on the above chart); was found guilty on all charges with the exception of one robbery count; and was sentenced to three consecutive life terms, two without parole, plus seven years.[5] (Minute Orders for 10/31/96 and 1/9/97, in the Superior Court file for this case; see also CT in No. E019849, pp. 732–736, 862–879, 902–903.) Codefendant Jose Munoz, who had been facing the same three special-circumstances murder charges as appellant and Self, along with 11 other felony counts, pled guilty to eight of those charges and two that were added later, testified at his accomplices' trials, and received a bargained-for sentence of 51 years to life. Six counts were dismissed. (CT 1: 143–154; 3SCT 45: 12906–12909, 13154–13156; 8/1/97 RT 9–13, 22–23, 26; RT 39: 5878 et seq.; RT in No. E019849, pp. 308 et seq. [testimony against Chavez].)

---

[4](...continued)
judgment. The minute order showing the sentence was replaced during record correction proceedings but still contains numerous errors which appellant sought unsuccessfully to have corrected.

Since the abstract of judgment—which had contained the same set of errors as the clerk's transcript—was amended to correct them, appellant foresees no situation in which he could be prejudiced by the errors in the minute order. He has therefore declined to expend judicial or attorney resources in the pursuit of further remedies at this time. Relying, however, on the rule that such clerical error can be corrected at any time (*People v. Mitchell* (2001) 26 Cal.4th 181,185), he reserves the right to do so in the future, should such action become necessary.

[5]The information in this paragraph is included for the sake of completeness. Parts of it rely on judicial records which are not in the record on appeal, but they are not required for the disposition of any appellate issue. Therefore appellant has not sought judicial notice of those facts.

STATEMENT OF FACTS

Introduction

From October 8 through December 7, 1992, Jose Munoz, Daniel Chavez, and brothers Orlando Romero and Christopher Self committed a series of serious offenses in Riverside County. These began six weeks after Munoz left his San Diego home—where he was using "crystal meth," stealing cars, and sometimes carrying a pistol—to move in with a sister in the Riverside County town of Perris. (RT 37: 5608–5610; 39: 5879; 40: 6051–6053, 6063–6064, 6170–6171.) Within a week he had borrowed a pistol from a San Diego friend, which he carried for a couple of weeks. (RT 40: 6171–6174.) He apparently became the link among previously unacquainted members of the group. Thus Munoz became friends with Self, a neighbor after his move to Perris,[6] and he soon helped Self purchase a gun in San Diego.[7] And Chavez, a boyfriend of Munoz's cousin, was, like Munoz, staying with Munoz's sister. (RT 39: 5894.) Appellant Romero had been living with a friend in Riverside and doing odd jobs. He visited his brother Self for the latter's birthday, after Self and Munoz were already acquainted, and decided to stay in Perris, where he also had other family. There he became involved with the group. (RT 37: 5586; 39: 5880; 40: 6231; 42: 6405; 3SCT 2: 279, 297, 325–326.)

Generally in twos and threes, but occasionally alone or with all four, these young men[8] committed eight actual or attempted armed robberies, along

---

[6]RT 37: 5573–5575, 5586; 39: 5879; 40: 6231; 42: 6403–6404.

[7]RT 37: 5575, 5600–5601, 5616; 39: 5879; 40: 6105, 6174–6176; 42: 6405–6406.

[8]Munoz said that appellant was 21 and Self was 18. (3SCT 45: 12960; see also RT 41: 6350.) Munoz was 20 or 21. (RT 37: 5573.) Chavez's age (continued...)

with vandalizing a shop one night and attempting to retaliate for a bad drug deal. The majority of their victims were unharmed, but others were shot, and three were killed in two incidents. Munoz, at least, was using "speed" (methamphetamine) and alcohol heavily during this period, as well as some marijuana. (RT 37: 5608; 39: 5936; 40: 6048, 6054–6055, 6102, 6141, 6232, 6242.) There were indications at trial that the others were as well, although neither side made a point of establishing the fact. (RT 34: 5253–5259; 39: 5935– 5936, 5974–5975; 40: 6117, 6141, 6156, 6237; 52: 7701–7704, 7715–7716, 7738, 7767–7768, 7773–7774, 7778–7779; 3SCT 2: 298, 299; 3SCT 45: 12924, 12935, 12964, 12990, 12999–13000, 13025.)

After being arrested, each of the four gave statements accepting some responsibility but implicating others as being responsible for the shootings.[9] (3SCT 2: 275–328, 3SCT 45: 12911–13081; Ex. 399; Exs. 463-A – 463-D.) Munoz was arrested before the others because an ATM machine photographed him using the card of a young man who had just been murdered. So he was the first to give such a statement—during which he offered to "say anything you want me to say, even if it ain't true" (3SCT 45: 12958)—and he ended up receiving a plea bargain and being the state's witness at the trials of the other three. (RT 35: 5468–5471, 5410; 37: 5638–5639, 5671; 41: 6336, 6340–6341; 8/1/97 RT 12–14, 16; 3SCT 45: 12906–12910, 12990; Ex. 250.) He agreed to plead guilty to three counts each of murder, attempted murder, and robbery, and one count of attempted robbery and to testify against the

---

[8](...continued)
is not in the record.

[9]The tapes of appellant's and Munoz's statements were played for the jury, and the transcriptions of those tapes, referred to here and incorporated in the Third Supplemental Clerk's Transcript, were distributed to it as well.

others. (3SCT 45: 12907; 8/1/97 RT 10–13; RT 40: 6165.) A count each of attempted murder, shooting at an occupied vehicle, and robbery were dismissed, along with three more minor counts. (8/1/97 RT 9–13, 22–23, 26; CT 1: 143–154; see also 3SCT 45: 12907.) More significantly, the bargained-for sentence was 51 years to life, with parole eligibility at 34 years, the time to be served out of state at his request. (RT 39: 6035–6036.) Otherwise, he was facing the death penalty or life without parole. (RT 40: 6160.) It was also agreed that the District Attorney would send the Department of Corrections a letter stating that he cooperated in the investigation and prosecution of this case. (RT 40: 6041.)

Appellants Self and Romero were tried together, but before separate juries. This statement of facts recounts the evidence which the Romero jury heard.

Guilt Phase Testimony

Meredith Robbery (Count IV)

On the night of October 8, 1992, William Meredith's wallet and vehicle were stolen from him at gunpoint. Shortly after appellant's arrest two months later, two detectives and a deputy district attorney interviewed him. (RT 38: 5858, 5860–5862; 3SCT 2: 275 et seq.) As with the other crimes that he committed, appellant readily admitted his involvement in the Meredith robbery when asked about it.[10] (3SCT 2: 315–316.) Meredith, appellant, and Munoz gave consistent accounts of this crime.

---

[10]Citations to appellant's statement are to the interview transcript introduced as Exhibit 5 and included in the clerk's transcript at 3SCT 2: 275–328. The tape of the interview was also played for the jury. (See RT 38: 5864–5865.)

The night of the robbery, Munoz, appellant, and Self were driving around for perhaps an hour, in Moreno Valley, looking for someone who would be a good target to rob. (3SCT 2: 316; RT 39: 5881, 5885.) The group was carrying two .22 rifles, which were used in later crimes as well. (RT 39: 5882–5883.)[11] Meredith and another man were sitting in Meredith's parked SUV on a deserted road in Moreno Valley. Munoz, appellant, and Self pulled up in Self's car, and appellant and Self approached different sides of Meredith's vehicle, each carrying one of the .22s. Appellant pointed a weapon at Meredith and ordered him out of the car, while Self did the same with the passenger. On appellant's orders, Meredith emptied his pockets, putting his wallet and a money clip with about $30 on the hood of the car. Appellant also told him to take off his jewelry, but before he could, Munoz said to just "get the Pathfinder." Appellant told Meredith to drop his pants to his ankles so he couldn't run, and to lie in the grass nearby. Self had the other man lie down

---

[11]One, which Munoz called "the single-shot," could only be loaded by pulling the action back with a knife, inserting a cartridge, and closing it back up. A problem with the trigger kept it from firing all the time. (RT 39: 5883–5884.) When it was fired, the empty casing would have to be removed manually. (RT 41: 6285.) This rifle was sawed off. (RT 39: 5897.) There was no evidence on who owned it or where it came from.

The other .22 rifle, a Remington, was cut down at both the barrel and stock ends. It was supposed to be a repeater, but a new round would not feed into the chamber after one was fired unless the weapon was aimed upwards when fired or when the bolt was pulled back. (RT 39: 5884; 40: 6072, 6093; 41: 6286 ; see also RT 39: 5912.) Munoz and, he said, Self knew this; appellant did not. (RT 40: 6093; 41: 6287.) Self had recently purchased the Remington in San Diego, with the assistance of Munoz—who knew of its availability—shortly after Munoz moved from San Diego to Self's neighborhood. (RT 37: 5575, 5600–5601, 5616; 39: 5879; 40: 6105, 6174–6176; 42: 6405–6406.) Sometime later, Munoz hid the Remington in San Diego. (RT 35: 5474–5475; 37: 5601–5602; 41: 6304–6305.)

as well. Appellant drove the Pathfinder away, and Munoz drove off with Self in the latter's car, after Self tried unsuccessfully to start Meredith's companion's car. They bought gas using one of Meredith's credit cards. Soon afterwards Munoz, accompanied now by Chavez, used the card to make two $100 withdrawals from an ATM. He withdrew $200 but told the others that he had gotten only $100, which they divided four ways. So each received $25, except Munoz, who kept $125. (RT 32: 5018–5031, 5062–5070; RT 39: 5884–5894; 3SCT 2: 316–317.)

The Pathfinder sat over by Self's place for awhile. The defendants took a few parts from it and then dumped it off a hill in a rural area. (RT 33: 5084–5088; 3SCT 2: 316–317.) Investigators later found a receipt from one of the two ATM transactions and a part from Meredith's SUV in Self's car.[12] (RT 32: 5036, 5045, 5038, 5041–5042, 5050–5051, 5055–5060.)

Robbery-Murders of Mans and Jones at Lake Mathews (Counts I–II)

Introduction

Midday on October 12, 1992, 26-year-old Joey Mans's body was found near his blue Subaru wagon on a hilltop near Lake Mathews, a place that was frequented at night by people who would go up to drink, make love, or enjoy the view. (RT 33: 5090–5091, 5100, 5120–5121, 5125, 5163, 5184–5185; 38: 5719; 49: 7346.) On rough terrain down the hill, 100 to 150 yards away, was another body, that of 22-year-old Timothy Jones. (RT 33: 5133, 5141; 38: 5719; 49: 7361.) According to both appellant and Munoz, they were shot during a robbery on the hilltop early that morning, committed by Self, Chavez, and themselves. Appellant, in his confession, and Munoz, in his statement and

---

[12]Also in Self's car were a wooden box containing 261 .22 rounds and a casing. (RT 32: 5036, 5038–5040, 5045.)

subsequent testimony, gave portrayals of this incident that were consistent in their broad outlines. Each version apparently made out a complete robbery-murder case against all four participants. They differed, however, on who did what, in ways that so significantly affected the culpability of each—and, presumably, the forthcoming penalty choice—that defense counsel and the prosecutor spent most of their *guilt phase* summations arguing which version was true, although even appellant's evidently established his guilt. (RT 45: 6923–6931, 6938–6942, 6949–6950; 46: 6958–6962, 6971–6972, 6979–6982, 6985–7010, 7018–7035, 7037–7040; see also RT 31: 4848–4849.) The evidence provided by both appellant and Munoz is being set forth in detail, because the verdicts do not disclose which version was credited by the jury, or whether it even engaged in the task of determining which was true.[13]

The Onset of the Robbery

The night of October 11, the four met at either the house where Self and appellant were staying or the one where Munoz and Chavez were staying. They made a plan to go out stealing again. They left in appellant's

---

[13]The primary context in which the facts are relevant is this Court's decision whether the outcome could have been different, absent certain errors. For this purpose, the Court cannot adopt the version most favorable to the prevailing party. Rather, the Court must examine the evidence to see if jurors could have viewed it in a light under which one or more could have voted for life without parole, absent the errors. For this purpose, the rationale for presumptions in favor of the prevailing party, i.e., in favor of jury findings challenged for evidentiary insufficiency, is inapplicable. (Traynor, The Riddle of Harmless Error (1970) p. 28); see also *Neder v. United States* (1999) 527 U.S. 1, 19 [for constitutional error, issue is "whether the record contains evidence that could rationally lead to a contrary finding" to that which would support verdict], and cases cited at p. 113, fn. 69, below.)

girlfriend's[14] gray Colt, taking with them the two .22s and some masks that Munoz made, before leaving, from the legs of stretch pants he found at his sister's house. (RT 39: 5895, 5897–5898; 3SCT 2: 278–280, 282; see also RT 33: 5151–5158 [date].) Appellant was driving, and they drove around a long time,[15] looking for a likely robbery victim, amid some disagreements about whether this or that plan was a good idea. (3SCT 2: 276, 280, 282; RT 39: 5898–5901.) According to Munoz, appellant said at some point that he had a feeling that someone was going to die—it could be one of them, but he did not think so. (RT 39: 5900.) Appellant, when asked by detectives if anyone had said such a thing, said he recalled no such statement. (3SCT 2: 283–284.)

While the four were riding around, appellant eventually mentioned knowing an isolated place that young people sometimes drove up to. They decided to rob anyone who was alone up there, and otherwise to just watch the sun rise, and go home. (3SCT 2: 276–277, 283; RT 39: 5901.) They drove to the hilltop, where they saw Mans's Subaru. Before they took any action, some or all of the group got out of the Colt and urinated. (3SCT 2: 277; RT 39: 5901–5902.) According to appellant, there was already a plan when he returned to the car. (3SCT 2: 284–285.) Chavez took charge, and the others followed his lead. (3SCT 2: 294, 299.) Chavez and Munoz told appellant and Self that they would all be robbing the guys of their money and anything else of value that they had, and appellant was supposed to check them for money and valuables. (3SCT 2: 276.)

---

[14]This was Sonia Alvarez, a friend of Munoz's sister. (RT 39: 5896; 42: 6407–6408.)

[15]Mans and Jones were seen unharmed as late as 3:15 a.m. the next morning (RT 33: 5151–5159.)

Munoz's testimony on where the idea came from was, predictably, different. The jury heard that he had insisted to police that the original plan, which he described in some detail, was to steal an unoccupied car, and that he and Chavez had spent the whole evening arguing against doing any robberies. He abandoned this position by the time of trial, when he admitted bringing along the guns and masks. (Cf. 3SCT 45: 12970 with RT 39: 5895, 5897–5898.) As far as what happened on the hilltop, however, he stuck to the prior, more exculpatory version, that he had told the detectives. This was that appellant proposed robbing the occupants of the other car, and Self agreed. Munoz maintained that he and Chavez objected that the old car made it look like the occupants would not have anything worth taking. But eventually all four agreed to the robbery. (3SCT 45: 12971; RT 39: 5901–5903.)

According to both Munoz and appellant, Munoz and appellant approached the car with the sawed-off .22 rifles. (3SCT 2: 277, 281, 285–286; RT 39: 5903–5904.) Munoz had a box of bullets in his pocket. (RT 40: 6085.) The two of them, at least, and possibly the others, ordered the two occupants out, appellant reassuring the victim whom he was with that he could relax, that everything would be okay and they would leave after getting their money. (3SCT 277, 281, 285–286; RT 39: 5906.) Whoever was with the driver—Munoz and appellant each said it was the other—had him drop his pants, apparently to keep him from running. (3SCT 2: 286; RT 39: 5905–5906.) Munoz handed his gun to Chavez or Self and got into the car to search it, while the others had the two occupants lie on the ground next to each other. (RT 39: 5907–5910; 40: 6091; 3SCT 2: 286.)

Appellant's Account of the Shootings

In appellant's account of what transpired next, he wanted to tie Mans and Jones up with something found in the Subaru, so they could get away

before the victims could call police. (3SCT 2: 277, 289.) At some point Munoz or Chavez told appellant to put the gun on the passenger, which he did, but appellant also protested that they should just leave. (3SCT 2: 278.) Chavez took the gun that appellant was holding. (3SCT 2: 288.) Then, said appellant early in the interview, Munoz shot one of the men (who turned out to be Mans) in the back. (3SCT 2: 278; see also RT 38: 5719, 5743–5745.) Later, as he was taken through the events in more detail, appellant said that he was told to shoot one of the guys, but he did not do so, and Chavez got the single-shot from him and fired the shot. (3SCT 2: 285, 288, 290, 292, 299.) Appellant was frightened because he knew there were houses nearby, but he stopped to look through the victims' car, then hurried back to the Colt. At that point Jones just started running, and Chavez shot at him, and he may or may not have hit him. Munoz, who still had a gun, and Self, who did not, chased the guy while appellant waited, first with Mans to make sure he did not go anywhere, then in the car. Then the others came back, breathing heavily, and they went home, with Chavez at the wheel. (3SCT 2: 278, 289–290, 295.)

Munoz's Account

During his interrogation, Munoz stated that appellant and Self had told him about the Lake Mathews killings, but he did not believe it until he read it in the newspapers some time later. (3SCT 45: 12942–12943.) He also expressed his belief that it was wrong to kill, and his disbelief that anyone would want to.[16] (3SCT 45: 12943–12944.)

Later, after interrogators pressed him repeatedly, Munoz admitted his involvement. (3SCT 45: 12969 et seq.) His version agreed with appellant's

---

[16]In fact he had tried—successfully he thought—to kill Paulita Williams. (RT 39: 5945–5946, 6033–6034.).

statement in terms of the same four people being involved, the same two weapons, and the long night driving around in appellant's girlfriend's Colt looking for someone to "jack" (rob). (RT 39: 5895–5900.) However, in Munoz's narrative, after the car's occupants were ordered out, Munoz had Jones turn over his wallet.[17] (RT 39: 5906.) He handed the single-shot to Chavez, emptied the wallet, and entered the car to looked for anything of value. He opened the trunk area and took a box and speakers from it. Meanwhile, appellant was having Mans lie down by Jones, who was already lying down and being guarded by Chavez. (RT 39: 5907–5910; 40: 6091.)

Munoz testified that, while he was looking in the back of the car, the other three were standing over the victims and having a discussion. Appellant and Chavez had their guns pointing down at Mans and Jones. Appellant, he said, was telling Chavez to shoot.[18] Munoz was not paying much attention, and he only thought they were trying to scare the victims. (RT 39: 5911.) Nevertheless, according to his testimony, he "just kind of looked over" and said, "Don't shoot." (RT 39: 5911.) Then, according to Munoz, appellant said, "Something like this," and he shot.[19] Munoz described, in some detail, seeing appellant trying twice to shoot "the other guy," Jones. Nothing happened because the gun, the Remington, was pointed down, and no bullet would enter the chamber. (RT 39: 5903, 5911–5913.) However, on cross Munoz said that he did not see appellant try to shoot Jones; but he heard

---

[17]Later Munoz was able to describe the wallet. (RT 39: 5906–5907; 43: 6539.)

[18]In his original statement to police, Munoz was unsure who was saying, "Shoot him, shoot him." (3SCT 45: 12977.)

[19]In his statement to detectives, Munoz said that appellant said, "Oh here, just put the gun here and press the trigger." (3SCT 45: 12973.)

clicks. (RT 40: 6092.) Jones uttered a frightened expletive, then got up, jumped over some rocks, and ran down the hill. Munoz said that appellant and Self both told Chavez to shoot, but Chavez aimed high in Jones's general direction and fired, after the man was gone.[20] (RT 39: 5913–5914; cf. RT 40: 6095.) Self followed him, and appellant did as well a few seconds later. Munoz could not see them after that. He said he started reassuring Mans, who was still lying there. Although he had just testified he heard appellant call for shooting the victims, then speak as if he was about to demonstrate, and then fire a shot while pointing his weapon at one of them (RT 39: 5911; see also RT 39: 5912, l. 24), Munoz also maintained that, while Self and appellant chased Jones, he (Munoz) touched Mans, felt a wound, and learned from Chavez that appellant had shot him. Munoz "freaked out" and wanted to leave. (RT 39: 5914–5917.)

Munoz said he heard at least two shots from down the hill. Appellant returned, unarmed, after two or three minutes. Self came half a minute to a minute later, holding the Remington. They left, but as they were driving out, appellant—still according to Munoz—wanted to go back because he thought he saw Mans move. Appellant, he stated, said that it would be Munoz's responsibility if Mans's survival caused their arrest. (RT 39: 5917–5921.) As they drove off, Munoz started going through the box that he had taken from Mans's car. He threw boots from the box and the keys to the car out the window. (RT 39: 5921.)

Munoz threw the items out on the driver's side, where they were later found. (RT 39: 5921; 33: 5164–5165, 5172.) He acknowledged that he was

---

[20]Of Jones's wounds, there were two that he could have received before running 150 yards. (RT 38: 5804–5805.)

sitting in back on the driver's side. Self was also in back. Chavez was driving, and appellant sat in front. (RT 40: 6242.) Munoz denied that he and Self were sitting in back because they came up the hill together to a car in which Chavez and appellant were waiting. (RT 40: 6244.)

Munoz acknowledged that, when he went up to the Subaru, he was carrying the the "single-shot," the weapon that needed a tool to be reloaded and a box of ammunition. He first said he did not know if he had the knife for reloading it with him, then said that he did not, then acknowledged that maybe the reason he carried the cartridges was in case he needed to reload and that, if so, he would have needed the knife or another tool, but then said he did not have the knife. (RT 40: 6183–6184, 6246.) A kitchen knife was found between the upper crime scene and Jones's body. (RT 33: 5108; 43: 6552–6553; Exs. 145, 400.)

According to Munoz, later that morning Self said that he had caught up with Jones, beat him down with his fists, and hit him with a pipe or something that he found there. Appellant arrived, and Self took the gun that appellant had. Jones was lying on the ground, his hands behind his neck. Self—still according to Munoz—said he tried to jam the gun through his fingers so he could shoot him, then gave up and shot his hands, after which the victim moved them, and Self shot him in the head. (RT 39: 5922–5923.) Appellant, said Munoz, had not disputed this account. (RT 39: 5924.)

Jones had no gunshot or other wounds to his hands, nor blunt trauma from being beaten with a pipe. (See RT 38: 5745–5765.) No pipe-like object was found in the search of the area. (See RT 33: 5133–5147.)

Other Evidence

Mans was killed by a single bullet to the back, even though it apparently was of only .22 caliber. (RT 38: 5719, 5746, 5722; 43: 6584–6585.) The shot

came from a gun that had been held against his clothing or very close to it. (RT 38: 5742–5743; see also RT 38: 5772–5773, 5774.) In the dust near the Subaru and at other points in the general area where it was parked, there were four footprints from shoes of the same size and sole pattern as those which Christopher Self was wearing when arrested. (RT 33: 5110–5114; 38: 5729, 5732–5733, 5834–5837; 43: 6545–6548; see also RT 32: 5039–5040.) Three footprints consistent with Daniel Chavez's shoes were also in the area, one near Mans's body. (RT 33: 5116–5119; 37: 5673–5674; 38: 5839–5843.) There were other unidentified prints nearby. (RT 33: 5127–5128.)

Jones died of multiple gunshot wounds, two to the head, one through the shoulder, and a superficial one in the skin at the back of the neck. All apparently came from a relatively close range. (RT 38: 5724, 5749–5765.) Near the body was a footprint that came from a shoe like Self's, along with an unidentified print. (RT 33: 5135–5136; 38: 5838; 33: 5143–5144.)

Shotgun Acquisition; Its Use in the Mills/Ewy Shooting (Counts VI, VII)

A few days after the Lake Mathews events, Self acquired a shotgun. (3SCT 2: 301; RT 39: 5927, 40: 6190.) The weapon was never recovered, but both appellant and Munoz described it. It was a single-shot, 20-gauge device. The barrel and stock were both cut short, and Munoz added a pistol grip at some point. (3SCT 2: 306; RT 39: 5927--5928, 41: 6305--6306.) Munoz first testified that Self had bought it from someone in the neighborhood. Asked if he helped Self buy it, Munoz answered, "I was with him." (RT 39: 5927; see also RT 40: 6106.) Asked whether he put Self in touch with the seller, he replied, "Not that I can remember." (RT 40: 6106.) Later, however, he seemed to say that he (Munoz) got the gun from his next-door neighbor. (RT 40: 6135.) Later still, he said that he was there when it was purchased, did not recall where it was purchased—other than at a trailer in Riverside County—or

who was there besides him, or whether he did the transaction himself. (RT 40: 6188–6189.) Munoz also may have kept the single-shot .22 after the killing of Mans and Jones. (RT 40: 6104.)

Around midnight October 22, 1992, Kenneth Mills and his girlfriend Vicky Ewy went out for a drive. (RT 33: 5191.) At the same time, Munoz was out again with Chavez, appellant, and Self in Sonia's Alvarez's Colt, armed and looking for robbery victims, apparently having recovered from his reactions to the shootings 10 days earlier. They had been driving around for a couple of hours—again discussing and rejecting various possible victims—when they encountered Mills and Ewy's car coming towards them in a deserted area, near Mead Valley. (RT 33: 5198–5200, 5216; 39: 5927–5929; 40: 6102; 3SCT 2: 314.) They had been drinking, and they had had to swallow their anger when confronted rudely by security guards in an area nearby. (3SCT 45: 13025–13027.) Appellant, who was driving, made a U-turn as they saw Mills's car. Munoz recounted that this happened without discussion, and he thought that there would be a carjacking, which perhaps was discussed. (RT 39: 5930.) Appellant, too, was unable to recall the initial reason for the U-turn: "I don't know if they had provoked us or what." (3SCT 2: 314.) Mills testified that after the U-turn, the Colt was in front of them, but Mills passed it when it stopped at a stop sign and seemed like it was making a right turn. (RT 33: 5192.) However, the other car followed, turning on its high-beam headlights. Mills decided to roll slowly through the next stop sign and turn right, but as he checked for traffic to his left he saw the Colt even with his, about 15 feet to the side.[21] (RT 33: 5193–5194, 5202.) The entire

---

[21]Munoz testified that the cars were only three or so feet apart. (RT 33: 5190.)

upper body of the person in the passenger seat—where Munoz testified he was sitting (RT 39: 5929)—was extended out the window, and the person was pointing a gun at Mills. (RT 33: 5195.) Within a second, that person shot him in the face. (RT 33: 5196.)

When detectives brought up these events, appellant admitted his involvement immediately. (3SCT 2: 313.) However, he did not remember much about the incident. He said someone shot at the other car when he pulled up next to it, but he did not remember who. (3SCT 2: 314.) He thought that this was an attempt to get Mills to stop, for a robbery, but he was not sure. (3SCT 2: 315.)

Munoz's account at trial blamed appellant and Self. He testified that appellant said, "Shoot 'em," and Munoz froze. Self, sitting in the rear on the driver's side, extended his body out the back left window and fired across the top of the Colt and down to the driver's window of the car to the right. Munoz said he had pointed his gun–one of the .22s—out the window at Mills and Ewy but did not shoot. (RT 39: 5929–5932; 40: 6112, 6104.) The victim's account, however, implicated Munoz as the shooter. Mills actually saw the flash from the muzzle of the gun he was looking at in the hands of the front-seat passenger. He did not know whether there were people in back. (RT 33: 5196, 5213.)

Mills had difficulty seeing after that, having sustained what turned out to be an injury causing loss of his right eye, as well as a temporary injury to the left. (RT 33: 5196, 5201.) Four shotgun pellets hit his forehead, and there was minor injury under the eyes. (RT 33: 5201.) Mills made his turn and kept driving, but the other car followed. (RT 33: 5197.) He made another turn after a short distance, still followed by the Colt, then turned into what he and Ewy hoped was a driveway but was a golf cart path on a golf course. Mills drove

maybe another 50 yards, and the other car stopped following. (RT 33: 5198–5199.) Ewy took over driving until they found a residence and got help. (RT 33: 5199–5201.)

Appellant said that the others in the Colt had urged him to follow Mills and get him because "you can't leave something like that," and appellant was scared and chased him. (3SCT 2: 314, 315.) But from the way Mills drove, appellant did not think that he was hurt, and appellant wanted to just go. (3SCT 2: 314.) The Colt was not running that well, and when Mills pulled into what appellant thought was a residential area and started honking, appellant "just said[, 'F]orget it, I'm out of here.['] So I left." (3SCT 2: 315; see also 3SCT 2: 277 [car not good for going to the hilltop], RT 37: 5677–5678 [car later recovered at a transmission shop].)

Munoz said that they followed Mills because appellant said that they were going to take him out. Self, he said, had no more shells for the shotgun. Munoz stated that appellant kept telling Munoz to shoot, and he tried firing the .22 out the window but could not get it to fire until the second or third time. By this time the other car was pulling into a residential area and honking their horn, and the group drove away. (RT 39: 5932–5934.)

Attempted Murders of Paulita Williams and Randolph Rankins (Counts IX, X)

Munoz, Paulita Williams, and Randolph Rankins, also known as "Half Pint" or "Pint," testified about an attack on Williams and Rankins after a drug deal gone awry. Appellant was not asked about the incident by investigators, so his version was not before the jury. (3SCT 2: 275–327.)

The Drug Deal

Rankins met Romero, Self, and Munoz at a house in Mead Valley the night of October 25, 1992. (RT 34: 5253, 5258–5259, 5275; 40: 6117–6118.)

The three were looking for some speed. (RT 34: 5255.) Rankins got into their car and led them to where they could supposedly get some and took their $20 to make the purchase but returned with rock cocaine. (RT 34: 5257–5258; 39: 5937–5939; 40: 6119–6120.) According to Rankins, the others protested, but he said he could not take it back and that they would have to accept it and leave, which they did. (RT 34: 5258.) Munoz, he said, was willing to take the cocaine, but appellant was unhappy and said he would be seeing Rankins later. (RT 34: 5260.) According to Munoz, however, Rankins did not disclose the substitution, but they were suspicious, and they decided to go home and get a better look at what he gave them. (RT 39: 5939; 40: 6122.)

Munoz testified that when they got back to the house, they realized what it was and were all unhappy about it. Appellant was the most vocal and said they should use the crack, then look for Rankins and get a refund or "take him out." Self was in enthusiastic agreement, and Munoz "might have" had the same reaction. They shared the cocaine, then took the single-shot .22 and the shotgun and went looking for a car which they had seen Rankins get into with a woman. The goal, said Munoz, was to get their money back or, failing that, to kill Rankins. (RT 39: 5939–5941 [quote at 5940].) However, on cross-examination he denied that his intent was to rob or kill; he just thought they were going to talk to Rankins about his ripping them off. (RT 40: 6200, 6205.)

Munoz's Shooting of Williams

In the meantime, Rankins had left with acquaintance Paulita Williams in her car, and they smoked the piece of the cocaine which he had received from his supplier for his services. (RT 34: 5227–5228, 5240, 5260; 39: 5939.) As she was driving him back, they passed the car the others were in, going the other way. It did a U-turn and pulled up either next to them, or behind them,

as Williams tried to back up to make a turn she had missed. (RT 34: 5228–5230, 5260–5261.) The driver, who according to Munoz was appellant, got out, holding a gun on Rankins, and, according to Rankins, told Williams not to move. Munoz got out with the shotgun and some extra shells which he had purchased after the Ken Mills shooting. (RT 34: 5261; 39: 5942; 40: 6126–6127.) Williams testified that everyone she saw wore ski masks; Munoz said that he did but Self did not. (RT 34: 5239, 5246; 39: 5945.) As Rankins recalled it, Rankins told Williams to leave, but she popped the clutch and the engine died. (RT 34: 5261.)

Munoz, with partial corroboration from Williams, testified that Williams was still moving the car, backing slowly in a circle, when Romero approached, and he kept his gun pointed at them as they circled. (RT 34: 5231, 5942.) She was about to back into the Colt, and Munoz told her to stop, then, when she did not, he fired the shotgun. (RT 39: 5942–5943, 5946.) This blast hit Williams in the side, and both she and Rankins thought that it came through her window, although Munoz portrayed himself as firing at the back of the car at that point.[22] (See RT 34: 5230–5232, 5239; 39: 5942–5943; 34: 5261–

---

[22]Rankins contradicted Williams's and Munoz's accounts of two men approaching the car and Munoz's admission of being the assailant on the driver's side. In his version, the driver of the other car (apparently appellant) did everything. I.e., he approached the passenger window and said to stop, ran around to the other side and shot Williams, then walked back to the passenger side to try to shoot Rankins. (RT 34: 5261–5262.) Rankins capacity to perceive may have been affected by his terror (see RT 34: 5263) and his cocaine intoxication (RT 34: 5260, 5272, 5276). His portraying one of the men on trial as the shooter could also be viewed in light of his deception of his buyers and his testifying in exchange for a recommendation that his latest of a string of drug and other offenses not be treated as a parole violation. (See RT 34: 5282 [he knowingly went to a cocaine-only dealer], 5264–5267, 5280).

5262.) Rankins ran. (RT 34: 5261–5262; 39: 5943.) Munoz reloaded. (RT 40: 6127.)

According to Munoz, appellant had the single-shot .22 trained on Rankins as he ran. He testified that appellant later said he had tried unsuccessfully to fire it. (RT 39: 5944; 40: 6180–6181.) In the meantime, Self leaned into Williams' window. She thought he was trying to grab her, but she later found he had been slashing at her with a knife and wounded her arms as she tried to defend herself. (RT 34: 5231–5232; 39: 5944–5945.) Munoz pushed him or told him to get out of the way, cocked the shotgun, and pointed it at her head from a foot or two away. (RT 34: 5232–5233; 39: 5945–5946.) Williams testified, and Munoz denied, that she screamed, "Don't kill me,"and he replied, "Die, Bitch." (RT 34: 5233; 39: 5947.) He fired. (RT 34: 5232–5233; 39: 5945–5946.) He felt that if Self was going to kill her, they should get it over with, not prolong the cutting and screaming. (RT 40: 6131, 6211–6213.) He left thinking he had killed her—according to him Self laughingly said her brains were on the windshield—but he had closed his eyes when he fired, and the blast wounded her across the upper back and shoulders. (RT 34: 5236–5237, 5295; 39: 5946.) She waited until they left and drove for help. (RT 34: 5233–5234.) She described in detail her struggle to get help, her fear that she would die, and her wounds, including a punctured lung. (RT 34: 5233–5237; see also Ex. 174 [her bloodied clothing].)

Appellant was back in the Colt during the attacks on Williams. (RT 39: 5947.) Munoz and Self got back in the car; they drove around a little looking for Rankins, appellant at the wheel, then went home. (RT 39: 5946.) The three were concerned afterwards that Rankins might come back with friends and shoot up the house. (RT 39: 5947.)

Munoz told his interrogators, " . . . I would never shoot anybody." (3SCT 45: 12955.) And again, " . . . I swear to God, I would not ever shoot anybody, I could not . . . . [O]bviously I would never shoot anybody," explaining that for him the limit was using stolen ATM or credit cards or illegally tapping cable television. (3SCT 45: 12957.) He also expressed horror at the Mans/Jones murders, asking, "[H]ow can you kill somebody jus' fer nothin'? you know." (3SCT 45: 12943) At the time he made these statements, he thought he had killed Williams. (RT 41: 6319.)

Subsequent Events

Munoz testified to some subsequent events, the relevance of which was unclear. He said he warned his sister about his concern about retaliation after the Williams/Rankins incident. He told her some of what they had been doing. She, appellant's girlfriend Sonia, and Sonia's sister all worked for the same employer, and Munoz's sister apparently told Sonia something about what Munoz had said. A couple of days after the conversation, appellant came to speak to Munoz about what Munoz had told his sister. Appellant said that Self wanted to kill him, but that he himself thought that if appellant and Munoz talked, Munoz would make things right. Appellant wanted Munoz to tell his sister that he had made it all up. Instead, he told his sister that what he said was true, but that she had to tell Sonia that he had said that it was a lie. (RT 39: 5951–5953.)

After the Williams shooting, Munoz obtained the Remington. Self had turned it over to a neighbor as collateral for a loan, and the neighbor let Munoz have it. (RT 39: 5953–5954.)

Magnolia Interiors Vandalism (Counts XI, XII)

Sometime between 6:00 p.m., Friday, November 13, 1992, and 9:00 the next morning, i.e., 19 days after the Williams/Rankins incident, Magnolia Center Interiors, a Riverside interior design and contracting business, was vandalized. Desk drawers had been emptied onto the carpet and file drawers overturned. Graffiti was spray-painted on the walls. Spray glue had been sprayed into business machines, computers, phones, and a stereo. There was white powder from the establishment's fire extinguishers covering samples of fabrics and other materials. Plants had been knocked over. Two couches and/or a chair had been spray painted, and the cushions had been stabbed with scissors. The bathroom had felt-tip-pen graffiti. A sonogram of the proprietor's unborn son had writing mentioning death and had been punctured. The writing in other places said things like "Just when you thought," "Now is then," "Now you die," and various numbers. An antique safe was damaged but not opened. Certificates and diplomas were on the floor, looking like they had been stomped on. The proprietor stated that his out-of-pocket expenses, which were basically wholesale, were $18,000. (RT 34: 5355, 5362, 5363, 5366–5375.)

The shop had been entered near the rear workshop area, where there was a broken window in a door. Near it were pieces of glass that seemed to have been removed from it. (RT 34: 5356–5357, 5364–5365.) Among fingerprints found on the glass were three that matched appellant's. (RT 34: 5358–5359, 5550–5555.) Missing from the proprietor's desk were some key sets, a dummy hand grenade, some collectible coins, and a paperweight with a scorpion inside. (RT 34: 5376.) A detective later saw a similar paperweight in Self's room, and he recovered some of the keys there. (RT 37: 5660–5661, 5662, 5668–5669; 34: 5376–5377.)

Alfred Steenblock Kidnap/Robbery (Counts XIII, XIV)[23]

Five days later, November 18, 1992, Alfred Steenblock was eating lunch in his car in a shopping center parking lot in Riverside. (RT 34: 5308–5309.) Self approached him, pulled up his sleeve, exposing the barrel of a large-bore firearm, and placed it close to Steenblock's face. (RT 34: 5311–5312, 5318–5319.) He came from the direction of a car parked behind Steenblock. (RT 34: 5311.) He ordered Steenblock to move over, got in, and drove about a quarter of a mile, to where the street dead-ended at a field. (RT 34: 5312–5313.) On the way over, he asked for and was told Steenblock's name. (RT 34: 5315.) He told Steenblock that he was not going to kill him. (RT 34: 5332.) He was cool and calm and seemed to know what he was doing. (RT 34: 5315.)

The car that had been parked behind Steenblock's followed, and two people got out of it, one of whom, Danny Chavez, came over. (RT 34: 5314–5315, 5335.) Chavez was more uptight and excited, and quite belligerent. (RT 34: 5315, 5335.) Self asked for Steenblock's wallet, and Chavez began demanding his personal belongings, including a money clip, and was in a hurry to get his watch off. Self took Steenblock's wallet from the car after Steenblock disclosed its location. He pulled out an ATM card and asked for the PIN, saying, "We know where you live," so Steenblock gave it to him. Then they had Steenblock empty the glove box. (RT 34: 5315–5316.)

---

[23]Appellant was acquitted of these charges. (CT 8: 1730.) The facts remain relevant because, along with the acquittal, they show the degree of the jury's skepticism about Munoz's testimony, as well as something of Chavez's character, which was at issue in the accounts of the Lake Mathews incident and another crime described below.

They had him walk into the field, telling him to stay there for an hour. (RT 34: 5317.) The third person remained back by the other car the whole time. (RT 34: 5318.) The three men left, taking both cars with them. (RT 34: 5318.) In the trunk of Steenblock's car were his brief case with business papers, a cell phone, golf clubs, and a box of golf balls. (RT 34: 5321–5325.)

Munoz testified that he saw appellant unload some clubs, balls, a cell phone, and a watch from the trunk of Sonia's car, in the presence of Chavez and Self. Chavez had the watch. Appellant said he had stolen the items from someone. (RT 39: 5954–5957.) A good-quality golf bag and clubs were observed during a search of the room where Self apparently stayed. (RT 37: 5659–5660; 42: 6403, 6409–6410.) Appellant and Self left the cell phone with a friend shortly before their arrest. (RT 37: 5631; 41: 6253, 6254–6256; 43: 6549–6550.) Steenblock's golf balls and briefcase were recovered from Sonia Alvarez's Colt. (RT 34: 5323–5324; 37: 5683–5685, 5688–5696.)

Albert Knoefler Robbery (Count XV)

Two days later, the group robbed Albert Knoefler. The accounts of Knoefler, appellant, and Munoz were all consistent. In the afternoon of November 20, 1992, the 70-year-old beekeeper was tending some hives in a field in a rural area. He had his pickup truck with him. (RT 34: 5340; 45: 6938.) In the meantime, Munoz, Chavez, appellant, and Self were driving around in Sonia's car, appellant at the wheel. They had the shotgun and perhaps the Remington, having gone out to steal again.[24] (RT 39: 5958.) When they saw Knoefler, they decided that appellant would go see what the

---

[24]Munoz had told investigators that this was the next time he went out with appellant and Self after the Lake Mathews incident, and that he just went along for the ride so that they would buy him some lunch. (3SCT 45: 12978–12980.) But at trial he gave the above account. (RT 39: 5958.)

man had that was worth taking. (RT 39: 5959.) The car stopped out of sight of the beekeeper, and appellant left with the shotgun. (RT 39: 5960.)

Appellant[25] approached Knoefler, spoke with him about bees, and walked through the bee yard. (RT 34: 5341; 3SCT 2: 310.) Knoefler testified that appellant seemed to be a pretty nice guy (RT 34: 5342); appellant later said that Knoefler reminded him of his grandpa (3SCT 2: 310). Returning to Knoefler from his walk, he said he needed the keys to Knoefler's pickup. At that point he displayed just the end of what seemed to be a sawed-off shotgun, which was otherwise concealed under his jacket, without pointing it at him. (RT 34: 5341, 5343; 39: 5962.) Munoz, who had become impatient after maybe three minutes, had come—masked and carrying one of the other firearms—to see what was taking so long. When he arrived, however, he hung back by some trees and listened to this interchange. (RT 39: 5961–5962, 5959; 34: 5342; 40: 6136–6137.) Appellant said he would not hurt Knoefler, and he told Knoefler he could get his water and any equipment he needed out of the pickup, which Knoefler did. (RT 34: 5343, 5342; 3SCT 2: 310.)

Knoefler heard someone whistle, and Munoz appeared. Munoz got into the pickup, and appellant handed the gun to him. Knoefler went back to work, but then appellant came back and said he needed money for gas.[26] (RT 34: 5342; 39: 5961–5962, 5964; 40: 6225–6226.) Knoefler started pulling money from his billfold and, after he gave appellant $40 to $50, appellant said,

---

[25]Knoefler could not identify the man later. (RT 34: 5341.) However, appellant, when asked, "How about the bee keeper," replied, "That was me." (3SCT 2: 310.)

[26]With considerable leading, Knoefler eventually testified that he had given up his property out of fear. (RT 34: 5344.)

"That's enough," although Knoefler had more money.[27] (RT 34: 5342–5343.) Appellant and Munoz left in the pickup and drove out of sight. (RT 34: 5343–5344.)

They drove to the Colt, and the Colt followed as they went to a field a couple of blocks away. Munoz looked around in the truck a little but did not think they took anything, and appellant sent it down an incline into the field. They all left in the Colt. (RT 39: 5964–5966.) Appellant said that he abandoned the truck nearby so that Knoefler would find it if he went walking. (3SCT 2: 310.) Knoefler, however, next saw it several weeks later, and by then it was stripped of parts. (RT 34: 5346.)

After appellant and Munoz left, Knoefler kept working for awhile, then decided that it was time to let someone know where he was, because he had no transportation. He found someone who let him use a phone. (RT 34: 5345.)

Munoz's Modification of Weapon

At some point—he thought after the Knoefler robbery[28]—Munoz decided to modify the Remington to make it fully automatic, but he was unsuccessful. (RT 39: 5972–5974; 40: 6180.)

Robbery of Jerry Mills and Jerry Mills, Jr., Receiving (Counts XVI, XVII)

Around noon on November 21, 1992, the day after the Knoefler robbery, Jerry Mills and his teenaged son were shooting guns at an informal outdoor target range about two miles from the Perris airport. (RT

---

[27]This was according to Knoefler. Munoz's version was the reverse: when Knoefler offered $25, appellant demanded all his money. (RT 39: 5962–5963.)

[28]Later he said it was right after the Williams/Rankins assaults. (RT 40: 6179.)

35: 5382–5383; Ex. 206.) They were in the back of their pickup truck, reloading, when a light gray older hatchback pulled close. The person in the passenger seat had a shotgun pointing in Mills's direction. Mills told them to take what they wanted and leave. Three people got out of the car and told Mills and his son to stand behind a telephone pole some distance away while they did their business. Mills and his son complied. The people in the car took an ammunition box, three handguns (.22- and .45-caliber pistols and a .22 revolver), a .22 rifle equipped with a telescopic sight, and a few other items. Then one of the men approached, now with Mills's .45 in his belt, and asked for money. Mills opened his wallet and said to take the money, which was about $150, but he said the credit cards would be no good to them. The man took the money and walked away. Two of the men drove off in their car, and one left in Mills's pickup. (RT 35: 5382, 5384–5389, 5390–5400.)

A half hour later, Mills found the truck a mile down the road, with the keys. (RT 35: 5390.) Mills did not identify the people who robbed him.

The only other account of this offense was appellant's confession. When asked in his interview where the scoped .22 came from, appellant first said that he did not know. But when an interviewer said something about Perris,[29] appellant readily agreed, "There you go, yeah, that's where it came from." (3SCT 2: 308.) He added that they also got a .45 there, which was all that he was interested in, and a .22 revolver. He said that Chavez and Self were there. The three were in Alvarez's car and supposed to go out to breakfast. He also recalled them taking a box that had shells and things in it, and cash—maybe $100, but not credit cards, which Mills asked if he could keep. Appellant said Chavez told him to take Mills away and "finish him."

---

[29]The question was mostly inaudible on the tape. (3SCT 2: 308.)

(3SCT 2: 308–310.) But, said appellant to officers, "That's not what I like to do. We got everything we wanted." (3SCT 2: 309.) Appellant, afraid someone else would shoot Mills, walked him up by the pole and told him to just stay there. (3SCT 2: 309–310.) He referred to Mills as "the guy with the little boy," adding, "I have a little boy. I didn't want, I didn't want to hurt him." (3SCT 2: 310.) Appellant liked the .45 and kept it. (3SCT 2: 310.)

According to Munoz, Chavez told him about the robbery, and Munoz saw Self target shooting with what could have been the .22 handguns. He saw the scoped .22 rifle and the ammunition box in Self's room. He said that after this Self carried the rifle with him at all times. A day or two later, he saw appellant with a .45 in his pants, and appellant always had it with him after that. (RT 39: 5966–5972.) Munoz said he shot the .22 revolver, and that it was sold at some point. (RT 39: 5971.)

There was further corroboration of appellant and Self's possession of these weapons, the ammo box, and a clip for the rifle.[30] The pistols were later found in a closet at the empty house where Self and appellant were ultimately arrested, as was a clip that would have fit the rifle. (RT 35: 5395; 37: 5637–5639, 5640–5642, 5645–5648, 5651–5652; 43: 6573.)

Aragon Murder (Count III)

The evidence before the jury on this count—from appellant's confession, Munoz's testimony, and forensic evidence—was generally consistent, although to some extent appellant and Munoz supplied different

---

[30]See RT 37: 5573, 5587–5588, 5592; 35: 5392–5393; 37: 5645–5648 [weapons shown to Munoz's brother], as well as RT 35: 5400–5401; 37: 5655, 5657–5658; 42: 6404, 6409–6410 [clip and ammo box found where Self stayed].

details. As the prosecutor later pointed out to the jury, "In a big way he [Munoz] agrees with what Romero said he did at Aragon." (RT 46: 7031.)

The Initial Encounter

Four days after the Mills robberies, midday on the day before Thanksgiving, appellant, Munoz, and Self were driving around looking for someone to rob. They were carrying the shotgun, which Munoz had been keeping, Jerry Mills's scoped .22 rifle, and perhaps the .45 and .22 pistols. (3SCT 2: 299, 301–303; RT 39: 5975–5976; 40: 6139.) Munoz had drunk a very large quantity of beer in a short period of time, but there was no evidence regarding the others' consumption. (RT 39: 5974; 40: 6139, 6141.) The three were in a mountainous area near Banning when they saw 22-year-old Jose Aragon riding his motorcycle in a sandy place called San Timoteo Canyon. His pickup truck, which he used to take the bike to the riding area, was parked nearby. (RT 35: 5406, 5410, 5413, 5422, 5426–5427; 39: 5977–5978; 3SCT 2: 299–300.) Self, Munoz, and appellant discussed robbing him. Self wanted to use the new scoped rifle to shoot him while he was riding, but appellant wanted to watch him ride awhile, because it looked "cool," and, per Munoz's account, said that they were going to park and check out the entire situation. (RT 39: 5978–5979; 3SCT 2: 300, 315.) They parked some distance away and watched until Aragon came back in, to where the pickup was. When he did, appellant and one or both of the others walked up to him. (RT 39: 5979; 3SCT 2: 300.)

Aragon showed appellant the bike, and appellant was interested and asked questions about his riding, which encouraged Aragon to say more. (RT 39: 5979–5981; 3SCT 2: 301–302.) Aragon rode competitively. (RT 35: 5407.) Appellant introduced himself and the other two to Aragon. (RT 39: 5981.)

Munoz testified that at this point he went back to the car, explaining that he wanted to get his gloves and ski mask because he was cold. When he returned, appellant was still talking with Aragon. Appellant asked Aragon to do some tricks on the motorcycle, and Aragon agreed. According to Munoz, while Aragon showed off his riding, appellant said that Aragon was alone and was not expected anywhere for a long time, so they could take all his stuff. Self wanted to shoot him while he was riding. Munoz testified that he said that they were not going to shoot him, that they should wait for him to ride in, and that Munoz would then go demand his stuff under the threat of a beating. (RT 39: 5981–5983.) It was windy and cold, and in appellant's version, both of the others wanted to shoot him and get out of there, but appellant just wanted to talk to him. (RT 39: 5980; 3SCT 2: 302.)

Aragon rode for five or ten minutes, and the others went back to their car. Aragon came back in and parked his motorcycle by his truck. Munoz started walking towards him. (RT 39: 5983–5984.) According to his account, this time the 140-pound Munoz approached a robbery victim alone and unarmed. His intention was to rough up Aragon, who was dressed in full protective gear, and tell him to give up his property. (RT 35: 5413–5414, 5432; 38: 5765; 40: 6151, 6218; Exs. 3-A–3-C.)

The Robbery and Shooting

Munoz and appellant both described being surprised when Aragon was felled by a shot. Munoz testified that he was approaching Aragon according to plan and was somewhere between the Colt and Aragon's pickup, when Self—who was partly out of the car—started shooting from its open doorway. He fired, more than once, and Munoz got out of the way. (RT 39: 5983–5986.) Appellant was near Aragon when this happened. (RT 41: 6258–6260.) By his account, he was less than 10 feet from him, unarmed, when the latter just fell.

Someone had shot him from a distance using—he assumed—the weapon with a telescopic sight. He looked around after the shot but did not see the others. He had not heard the shot[31] and was somewhat shocked—he was just talking to Aragon and couldn't believe that he got shot. Appellant asked him where he was hit. Aragon showed him. (3SCT 2: 302–303.)

Munoz ran to Aragon and asked where his wallet and the keys to the truck were. Aragon said it was all in the truck and told him to take everything. (RT 39: 5986–5987.) As Munoz was getting into the truck, appellant helped Aragon, who was still conscious and in just a little pain, over to the tailgate, and at some point he lay back in the truck bed. (3SCT 2: 304; RT 39: 5988–5989.) According to Munoz, appellant also asked how it felt to get shot and whether it burned. (RT 39: 5988.) After helping Aragon to the truck, appellant, who needed some tools to work on Alvarez's car, picked up Aragon's two tool boxes and walked back to the car with them. (3SCT 2: 303–305; RT 39: 5994–5995.) Appellant did not go into the cab of the truck:

> [I] wasn't interested. After he was shot I just saw the tool boxes, I needed those, and I was gone. Didn't want to have nothing to do with it.

(3SCT 2: 321.) Munoz found Aragon's wallet inside the truck, and he or Self found an ATM card, and they went back to demand the PIN from Aragon. Self told him to give it to him or he would kill him, and Munoz kept yelling at him to give them the code, because Aragon was "nodding out." He eventually recited the PIN. (RT 39: 5988–5991; 3SCT 2: 321.)

---

[31]Munoz said that the car from which Self fired was "kind of far away . . . a good distance" from Aragon's truck (RT 39: 5979), and the weather "was really, really windy . . ." (RT 39: 5980; see also 3SCT 2: 302; RT 35: 5430). The rifle with the telescopic sight was only a .22. (RT 35: 5394–5395.)

Munoz gave an account of what happened to Aragon after appellant left. Self, he said, pulled out the .22 pistol, put it up to Aragon's left side, and fired. Aragon's body jerked, and then Self emptied the gun into him, shooting maybe a total of eight times. Munoz testified that he started to walk over to the Colt, which appellant had driven closer. Self stayed behind. Self, he said, stood over Aragon with the shotgun and fired, then came towards the car. (RT 39: 5991–5993; Ex. 15.) Appellant was still in the car when Munoz heard the shotgun fire. (RT 41: 6262.)

Appellant did not know who shot Aragon: ". . . I grabbed the tool boxes and left. [¶ Q:] You wasn't over there when they shot him. [¶ A:] Uhn uh. Not my thing." (3SCT 2: 320.)

After the shooting, Munoz and Self got into the Colt, and Self said, according to Munoz, "Oh, wow, you should have seen the hole it made," showing a two-and-one-half-inch space with his hands. "It made a hole, went all the way through. And then it just closed up with blood." (RT 39: 5994; see also 3SCT 2: 304.) Self was kind of laughing, he said, kind of goofy.[32] (RT 39: 5994.)

---

[32]Munoz denied participation in the shooting, even though three weapons were used. His position was that Self shot Aragon with the scoped .22 rifle, the .22 pistol, and the shotgun, and that Munoz himself touched no guns that day. (RT 40: 6150–6251.) Rather, when he and Self were at the truck, Self was holding both the handgun and the shotgun. (RT 41: 6261.) Munoz denied repeating the action he had taken with Paulita Williams, where he tried to use a shotgun to deliver a *coup de grace* when Self was drawing out a killing. (RT 40: 6213.) He also testified that he did not have the shotgun at his house when the day began but backed off when confronted with contrary prior testimony. (RT 40: 6227–6228.) After saying that he carried shells for the shotgun on his person whenever it was around (RT 40: 6233), he denied carrying any the day Aragon was killed (RT 40: 6234).

Aragon's wounds and spent casings found at the scene were—with a significant exception—consistent with his having been killed in the manner described by Munoz, although there was nothing to indicate who fired the weapons involved. (RT 35: 5435–5438, 5451–5454; 38: 5719, 5765–5767, 5768–5774, 5778–5785, 5788, 5791–5792, 5793; 42: 6372–6374.) Seven .22 casings in the bed of the truck could have come from the pistol taken from Jerry Mills.[33] (RT 35: 5435–5438; 43: 6564, 6578–6580; 35: 5393.) However, an eighth—though the same brand—had been fired near the pickup, but by a different weapon. (RT 43: 6580–6581, 6588; 35: 5441–5443, 5435–5438; 40: 6227; 39: 5971.) Similarly, there was a contact or near-contact wound ("number four"), from a shot which had been fired by someone standing at a different angle in relationship to the body than the person who fired the other small-caliber shots.[34] (RT 38: 5768–5774, 5778–5784.) This contradicted Munoz's account that Self fired a single series of shots.

//

//

---

[33]Similarly, seven bullets recovered from the body could have come from that weapon. (RT 35: 5459–62, 5464–67, 6562–63, 6566–71.)

[34]This is in addition to an entirely separate wound that apparently came from the initial long-distance shot. (RT 38: 5785.)

The shotgun had fired a sabot round[35] that entered beneath the chin and exited at the left side of the back of Aragon's still-helmeted head, above and behind the ear. (RT 35: 5432, 5462, 5788, 5791–5792.)

The Aftermath

After the three left the scene, they bought gas, perhaps with money from Aragon's wallet. (3SCT 2: 305–306; RT 39: 5995–5996.) Appellant took Munoz to Sun City to two banks near each other to use Aragon's ATM card, which he did. (3SCT 2: 305; RT 36: 5480–5488; 39: 5996–6001.) One of the ATMs photographed Munoz using the card. (RT 35: 5468–5471; 36: 5490–5496.) According to Munoz they also had lunch at a restaurant across the street.[36] (RT 39: 5999–6002; cf. 3SCT 2: 306.) Afterwards appellant and Self dropped Munoz off at his house. Munoz kept the black toolbox. He later gave it to his father. (RT 39: 6003–6004; see also RT 35: 5416, 5472–5473.) The day after the killing, Munoz took the Remington

---

[35]This is a shell containing not a group of pellets, but a single projectile. Its diameter is less than the bore of the shotgun, however, and the gap is filled by a plastic "sabot," which breaks off from the slug after it leaves the weapon. (RT 37: 5690; 38: 5790–5791, 5815–5816; Exs. 319, 342–344.) The type apparently used in this crime had a .40-caliber bullet and was marketed as giving a shotgun capacities equivalent to those of a high-powered rifle. (RT 37: 5690; Ex. 319.) Appellant acknowledged having been involved, with Self, in a purchase of sabot rounds. Appellant had not seen such a thing before and was intrigued when he saw them at the store. (3SCT 2: 311–312; see also RT 39: 6009–6011.)

A box that had contained BRI sabot shells was later found in the Colt. (RT 37: 5682–5690.) The round fired at Aragon could have been made by BRI. (RT 35: 5462–5463, 5788–5789, 5820–5822; compare Exs. 209, 210, with Exs. 340, 341.)

[36]Two acquaintances of Self saw him, appellant, and a third person having lunch at the restaurant, where Self had worked, on an undetermined date which may not have been near this time. (RT 36: 5497–5513.)

to San Diego, left it with his brother Ruben, and returned. (RT 37: 5601–5602, 5618; 35: 5410; 39: 6008–6009, 6012; see also RT 35: 5474–5475; 41: 6304–6305.) Ruben hid the gun. (RT 37: 5618–5619.) Aragon's other toolbox was later found in the Colt. (RT 35: 5414–5416, 5471–5472.)

This was the last time appellant was alleged to have committed a crime with any of the others.

Munoz's Prior Statements

Munoz originally told investigators that he was last in Sun City a week or two weeks before Thanksgiving. (3SCT 45: 12911–12916.) When they confronted him with the ATM photograph of him using Aragon's card, he said, "Okay, let me tell you somethin' . . . Tell you who gave it to me." (3SCT 45: 12919.) He explained that appellant and Self "go out an' do jobs." They would come to him with ATM cards, and the codes to use them, and have him use the cards, because he was supposed to be smart and he knew how to use an ATM from the women in his life. (3SCT 45: 12920.) Regarding Aragon's card, they came and woke him around noon or 2:00 p.m. and offered him $50 to go with them to Sun City, and they refused to take him home when he asked them to after two unsuccessful attempts to use ATMs. (3SCT 45: 12921–12923.) When he asked where they had gotten the card, they said, "some dude," in a funny voice, and he replied, "[O]k, I don't need to know . . . ." (3SCT 45: 12938.) He then weaved in apparently true details about what they did in Sun City, or at least that part of the narrative remained the same through the trial. (3SCT 45: 12922–12923.) He also repeated, later in the interview, the story that the others came to him with the card. (3SCT 45: 12950–52.)

Munoz also told investigators that he did not try to use the card again; he had given it to a guy in the neighborhood named Dave. (3SCT 45: 12926.)

At trial, Munoz acknowledged that he tried to use the card again a day or two later. On the first attempt the machine said it could not be used; he tried a day later, and the ATM kept the card. (RT 39: 6003.)

Receiving Property Stolen From John Feltenberger (Count XX)

Five days after killing Aragon, Munoz and Self robbed and tried to murder off-duty police officer John Feltenberger.[37] (RT 32: 4944 et seq.) As far as the Romero jury was concerned, the evidence related only to Count XX, receiving stolen property—a leather pouch for holding ammunition clips—to show whether the property was stolen and whether appellant had knowledge of that fact. (RT 32: 4944; see also RT 32: 4961; 37: 5644; CT 4: 832.) However, since there was an issue as to whether the jury should have heard the inflammatory details of how the item was stolen, they are presented here.

The Robbery

Feltenberger was a sergeant with the Ontario Police Department. At 4:00 a.m., on November 30, 1992, he was driving home from work, dressed in civilian clothes and unarmed. (RT 32: 4945–4946.) In the Moreno Valley area, near his home, he noticed a car parallel to him, going the same direction, with its turn signal on. He slowed to allow it to pass, but it matched his speed, as it did when he sped up and slowed down again. He thought it was the newspaper deliveryman trying to give him his paper, so he stopped. (RT 32: 4946–4947.) The car stopped beside him, and Self got out from the passenger side, holding a sawed-off shotgun. Before Feltenberger could lock his own door, Self opened it and ordered him to get out and to give him his wallet. (RT 32: 4947–4948, 4951, 4956.)

---

[37]The name is variously spelled "Feltenberger" and "Feltonberger" in the transcript, but "Feltenberger" appears to be correct. (See RT 32: 4944.)

Feltenberger repeatedly denied having a wallet, but when he got out of the car, Self patted a wallet in Feltenberger's pocket and again demanded it. (RT 32: 4950–4951.) Self moved close to the driver's seat, with his back to it and with Feltenberger facing him, and Feltenberger shoved the car door into Self and backed up two or three steps. (RT 32: 4950, 4952.) Self opened the door and pointed the gun, demanding the wallet again, as Feltenberger continued to back away. (RT 32: 4952.) When he was 10 to 15 feet away, he heard a voice from his right, also 10 to 15 feet away, which surprised him, because he had forgotten that another person was present. (RT 32: 4952, 4966.) That person, who was Jose Munoz (RT 39: 6012–6014), said, "Kill him" or "shoot him" in a clear, loud, commanding voice, and he repeated it several times. (RT 32: 4952, 4957, 4965–4966.) Munoz later claimed that he had been saying, "Don't shoot," but Feltenberger was certain that this could not have been what he said. (RT 39: 6017; 32: 4966; see also 3SCT 45: 12964 [Munoz, in interrogation, gives detailed exculpatory statement, but portrays himself as discouraging shooting Feltenberger only when the decision to stop and rob him was made].)

At the first "Kill him," Feltenberger said, "Nobody has to get hurt" and threw his wallet to Self's feet. Self picked it up and said, "I ought to shoot you." (RT 32: 4953.) A blast from the shotgun followed immediately, and a bullet from a sabot round struck the officer in the right chest, going through the right lung and out his back. Wadding and a piece of the shell caused less serious injuries, and half of the sabot was embedded in his arm. (RT 32: 4954, 4956, 4982–4983, 4998–4999; 38: 5817–5819, 5826–5829; Ex. 55.)

Feltenberger's Survival

Feltenberger described the ensuing events for the jury. As a car drove off, he collapsed to his hands and knees and could not breathe. He saw blood

dripping onto his hand and said to himself, "I can't stay here. I've got to get up." Walking, crawling, and tumbling, he made it to a corner house. (RT 32: 4954.) On his hands and knees, leaning against the wall, he rang the doorbell until someone came. The neighbor looked out a viewing port, saw no one, and asked who was there. Feltenberger replied that he was a police officer who had been shot, but the man told him he would have to stand up and show himself. Feltenberger said he was too weak. He could think of nothing to say to reassure the man, but finally said, "I'm the guy with the red car that waves at you on Saturdays." Finally the man opened the door and telephoned for help. (RT 32: 4954–4955.)

An officer who responded found Feltenberger alone on the porch with a pillow and blanket. Feltenberger "had trouble talking. There was a lot of blood. Um, he was a mess." (RT 32: 4976.) Paramedics began working on him there. (RT 32: 4977–4979.)

In the emergency room Feltenberger's rib cage was intubated with an evacuation machine on both sides. He spent three days in intensive care, remained in the hospital for about ten days overall, saw a pulmonary specialist for three years, and suffered a permanent diminution in his lung capacity. He also had surgery on his right arm because of numbness, and knee problems that he attributed to falling to his knees. (RT 32: 4958–4959.)

Physical Evidence

A detective testified in detail about a blood trail, beginning with a large blood spot where Feltenberger was shot, going down the street, up a driveway, and up the walkway to the front porch of the house where Feltenberger summoned assistance. Photos of the trail, and of blood smears on the car in the driveway, were also introduced. (RT 32: 4995–4997; Exs. 39–42, 44.) On

the porch was a large pool of blood, with what looked like human tissue in it.[38] (RT 32: 4997.)

Feltenberger's car was soon found, ransacked, in a ravine in the Mead Valley area. (RT 32: 4964, 4999–5001, 5003; see also RT 39: 6023–6024.) His flashlight was recovered in a shed on the property where Self lived. (RT 32: 4960; 37: 5655, 5661–5664; 42: 6403, 6409–6410.) Regarding the stolen property charge that was the reason for having appellant's jury hear the Feltenberger evidence, Feltenberger identified an ammunition pouch which was eventually recovered with appellant's and Self's belongings when they were arrested. It had been in Feltenberger's car. (RT 32: 4961; 37: 5638, 5644–5645.)

Munoz's Testimony and Appellant's Stolen-Property Confession

Munoz gave an account of this incident that was generally consistent with Feltenberger's, except for the difference between a repeated command to shoot and a repeated "Don't shoot." (RT 39: 6012–6020; cf. RT 39: 6017 with 4966.) He put himself at the scene but painted Self as responsible for their deciding to "jack" Feltenberger when they were out for various other reasons. (RT 39: 6012–6013; 40: 6237.) However, he assumed that they would take the shotgun along, and he obtained shells to carry in his pocket because "it's always a possibility" that he could need to use the shotgun. (RT 40: 6234, 6236–6237.) He added that later in the day he, Chavez, Self, and appellant were watching the news. There was a report on the robbery of Feltenberger, which stated that he was in the hospital. Appellant, he testified,

---

[38]An objection to the testimony about human tissue was sustained, but repeated questioning about it put the information before the jury. (RT 32: 4997.)

said that they had to go to the hospital and take him out. (RT 39: 6022–6023; see also RT 32: 4988–4989.)

Appellant confessed to the stolen property charge. Asked about the Feltenberger incident, he said that he was not involved in it, but he believed that his brother and Munoz were. He did not know much about it. Self started to tell him that he had gotten a cop, but appellant said he did not want to know about it, so he did not hear much more. (3SCT 2: 307–308, 324.) Shooting a cop was "not my thing. I used to work for you guys," raising money for the sheriff's association's programs for youth. (3SCT 2: 323 [quotation], 324–325.) Appellant volunteered that the pouch in which he kept the clips for his .45 came from Feltenberger. (3SCT 2: 324.) Munoz testified similarly: appellant saw the pouch in Self's room the afternoon following the Feltenberger shooting, was told by Munoz and Self that it came from a carjacking, and took it. (RT 39: 6021.) Ruben Munoz had seen appellant using what looked like the same pouch to carry clips at his side. (RT 37: 5587–5588; see also RT 37: 5644; 32: 4961.)

Munoz, when first asked by detectives about Feltenberger's Geo, denied having seen it. (3SCT 45: 12953.)

Robert Greer Kidnap/Robbery (Counts XXI–XXII); Conversation Afterwards

Robert Greer parked his Honda Accord near the ATM machine at a bank at a Riverside shopping center at about 8:00 p.m., December 5, 1992. (RT 36: 5525–5527.) He withdrew $40 and, while returning to his car, was hailed by a man 15 to 20 feet behind him. The man, whom Greer could not identify but whom appellant later admitted was himself,[39] was wearing a ski

---

[39]Asked, after his arrest, about the taking of the Honda, appellant (continued...)

mask, and he had his hand on a gun that was partially visible beneath his jacket. Appellant told Greer to throw him his keys and get into the passenger side of the car, which he did. (RT 36: 5528–5530; 6SCT 1: 132, ¶ 36; 3SCT 2: 317–318.) Appellant took the money which Greer had just withdrawn. (RT 36: 5536.)

Greer testified that appellant drove, resting the gun in his lap, pointed towards Greer. The gun looked like a .45 semi-automatic. During a 10- to-15-minute ride to Mead Valley, where they ended up, appellant, who was calm, made conversation. He told him not to worry about it, that it was only business, and that he would take the car to a chop shop in San Diego.[40] He asked for Greer's wallet but acceded to Greer's request to keep things like pictures, his social security card, and personal items. Then Greer told him that he would not be able to use the credit cards, saying that appellant did not have the PIN and that Greer would have them blocked before he could use them. (RT 36: 5531–5535.) Appellant said, "[O]kay, well, then just give me your driver's license and your ATM card with your PIN number." (RT 36: 5533; see also RT 36: 5541.) Greer complied, writing his correct PIN on the back of the ATM card or the driver's license after appellant threatened to send someone to his house to harm him if he did not comply. (RT 36: 5533, 5544.)

They ended up on a dirt road in a rural area. Appellant let Greer get a trash bag from his trunk, so he could remove books and manuals that he kept

---

[39](...continued)
immediately replied, "Oh, . . . yeah, the Honda, um, I, yeah, I, I, I did that." (3SCT 2: 317.)

[40]According to appellant, Greer seemed scared, so appellant tried to reassure him and talked with him about, among other things, whether insurance would cover his losses. Greer "was a pretty cool guy." (3SCT 2: 318.)

in his car. Appellant still had a gun, but he pointed it downward, not at Greer. (RT 36: 5535–5536.) He drove off, taking the car and various items of sports equipment and other things that were in it. (RT 36: 5536.) Appellant had told him where there was a restaurant where he could go call for help. (3SCT 2: 318.) Greer, however, walked two miles to a house, where he called the police and the bank. (RT 36: 5537.) His ATM card was used in about 12 transactions, totaling about $800, before it was disabled. (RT 36: 5537.) When he next saw his car, it had been burned. (RT 36: 5537.) His ATM card was later found in a search of Self's room. (RT 37: 5660; 42: 6403, 6409–6410.)

Roger Beliveau Robbery (Count XXIII)

The next night, at 12:45 a.m. on December 7, Roger Beliveau stopped his car at Hunt Park in Riverside to take a walk after leaving work. After walking 10 or 15 minutes, he used a rest room that was illuminated only by light coming in from a window. A person moved from the darkness in a corner of the restroom and, after the two greeted each other, asked if the car outside was his. Beliveau confirmed that it was. Beliveau heard a sound like a round being chambered in a .45 pistol, and the man told him to give him his car keys, telling him that he would not get hurt. The man was silhouetted in the window, but Beliveau could see that he was pointing a .45-caliber or 9-millimeter pistol at him. Beliveau handed over his keys, then asked if he could take off those that were not for the car. The man—whom Beliveau never identified—returned the keys. Beliveau gave him the ignition key. The man told him to stay without moving for five minutes, and he wouldn't get hurt. (RT 37: 5559–5564.) He left without asking for money or Beliveau's wallet. (RT 37: 5571.)

The car was found at a shopping center in Riverside five days after the robbery. The only apparent damage was some wires dangling beneath part of the dash. (RT 36: 5514–5518.) However, it had been ransacked and some small items were gone. (RT 37: 5566–5567.)

Appellant identified himself as the perpetrator of this offense when he was asked about Beliveau's vehicle. He gave a narrative of the robbery that matched Beliveau's. (3SCT 2: 319.) Appellant thought that this was the last robbery that he was involved in, and there was no evidence to the contrary. (3SCT 2: 320.)

Defendants' Flight; Arrests

Munoz was arrested December 11, 1992, at his sister's house. Several hours later he gave authorities his account of many of the crimes he was involved in. (RT 39: 6029–6031.) The next day, a search warrant was served on the Mead Valley residence where Self had been living.[41] (RT 37: 5655, 5662; 42: 6403, 6409–6410.) Also the next day, Sonia Alvarez told investigators that appellant and his brother were in a particular motel in Fontana, but they were gone when the detectives arrived. (RT 37: 5676–5677.)

They had left after a call from Alvarez, walking a very long way from the motel, and they were tired. They stayed along railroad tracks, and they slept in a sewer one night. Appellant did not want to steal a car; he felt like they had done enough. But they met a man who gave them a ride back to Riverside for the little bit of money that appellant was carrying. They then returned to Perris, rested in some rocks by a field, and spent a night in an abandoned house in that area. From there they made it back to his

---

[41]The items seized have been set forth previously.

godmother's house. She had been hearing things but really did not know much. (3SCT 2: 321–323.) "[S]he was just glad to see me and she was wondering, and she was mad cause I hadn't called sooner and, you know how relatives are." (3SCT 2: 323.) Then they went to see "Flo," a friend of appellant's ex-wife's, who urged them to stay at least for Christmas, but he had her drop them off near where they were eventually found. (3SCT 2: 323.)

Florence ("Flo") Daul later told investigators that sometime in December appellant, who was a friend, and Self visited her and her children, saying that they had been dropped off by an aunt. They spent the night at her Riverside home. They had a black bag containing guns. She gave them food, cigarettes, and blankets or sleeping bags, and that she and the man she was living with took them to an abandoned house. They left behind Alfred Steenblock's cell phone and some other small items. (RT 37: 5627–5631; 41: 6252–6256; 43: 6549–6550.)

Investigators found and arrested the brothers at an abandoned, dilapidated house on December 17th. (RT 37: 5638–5639.) A closet contained sleeping bags, a mattress pad, canned food, a flashlight, and candy and snack wrappers. As noted earlier, along with these were Jerry Mills's .45 and .22 pistols and John Feltenberger's pouch for holding pistol clips. The pouch contained two clips, with three rounds in them. (RT 32: 4961; 35: 5391–5393; 37: 5641–5648.) On a shelf in the closet was a black sports bag, containing clothing, appellants' and Self's wallets, other papers and personal items, and a banana clip that could have come from Mill's .22 rifle. (RT 37: 5649–5653; 35: 5400; 43: 6573.)

Alleged Escape Attempt

The prosecution presented evidence purportedly showing an escape attempt by appellant a year and four months after his arrest.[42] Convict Arthur Dicken testified that he was housed next to appellant and one Michael Aragon in the Riverside County Jail. Dicken said that they asked him to have his attorney mail him something and give them the legal-mail envelope. They would pass the envelope to a visitor, who would use it to mail back a legal pad with a hacksaw blade hidden in the rigid portion across the top. Both appellant and Michael Aragon did receive legal mail, and at one point Dicken heard Aragon ask if "it" was in there, and appellant answered that they got it. That night they were cutting on the bars. (RT 42: 6423–6425.)

Dicken heard a scraping sound continuously at night, and on a television set across the tier he could see reflected images of appellant and Aragon taking turns using a hacksaw blade on two bars of their cell door, near the floor. He testified that appellant told him that they were going to grab a deputy when he came for the night head count, leave through the gap in the cell door, and hold the deputy hostage—using a shank—so they could leave the jail. They used scotch tape and paint made from toothpaste and paint chips from the cell to hide the damage to the bars. (RT 42: 6418–6423, 6427.) Appellant, he said, had a four-to-six-inch piece of sharpened steel, and Aragon had a makeshift spear. (RT 42: 6425.)

Dicken had numerous felony convictions. (RT 42: 6419, 6428, 6432.) He carried identification for three aliases, stole from a co-worker, and had

---

[42]This was admitted during the guilt phase to show consciousness of guilt (RT 30: 4740), although appellant's confession had also been admitted.

previously identified himself as a commander in the armed forces, as a CIA operative, and as an FBI agent. (RT 42: 6434–6436.)

In any event, two bars in the lower right portion of the door to the cell in question were found to have been cut, taped in place, and painted to hide the cuts. The bars could be removed, exposing a gap large enough for a person to get through. (RT 42: 6450–6455, 6470–6475.) Escaping from one's cell would not be the equivalent of escaping from the jail; one would need to pass through a number of normally locked doors or gates, either using a key obtained from a deputy or somehow getting deputies to open them. (RT 42: 6441–6449, 6478–6481.) A search conducted a day after appellant and Aragon had been removed from the cell and other prisoners placed in it turned up a piece of ornamental metal. It had been broken into a shape that left a triangular prong that was about 1¼ inches long, which, if it were sharpened, would permit its use as a short stabbing weapon. (RT 42: 6427, 6449–6450, 6455–6459; Exs. 386–388.) A piece broken off from it was found in the cell that the two had been moved to. (RT 42: 6476–6477.) There was no evidence of a four-to-six-inch piece of sharpened steel or of a spear.

Michael Aragon had made an escape attempt prior to this time. (RT 42: 6482.)

Munoz's Interrogation

Regarding the credibility of the chief prosecution witness, Munoz avoided telling authorities about his criminal activities for the first several hours of his post-arrest interrogation. (RT 40: 6045, 6057.) The subject of plea negotiations was broached—by Munoz himself—soon after detectives confronted him with the ATM photo. After he told his story about how appellant and Self came to get him to use Aragon's card for them, he started asking what kind of time he might be facing and what deal would be available,

adding that appellant and Self had little by little revealed details to him of their other criminal activities. (3SCT 45: 12926–12927.) He went on to claim that the two did robberies two or three times a week, that they said that they had killed everyone that they robbed, and that it scared him. (3SCT 45: 12937.) He said he refused to spend time with appellant and Self, again giving a detailed explanation. (3SCT 45: 12929.) Later, after his interrogators had continued to ask him about what he knew, he again turned the conversation towards how he could be of more use to them in exchange for a plea bargain: "So okay, seriously, what's going to happen? . . . I'll testify fir [*sic*] you guys, 'cuz, um . . . What can we work out an' I can find out so much more . . . ." (3SCT 45: 12939.) He continued to pursue this topic while one of the detectives was trying to stop for a break, adding, "I mean, I'll say anything you want me to say regardless, whatever . . . ."[43] (3SCT 45: 12940.) Acknowledging a new attempt to initiate a break, he said, "No, I know, but, I mean, you guys gotta tell me something of wha-ho-what . . . ," which elicited the reply, "We'll—we'll take care of you." (*Ibid.*) Then he offered to tell them more. (*Ibid.*)

Later, when a detective insisted that Feltenberger had identified Munoz as his assailant, Munoz offered, "[A]fter you show 'em Chris picture, an' if he still says it's me, I'll say anything you want me to say, even if it ain't true I'll say it." (3SCT 45: 12958.)

---

[43]Munoz's offer here may or may not have been part of an offer to seek admissions from appellant and Self. In any event, as the text above shows, he soon made another offer to "say anything" that clearly involved a testimonial statement.

Well into the third hour[44] of his interrogation, Munoz started telling the versions of the events that acknowledged that he was present during some of the crimes but had others taking all the initiative. (3SCT 45: 12964.) This was after repeated, increasingly confrontational statements by interrogators who were rejecting his story, telling him (apparently falsely) that Feltenberger identified Munoz as shooting him, (falsely) implying that appellant and Self were in custody and naming him as the shooter in various incidents, telling him that he would be charged with murder, and saying he had been seen at the crimes. (3SCT 45: 12919, 12927, 12946–12948, 12953–12955, 12957–12958, 12962–12963, 12965–12966, 12969.)

Their stance was that they knew that he was present. They were not saying that he shot anyone, but that he had some "big time" problems and now was the time for him to clear it up with them. (3SCT 45: 12962–12963.) When they said more about coming clean, Munoz asked what was going to happen to him. (3SCT 45: 12966, 12967.) A deputy district attorney answered that if Munoz did not do the shootings himself, then now was his opportunity to talk about what happened. (3SCT 45: 12967.) He added, "You have an opportunity to save your tail and you ought to take advantage of it, because this time is not gonna come again." (3SCT 45: 12968.) Convinced that appellant and Self were in custody incriminating him, he then offered to tell "everything," truthfully and in detail. (3SCT 45: 12969.) Within minutes he started giving accounts of the events that fit the prosecutor's condition for "sav[ing] his tail": i.e., that he was present but fired no shots. (3SCT 45: 12970 et seq.) He went into essentially the version of the killings at Lake

---

[44]Each tape covers an hour. (RT 41: 6338, 6340.) Neither a tape nor a transcript of the first hour of the interview was offered into evidence. (See RT 41: 6338–6342.)

Matthews that he later gave at trial, in which he was along for the ride and found himself present at occurrences of which he wanted no part. (*Ibid.*)

On the question of whether those accounts were true or a response to being told what the investigators needed to hear, as the defense argued (RT 46: 6994–6995), even at trial Munoz showed a consistent tendency to let his interrogators put words into his mouth. (Compare RT 39: 5942–5943, 5946 and 40: 6203 with RT 40: 6200–6201, 6202; compare RT 39: 5982 and 40: 6216 with RT 40: 6217; compare RT 39: 594 with 40: 6129; and see RT 40: 6126, 6131.)

Appellant, in contrast, immediately admitted involvement in every incident which he was asked about, except for two where he was in fact not present. His confession included three incidents in which no one, not even Munoz, could identify him as a perpetrator (the Jerry Mills firearms robbery, the Greer kidnap/robbery, and the Beliveau robbery). (3SCT 2: 275–327, and see pp. 32–34, 46–49, above.)

Belated Disclosure of Paulita Williams Shooting

The Paulita Williams incident was the only one where Munoz portrayed himself as doing anything assaultive, but he did not mention it until he had been assured that he would get no more time if he told authorities about the case. He had various explanations for why he ultimately disclosed it. (RT 39: 6033–6035; 46: 7026–7027; see also 40: 6161, 6166, 6196.)

He testified both that his attorney left it up to him about whether he was going to tell the deputy district attorney about it (RT 39: 6034; 40: 6168), and that the attorney told him that he had to tell them about it (RT 40: 6167–6168). He variously said that he knew from his attorney that he could tell authorities about anything and would not get any more time for it as long as he told them, assumed that they would charge him with it and was not sure that his deal

would still stand, and never really thought about whether the Williams/Rankins offenses would be covered by a deal. (RT 40: 6167–6168; 41: 6284, 6309). According to the prosecutor, however, an unwritten part of the plea agreement was that Munoz would tell about the unknown additional incident and plead to it without receiving more time.[45] (RT 46: 7026–7027.) Both sides signed the agreement, and then Munoz told about the incident, as, he knew, the prosecutor expected him to. (RT 40: 6166.)

Penalty Phase Testimony

Victim-Impact Witnesses

The prosecution led off its aggravation case with a day of lengthy and detailed victim-impact testimony. Six witnesses testified about the victims and about their own reactions to the murders, along with those of 11 other named family members. Because the testimony is summarized in depth in Argument II, below, what follows here is a brief sketch.

Lydia Roybal-Aragon, Jose Aragon's stepmother, testified at length about what Jose was like, his role in the family, the trauma surrounding his death, and the subsequent and ongoing struggles of the family as a whole and various members. (RT 49: 7276–7301.) Stephanie Aragon, a younger sister, gave her perspective on the same topics. (RT 49: 7318–7328.) Leighette Hopkins, a long-time friend of Aragon, told more anecdotes about the young man and described the impact of the murder on herself and on Aragon's friends. (RT 49: 7303–7317.)

Catherine Mans testified about what her son Joe had been like, as well as the devastating effect of his murder on her. (RT 49: 7331–7344.) Angela Mans also described her older brother, and she testified about the lingering

---

[45]The prosecutor disclosed this information during a summation.

effects of the trauma on herself and other family members. (RT 49: 7346–7357.)

James Jones testified about his love for his sweet son Timmy and, again, the devastation wrought on a family by a murder. (RT 49: 7360–7371.)

Evidence of Other Criminal Acts

Appellant had no prior record, but evidence of post-arrest misconduct at the jail was introduced against him. He was involved in several incidents during an 18-month portion of his 39-month pretrial incarceration.[46]

Altercation Over Snacks

On September 22, 1993, Rodney Medeiros was in a section of the Riverside County Jail to which he had been newly transferred. He received a grocery bag of snack items from the commissary, on a day when no one else on the new tier received commissary items. Six or seven strangers crowded into his cell and started demanding his food. He tried handing out some hard candy, but that was not enough. People were grabbing things, and they started beating him. After the incident, he was housed in the hospital ward, where he rested and received Tylenol because of his bruises. Medeiros identified appellant as among those making the demands and, from his position in the group, Medeiros believed that appellant took part in the beating. (RT 50: 7375–7389, 7391–7396.)

The incident was the kind of thing "that happens quite often" in that part of the jail. (RT 50: 7386.) The incident was investigated, but appellant was not disciplined. (RT 50: 7397–7398.)

---

[46]See RT 37: 5638–5639 [12/17/02 arrest], 4794 [trial opens 3/20/96], and the following summary of incidents beginning in late September, 1993, and ending in March, 1995.

Assault on Suspected Informant

Two weeks later, Walter Jutras, another inmate, lost his kitchen job, his trustee status, and the housing accorded to those in such a position. Still wearing the green jumpsuit of a trustee instead of a regular orange one, he was transferred to a different "pod" in the jail. When he arrived, the 40 orange-suited inmates were drunk on "pruno." Appellant and another man appeared at the door of his cell and threatened to hurt him, but he went to sleep. Later, when the cell doors were opened, he woke up. The same two people were inside, and appellant had his knee on the back of Jutras's neck. They were demanding to know why he had been sent to the new pod, and if he was an informant. They hit him a number of times, but Jutras rolled into a ball and apparently was uninjured. (RT 50: 7400–7412.)

A deputy testified that, at the time of trial, the jail avoided putting trustees in a general-population block. Sometimes other inmates considered trustee status in a negative light, because trustees were essentially nonsworn staff and worked with deputies. (RT 50: 7412.)

Shank Possession

On October 27, 1993, i.e., later that month, appellant apparently set himself up to be found with a shank in an area outside his cell. He had asked to be assigned to a different housing unit. When, apparently per standard procedure, a deputy told him to empty his pockets in preparation for a pat-down, he tossed a toothbrush, with a sharpened handle, to the floor. In addition, in his property container was a hair brush, the handle of which was broken and partially sharpened. (RT 51: 7495–99.)

Assault on Child Molester

Eight months later, in June, 1994, Olen Thibedeau was transferred to the pod where appellant was housed. (RT 50: 7427, 7438.) Thibedeau had a

history of sex offenses, including some involving children, and at that point he was facing trial on numerous child molestation charges. (RT 50: 7437–7442.) Those known to be held for child molestation are at the bottom of the jail pecking order, and they are in danger of physical harm. (RT 50: 7442–7444.)

Inmates in the new pod could not mingle. Rather, they each had separate "day room time" to take a shower, make phone calls, get hot water for coffee, or walk around. During Thibedeau's first day room time after his transfer, appellant asked him for hot water, Thibedeau testified, in a very friendly manner. When Thibedeau brought hot water, appellant shoved what Thibedeau and a deputy called a spear through the food slot in his cell door, where it could reach Thibedeau's abdomen. The "spear" was a newspaper rolled into a hard shaft. A broken toothbrush handle was tied to the end, which deputies variously described as sharpened or merely jagged. Another guard describing the newspaper/toothbrush instrument said it was what the deputies call a "channel changer." (Television sets were mounted a few feet outside the cells, and the channel could be changed with such an implement. (RT 42: 6429.)) The thrust at Thibedeau was a hard one, but he twisted away and the skin was not penetrated. He ended up with a blood blister and some pain that persisted awhile. (RT 50: 7428–7433, 7446–7460.) A voice from the next cell said, "We're going to get you wherever you go." (RT 50: 7434.) A subsequent search of appellant's cell produced two razor blades lying on the desk and some torn cloth strips. (RT 50: 7461–7464.)

Eight months after this incident, appellant told a jail visitor that he did not like violence, but that if authorities housed him with a child molester, they should expect an assault. He described a method of attack that had some similarities to the Thibedeau assault. (RT 51: 7517–7519, 7522–7523; Ex. 435.)

Shank Possessions

An officer testified that cell searches are regular and routine, and yet inmates continually arm themselves. He had personally found about 100 shanks in six and one-half years. (RT 50: 7423–7426.) Another officer agreed that shanks were common, in all parts of the jail. He had seen about 50 that had been recovered during a 21-month period. (RT 51: 7492.) Three months after the Thibedeau incident, on September 3, 1994, a shank was found in appellant's cell, during a regularly scheduled search. Prisoners were allowed to possess pencils and disposable razors, and the article found consisted of a pencil with a razor blade embedded at one end. (RT 50: 7416–7422.)

On October 29 of the same year, a biweekly search of appellant's cell turned up another shank. This one—a toothbrush with razor blades melted into the end in an arrowhead shape and a handle thickened with plastic wrap—was unusually sophisticated. However, it was hidden in an area that was commonly searched. (RT 51: 7484–7495.)

Harassment of Child Molester

Inmate Tyreid Hodges testified that appellant harassed him in a series of incidents from September, 1994, through March, 1995. Hodges was facing charges that led to conviction on 26 counts of child molestation. He and appellant were never face-to-face, but, from underneath one or the other's cell door or through other gaps in it, there were attacks with water and mop water, and, he said, appellant flooded his cell by plugging up the shower. In one incident, Hodges was squirted on the back of his jumpsuit with urine from a plastic bottle as he passed by appellant's cell. Appellant told him that he had no right to leave his cell. He added that, if he had his way, he would take Hodges out. (RT 51: 7501–7505.)

On another occasion, during day room time for appellant alone, a milk carton containing feces was placed under Hodges's door and stomped on, causing feces to splatter on his foot and part of his pant leg. Another time, appellant squirted hot urine under the door from a plastic bottle and told him it would keep happening until Hodges told the deputies that they had to move him. On other occasions a shampoo bottle with a liquid in it and a hair brush were thrown at him from the gap under appellant's cell door, and once a bar of soap came from appellant's or a nearby cell. All the other inmates harassed him as well and told him to leave, but Hodges felt that appellant was serious about it in a way that they were not. Hodges reported the incidents, but deputies generally ignored them. (RT 51: 7505–7516.)

End of Incidents

There was no evidence of criminal activity by appellant in the jail after March, 1995, which was a year before the trial began. (See RT 31: 4794.)

Mitigation

Family Dysfunction, Neglect, Abuse

Maria Self testified as to the upbringing of both defendants, who are her children. At the time of trial, she was married to Philip Self, but Orlando Romero, Sr., was the father of both appellant and Self. She and Mr. Romero were married in 1968, when she was 17 and he was 22. He spent their wedding night with another woman. Thus began a marriage that lasted six years and resulted in the births of four boys. (RT 52: 7697–7699.)

The family spent five years in a small "shack" in Perris owned by Romero's parents. They had their first son about nine months after they were married. The father never worked; Maria did, generally at nursing homes, between pregnancies. Sometimes they received AFDC and food stamps. (RT 52: 7700–7701.)

Appellant's father continued to see other women. Maria coped with her pain through alcohol, beginning when Anthony, her oldest, was about four years old. Appellant was three; Timmy was two; Chris was one. She tried to take care of the children while drunk. She also used drugs, which she got from friends of Romero, Sr. She mainly used speed, along with alcohol, but also substances that calmed her. The father's friends used drugs at the house. (RT 52: 7701–7703.)

Maria had periods of depression, did not feel well at all, and had a lot of anger towards the children and their father. Appellant looks just like his father, she testified, and when she was angry at the father, she would be angry with appellant. Her behavior with her boys came to mind when she watched the movie *Sybil* and saw how the protagonist was treated by her mother. Maria would push and slap the boys to get them out of her way, for no apparent reason. She did not want to see them, and she tried to hurt them in every way she could. She was physically abusive towards appellant, including when he was only one or two years old. She never hugged the boys and never once told any of them that she loved them. (RT 52: 7703–7704, 7716.)

She took speed in front of the children and was "loaded" in their presence "all the time." (RT 52: 7704.) At those times the boys were on their own, running around, playing, and making their own meals. (RT 52: 7705.)

In 1975 or 1976, after many separations, she and the boys' father divorced, just before she had her youngest. Both were having affairs. When strange men came to the house, which was frequently, the children were confused and looked at her as if they were thinking, "What's she doing now?" Her husband confronted her often with his suspicions of infidelity and sometimes beat her up. Once, in the children's presence, he put a gun in her face and said he should kill her then and there. Another time, drunk, the elder

Romero broke a bottle and said that if he ever caught her with anyone else, he would jab the bottle up her private parts so that she could not do it anymore. (RT 52: 7701–7702, 7705–7707, 7721.)

She was never happy while with appellant's father. She would chase him down, fight with his girlfriends, and go to the bars and ask him to come home because the family needed him. If he did come, he would beat her up. (RT 52: 7721.)

Romero, Sr., was also violent towards the children. One time he was drunk, and they were arguing. The oldest son came in for something, and the father threw him against the wall. Maria tried to protect him, but then her husband hit her. Another time, he came home drunk, locked the windows and doors, put pizzas in the oven, and left them until the house filled with smoke. He threw Maria to the floor when she tried to take them out and open the windows. He was trying to kill them, and they were coughing. He passed out, and she took the boys and left, telling herself that that was it. They arrived at her mother's house at 4:00 a.m. Maria soon moved to Modesto. (RT 52: 7707–7708.) However, sometimes she and her husband reunited briefly, the latter promising to change. But, each time, he resumed his old behavior. (RT 52: 7746–7747.)

Between her leaving appellant's father and the beginning of her relationship with Philip Self, she had relationships with 10 or 11 men, all of whom were abusive towards her. There was a lot of yelling back and forth in each of these relationships, usually in front of the children. Self's attorney asked if they were abusive towards Self, and some were. (RT 52: 7725, 7739–7740.) One in particular, Bobby Guzman, did not want the boys around and was abusive to them. (RT 52: 7726.) At trial Self's attorney elicited that Self must have lived in 10 or 11 places with her and in placements with other

family members. (RT 52: 7729.) No similar questions were asked regarding appellant's experience, but nothing suggested that it was different.

Maria believed that she took all the boys with her to Modesto. They spent maybe four years there, living part of the time with her niece. She had a number of boyfriends, serially, in Modesto and used drugs even more during that period: "Acid, uppers, anything I could get my hands on." (RT 52: 7708–7709.) One boyfriend was a heroin addict and used the drug in the boys' presence. She, too, would get high while they were there. She was probably more violent with them in Modesto, because of the pressure of taking care of all of them. She was on welfare, not working. She wanted nothing to do with the boys, and she would shove them into their room and lock them up or tell them to not come out. (RT 52: 7708–7710.) She would have them stay there "[u]ntil dinner or whatever. Until I got myself together to do something." (RT 52: 7711.)

And in those days it was hard, very hard, to stay "together." Three or four years before trial she was diagnosed with a psychiatric disorder,[47] and as of the trial she was in therapy and taking Prozac, Ativan, and Lorazepam. She never received medication when the children were young, although she did try off and on to get help. One doctor put her on disability for about eight months because of her emotional problems, but that was it, as far as assistance went. (RT 52: 7711–7712, 7753, 7759.)

At one point, when appellant was six or seven years old, and Maria and her sons were living in a partly furnished house in Modesto, she was very upset by her sole friend's serious illness. The boys went outside and tore up

---

[47]The actual diagnosis was apparently not audible to the reporter, but from the context it appears to have been clinical depression. (RT 52: 7711.)

the interior of a borrowed car. She hit them, and she slashed Self's face by hitting him with a broken fly swatter, and she did not take care of his cut. But she did seek help at the Department of Mental Health. The children were taken away from her for a year and a half, and she could have only supervised visits. Authorities called the boys' father to come for them, but he showed up drunk, cursing Maria. During this time appellant and his older brother lived with Maria's sister, and Self and appellant's other younger brother lived with Maria's mother. They saw Maria once a month.[48] (RT 52: 7712–7714, 7750–7751.)

When Maria got the children back, she moved with them to Turlock, where she lived for about a year. She was abusing alcohol worse than ever and using every drug available except heroin, particularly speed and often LSD. Sometimes she took care of the boys when she was on methamphetamine, but when she was hallucinating on LSD, they took care of themselves. Once, when her children were visiting her mother, Maria took liquor, speed, and a couple of LSD tablets. She went three days without sleep and almost died. (RT 52: 7714–7716, 7718–7719.) This period was followed by about another year living in Stockton, where Maria continued her substance abuse. There she lived with an addict who sold drugs out of the house, while the children were around playing. During this period, too, she was violent with the children:

> [W]hen I was not on drugs and I was shaky and just couldn't seem to hold myself together, I just—I just constantly did vicious things to them. You know, "I hate you. Get out of here," you know, just stay out of my way, leave me alone.

---

[48]It was also possible that this happened somewhat earlier, as Maria later testified that Self was taken away from her when he was just turning two, which would have been when appellant was four. (RT 52: 7743–7744, 7702.)

(RT 52: 7716.) When she was sober she wished she did not have children. (RT 52: 7719.) One time she was upset with a boyfriend, and she called in her sons, who were doing nothing wrong, one at a time, and hit them on some pretext. She hit appellant and one of the other boys in the head with a belt buckle, and there was blood all over. She nearly killed him. She felt like she was losing her mind. (RT 52: 7716–7717, 7783.)

She never visited appellant's school, never checked on his homework, never asked how the day went; she did not care. Once she dialed 911 and told the operator that she was going to kill all the boys because she could not handle them. The boys were in the house during this and seemed confused, did not know why she was crying, and probably thought they had done something wrong. (RT 52: 7717–7718, 7784–7785.)

After Stockton the family moved to Riverside. There they stayed at one house for about eight months. Maria was still using drugs. The boys were in school, but she paid no attention. (RT 52: 7718.)

When appellant was a baby, she told him that she wished she had not had him. As he grew older, she continually told him that he looked just like his father, and that she hated his father. (RT 52: 7719.) When he was about 14 and in junior high school, she believed, he left and moved in with his father. She was having a very hard time getting along with him then and was very abusive towards him. He left because she was too hard on him, put him down constantly, and continued to physically abuse him. Also, he wanted to get to know his father, which upset her. (RT 52: 7719–7720, 7769–7770; see also RT 52: 7833.) At some point he lived with his girlfriend, Stephanie, and her family for a while, and then he moved back in with his father. Maria thought he lived "up north" a few months as well. (RT 52: 7774.) She also thought he lived at her mother's for a time before that. (RT 52: 7775.)

At one point she and her sons lived with her parents. Two of her brothers kept guns and ammunition there. Self's attorney elicited that one of them shot weapons in his presence, at least, there and at a house in Perris. She did not have a good relationship with either of these brothers and was afraid of them. (At trial, counsel was not permitted to elicit what her history with them was.) (RT 52: 7729–7730, 7441.) These men were around the house daily when the boys were wards of the court and stayed with her mother. On later occasions, too, they would be there with the boys, sometimes with no other adults around. (RT 52: 7736–7737.) Sometime after 1979, which would have been when appellant was seven or older (see RT 52: 7702, 7744), she caught one of them threatening the boys and making them drink beer. She picked up a hammer and told him that if he got near her boys again, she would kill him, and after that she kept the boys away from them. (RT 52: 7738–7739.)

The jury was shown a photo of Maria Self with her children, when appellant was about four. (RT 52: 7720; Ex. B.) Looking at another picture, of appellant when he would have been in junior high school in Perris, she admitted having no idea of whether he was a good or bad student. (RT 52: 7721–7722; Ex. A.) Appellant did not graduate from high school. (RT 52: 7722.) Appellant had chores to do when he was 14, and he generally did them. (RT 52: 7770.)

Maria Self was impeached with her vagueness on dates and sequences of events. (RT 52: 7746–7748, 7752–7753, 7776–7777, 7784; see also RT 54: 8020–8021.) She acceded to the prosecutor's suggestion that Phillip Self, whom she started seeing when appellant was about eight, was very good to the children and to her. Financially, he helped out "a little bit." Asked if it had been a non-abusive environment since then, she would only say that it had

been very different. (RT 52: 7754–7756.) She acknowledged that she received prescription anti-depressants only after her sons' arrests. (RT 52: 7759.)

The prosecutor established that her neglect of her children was not total, at least if she told the truth when she portrayed her performance as a mother to a defense investigator about six months after her sons' arrests. (See RT 52: 7760; 53: 7933.) At trial she explained that she was then too ashamed to say a lot of things, including the beating to appellant's head with the buckle end of a belt. (RT 52: 7783.) She did not recall telling the investigator that she never did drugs in front of the children, but she did tell her that in Modesto the kids were always clothed and did not go hungry. (RT 52: 7761.) She cared enough about her children to always find a way to feed them, although at points a neighbor was bringing by food from a school that she worked at because Maria had none. (RT 52: 7762.) She tried to teach the boys politeness and respect for elders. (RT 52: 7763.)

She may or may not have told them to do their homework. She did not always monitor it, but she thought that they pretty much did some of it. (RT 52: 7764–7765, 7769.) She did sometimes help them with spelling, a subject which she liked, and, infrequently, said something if they did poorly on a paper. (RT 52: 7765.) She thought both boys were very bright, but they did poorly in elementary school. She had previously characterized appellant as a bright kid who never felt it was worth the effort to apply himself. (RT 52: 7767.) She tried to give appellant and Self good advice, when she wasn't beating them. She was adamant about telling them to stay away from drinking and drugs, and when they were pre-teens, she warned them that they were predisposed to substance abuse, but by then their anger at her kept them from

taking much in. (RT 52: 7768.) Sometimes she did try hard to keep track of the kids. (RT 52: 7769.)

She had some concern about the choices appellant was making when he was older but, like most kids, he did not want her advice. (RT 52: 7772–7773.) Not long before appellant's arrest, she talked to him about his drug problems, and she did not want him to go to his father's place, because his father was on drugs, too. She tried to advise him because she loves him. He was willing to go to a drug rehabilitation program at a point shortly before his arrest, but there was a seven-month waiting period. (RT 52: 7774.)

Cross-examination also elicited that she had told the defense investigator that appellant had a very bad attitude, did not want to get up in the morning, did very poorly in school, and always found someone else to blame instead of taking responsibility for his own actions. This was in the context of commenting on appellant's low self-esteem and her contribution to that. (RT 53: 7940–7942; see also RT 53: 7933.) The statement was not entirely accurate; appellant may not have liked to take responsibility for his actions, but sometimes he did, while other times he blamed others. (RT 53: 7934.) This had a history: when he was little boy, if he was responsible for something that angered her, she beat him. (RT 53: 7934.)

Defense investigator Robin Levinson was called by the prosecution to testify that she interviewed Maria Self in June, 1993, seven months after appellant's arrest and nearly three years before Maria testified. (RT 53: 7936; see also RT 37: 5638–5639; 52: 7689, 7697.) At that point, Maria portrayed herself in a better light than she and other family members did at trial. She said she did not use drugs around her children. She did not spend much time with them because she was always out—dancing, out with the girls, or out with

a boyfriend, but she would try to find baby-sitters. Perhaps she had a drink or two in front of the children but did not recall getting drunk in their presence—she always tried to shield them from that. (RT 53: 7937.)

Carmen Burrola, Maria Self's sister; older cousins **Mona Quezada**, **Corinna Leon**, and **Sheila Torres**; **Peggy Lopez**, appellant's godmother and a sister of appellant's father; cousin **Catherine Mejia**, who evidently was closer to appellant's age; and **Anthony Self**, appellant's older brother corroborated, in various ways, Maria Self's testimony about the unstable, neglectful, and abusive home life when the children were very young and, apparently, for many years after that. They also painted a picture of poverty in the household, as well as providing a glimpse of appellant as a little boy who liked to play, like other children. (RT 52: 7787–7797, 7817–7846, 7849–7851; 53: 7894–7925.)

They added some information to Maria Self's account, some of which is summarized here. Burrola, for example, explained that appellant and his brother Anthony stayed with her family for perhaps two years, probably starting when he was in second grade, because their mother had a nervous breakdown. His father never came to visit during that time. (RT 52: 7787–7793.)[49]

When appellant was five, Quezada was often with her grandparents when they had to pick up Maria's boys because they were not being taken care of or because Maria was upset. They generally found the house a mess. Often

---

[49]On cross-examination Burrola acknowledged that she did not see Maria abuse the boys, and that the defendants' two other brothers had also lived with their mother, and they were both currently serving as non-commissioned officers in the army. She had a high opinion of the stepfather, Phillip Self. (RT 52: 7797–7800.)

there would be no decent food, and sometimes the electricity was off. She was 15 years old, and she felt she needed to take care of the boys when she and they were at the grandparents, because there was no one else there for them, although on cross-examination she admitted that the grandmother was good to the boys. (RT 52: 7820–7823, 7826.)

Lopez mentioned that appellant started living with his father when he was in junior high school. Before that, Maria prevented contact between the boys and their father's side of the family, although some took place in secret. (RT 52: 7828–7830; see also 53: 7896.) Torres said that the men Maria consorted with when raising her boys included heroin dealers. (RT 53: 7897–7898, 7907.) Maria lived with Torres for awhile, and Torres corroborated her testimony about her physical and emotional abuse of her children. (RT 53: 7894–7898, 7904.) Torres also mentioned that there was quite a family history of domestic violence, as well as a suicide and two homicides. (RT 53: 7898–7899, 7903.) Maria was very aggressive with appellant, always comparing him to his father, after whom he was named, and telling him that he would not amount to anything. (RT 53: 7904.) She firmly believed that men were no good, "and when she talked to her boys, that's the way she talked, men are no good. You're no good." (RT 53: 7905.) She made appellant do things that he was too young to handle. (RT 53: 7904.) Torres acknowledged on cross-examination that she had made different choices than others in her family, but, she explained, "I had a lot of support." (RT 53: 7309–7910.) Asked if she would characterize Phillip Self as a good man, she replied, "It depends what you mean by good." (RT 53: 7910.) He was unhelpful as a parent to the boys. (RT 53: 7910–7911.) Anthony Self testified that he liked Philip and said he was good to the boys, but Philip's involvement with them had its limits, and he was hot-tempered. (RT

53: 7920–7921, 7923.) Maria's violence towards the boys—including attacking them with household objects—continued even after she got together with Phillip, and while Anthony was in high school. (RT 53: 7917, 7922.)

Appellant's Good Traits[50]

Burrola, Quezada, Lopez, and Leon, each of whom was close to appellant at different points in his life, described him as a good boy, respectful and quiet. (RT 52: 7789, 7797, 7823, 7831, 7839–7840.) All were shocked by his arrest, as was Mejia, who had known him as a playmate and, later, as a housemate. (RT 52: 7797, 7825, 7831, 7845, 7852.) As a teen he baby-sat Lopez's children sometimes, and he played with, and got along well with, Leon's children as well. (RT 52: 7831, 7839.) Quezada's last contact with appellant before was in the summer of the year before the criminal activity, when he was at the terminal to take a bus. He seemed very unhappy. (RT 52: 7823, 7825.) Leon said that, in high school, appellant became a bit separated from the family. He spent more time by himself and with his girlfriend, and then they had a baby. (RT 52: 7840.)

Mejia had been a housemate of appellant's in Riverside for three or four months in 1990, i.e., two years before appellant's offenses. They had close personal contact, and she knew him as quiet and happy, and a nice guy. He was looking for jobs at that point. (RT 52: 7848–7849.) He would talk about

---

[50]There was other testimony, the purpose of which was not apparent. Richard Torres testified that he was a cousin of appellant's who saw him frequently when they were young children and on rare occasions after that. (RT 53: 7867–7869.) A jail deputy testified in front of both juries about Chris Self's doing art work in jail, and he authenticated some drawings. (RT 52: 7802–7805; Exs. FF, GG, HH.) Much of Anthony Self's testimony pertained to Chris Self, only.

his son, Kevin, and periodically he would say that he was going out with Kevin and Kevin's mother Stephanie, and he was happy that he was going to be with his son. Sometimes Kevin was over at the house. (RT 52: 7849–7850.) On cross-examination, Mejia admitted that drugs were used by some of the residents of the home she shared with appellant, but she never saw appellant using them, and he never spoke of drug use. (RT 52: 7853.)

Maria Self's testimony included the fact that, after appellant's son Kevin was born to Stephanie Stinson, appellant used to bring Kevin over to her house, and they would sit around and talk and play with him. Appellant frequently told Kevin that he loved him, and she never saw him abuse him. At the time of trial Kevin was five, and Maria took him to visit appellant as often as she could. ((RT 52: 7723–7724.) Stephanie Stinson testified that she also sometimes brought Kevin to visit appellant at the jail. (RT 51: 7517, 7522–7523.)

Christine Arrabito knew appellant from elementary school, junior high school, and high school. (RT 53: 7871.) They were good friends, and, although she had a crush on him for a long time, they never had a romantic relationship. (RT 53: 7876, 7881.) In 1991 Arrabito was living in a trailer park in Perris, and appellant stayed there off and on for perhaps a month. (RT 53: 7872.) At the end of July, 1991, Arrabito moved to Pacifica, in the San Francisco area, where her family was. (RT 53: 7872–7873, 7874.)

Appellant came with her and moved into the household as well. He wanted to find work, get stabilized, and get himself back together. He wanted to take care of his son and his family, and he felt like getting out of the Perris area would help him do that. He hoped for better surroundings, meeting new people, and maybe finding better work. (RT 53: 7873.)

Appellant stayed in the household five months, but it ultimately did not work out. Appellant had several jobs, including at restaurants and a drug store, either leaving or being fired from each and then finding another. (RT 53: 7873–7874.) When he started a new job, he would speak highly of how he was doing there, and then the job would be over, and Arrabito and her family began to distrust him. (RT 53: 7876–7877.) Appellant started out paying his share of household expenses, but eventually he did not, and he ran up a $300–400 telephone bill. A family meeting voted appellant out. (RT 53: 7874–7875, 7877–7878.)

On cross-examination, Arrabito said that appellant had told her that he had methodically stolen cars in high school. (RT 53: 7878–7879.) However, Arrabito felt that personally she could trust appellant. (RT 53: 7879.) Even knowing all the things that she knew about appellant, she and her family gave him a chance by letting him live with them, because he was a really good friend, and she cared about him. And he showed her family that he really wanted to get a fresh start. (RT 53: 7881.) He started out well but ultimately failed to make use of the opportunity that they gave him. (RT 53: 7882–7883.)

Appellant had told Arrabito that he and his friends would beat up someone who angered them. Arrabito thought it was all talk, for she never saw that in him. (RT 53: 7880–7881.) "He has got good parts to him." (RT 53: 7938.) For example, he "wants to help people out, people he cares about." (*Ibid.*)

Janish Babish, Arrabito's mother, corroborated Arabito's testimony. She added that the $300 telephone bill was all for calls to the Riverside area; relatives never called him, and he was trying to reach his son. Appellant cut back his telephone use in response to a request to stop using the telephone, but he did still use it, so, sometime between Thanksgiving and Christmas, 1991,

he was told to leave. He had stayed at a church for a time after leaving. Appellant had said he would pay the family back for the phone bill, but he did not. (RT 53: 7884–7890.)

//

//

(PAGE INTENTIONALLY LEFT BLANK)

ARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant's entire trial was about whether he would be sentenced to death or life in prison without parole. While formally there were guilt and penalty phases, functionally it was one long penalty trial, with a circumstances-of-the-crime phase and an other-evidence phase.

Thus, appellant mounted no guilt-phase defense, and his attorney did not argue for acquittal on any count. Rather, his summation was about whether Munoz was credible in painting appellant as an instigator of, or a shooter at, any of the crimes. (RT 46: 6978–7012.) These were important matters of culpability, but they were unrelated to guilt or the special circumstances. The prosecutor picked up the gauntlet, arguing in rebuttal that Munoz was credible on who played what role. (RT 46: 7017–7040.) At the close of the penalty phase defense counsel told the jury that five months earlier, the defense team "knew we would be here today . . ." (RT 54: 8035), and that is how the case was tried.

The prosecution used the guilt phase to predispose the jury to render a death verdict later. Some of its choices were either unobjectionable, unlikely to be deemed error under current law, or not preserved for review, like making extensive use of crime-scene and gruesome autopsy photos, or having grieving family members come in, somewhat unnecessarily, to authenticate various items and say more than necessary about related experiences. But there were also clear and serious guilt-phase errors affecting penalty. So the appeal, like the trial, primarily focuses on penalty-phase prejudice.

The prosecution—with a case virtually guaranteeing, at a minimum, three sentences of life without parole, along with lengthy determinate and indeterminate terms—chose not to charge every offense to which its evidence pointed. Yet it insisted on trying appellant on a minor charge of receiving an ammunition pouch stolen from Officer John Feltenberger. Its purpose in doing so was accomplished when the trial court erroneously permitted the entire case regarding the attempted murder of Officer Feltenberger by appellant's brother to be heard by appellant's jury, ostensibly to prove receiving. This allowed the prosecution to open appellant's trial, and set its tone, with a police officer's horrifying account of being shotgunned and left to die, by a person very closely associated with appellant, along with bloody corroboration of that account.

Under the trial court's view of the evidence relevant to the receiving count, it should have been severed for trial, but a motion to sever was denied. Similarly, there was no legal basis for joinder of the felony vandalism count, another minor offense and one unrelated to the crimes against persons. Refusal to sever that count permitted the prosecution to argue highly prejudicial theses about appellant's character, using slogans spray-painted in the building, with evidence that would not have been admissible at the penalty phase.

Guilt-phase error aimed at a death verdict continued with introduction of "escape attempt" evidence to show consciousness of guilt, which was not an issue. Under black-letter law distinguishing between preparations and attempt, it was clear that appellant had not attempted to leave custody. The crime of attempt not having been committed, the evidence would not have

been admissible as aggravation.[51] Any purported value it had to show "consciousness of guilt" was so cumulative to the evidence of appellant's week-long flight and—most particularly—his confession, that the only true effect was to prejudice the penalty decision. The jury was later directly invited to consider the evidence as aggravation, and the instructions on attempt so muddled the preparation/attempt distinction that they did not permit the jury to decide for itself that no factor (b) crime had been committed. Given typical jurors' documented fears of violent criminals, raising the specter of escape was enormously prejudicial.

The other prejudicial guilt-phase error was an instruction on aider-and-abettor liability that employed an unconstitutional mandatory presumption that one intends the natural and probable consequences of an action to substitute for proof of the statutory element of intending those consequences. The error invalidates the guilt finding on the most serious offenses.

The penalty phase began with a day of excruciating victim-impact testimony. It was enormously prejudicial by the standards applied to all other types of evidence, and its probative value was undermined by, inter alia, its failure to tend to show that the murders of which appellant was convicted were aggravated instances of death-eligible murder. All homicides produce similar consequences, unless the victim had no loved ones. This Court is constitutionally compelled to retract the open-ended invitation it has given prosecutors to use such evidence. Under appropriate safeguards mandated by many other jurisdictions, the victim-impact case here would not have been permitted; without them, the fairness of the trial was severely compromised.

---

[51]The crime that was committed but not charged—destruction of jail property—is not a violent offense for purposes of section 190.3, factor (b).

Some of the damage could have been ameliorated had the trial court granted appellant's request for a limiting instruction. Under clear law it had to do so, but it refused.

There was a gross incompatibility between swamping the jury with the emotional, scarcely-probative victim-impact testimony which it heard and the extraordinary requirements for a fair trial that are mandatory when the issue is whether the state will put a person to death. The problems were so clear that appellant begins the discussion of trial error with the victim-impact contentions, believing that the Court's resolution of them may well eliminate the need to deal with most of the other claims.

Most of the other-offenses evidence brought in at penalty should have either not been admitted, or else admitted with instructions that would have permitted the jury to disregard it. Spraying feces under Tyreid Hodges' door and squirting urine on his back were not crimes of violence, for purposes of the statute specifying what misconduct can make a death-eligible defendant death-worthy. Neither, as noted above, were the escape preparations. The instruction guiding the jury's determination of which other-offense allegations could actually be used against appellant was full of prejudicial errors. Appellant shows a disturbing pattern of the CALJIC committee's having deviated from prior law and this Court's accepting each change, without having that fact called to its attention, and without having to confront certain constitutional and statutory reasons why the changes were error.

The prosecutor fought for introduction of a statement in which appellant expressed an inclination to seriously injure any child molester whom he encountered in custody, on the spurious basis that it was needed to corroborate molester Olen Thibedeau's account of the ineffective assault on him, which was uncontested. When it came time to use the statement in argument, the

prosecutor cited it solely as bad-character evidence, although, under settled law, it could not have been admitted for that purpose.

The errors regarding admission and use of other-offenses evidence came together in the use to which the prosecutor put them: a compelling but misleading argument that appellant had to be executed because of the danger he would pose to others in prison. Future dangerousness is not, however, on California's exclusive statutory list of aggravators. This Court has been steadfast is its stance that, for constitutional and legislative-intent reasons, if a consideration is not enumerated in the statute, it is not aggravation. The Court has upheld future-dangerousness arguments, but it has never provided a reasoned answer to a challenge on this basis, dealing only with other complaints.

The trial court twice erred prejudicially in the extremely sensitive area of excluding mitigation. First, it excluded evidence that Maria Self was a longtime childhood victim of incestuous rape. The prosecutor claimed that she and others had offered an exaggerated and unexplained portrayal of her extreme abuse and neglect of her sons. The excluded evidence would have corroborated those accounts, by giving the jury a basis for understanding how she could be so disturbed as to have behaved in the way she was said to have acted.

Second, the trial court refused to permit argument or instruction allowing the jury to consider Munoz's lenient treatment in mitigation. While California case law limits mitigation to that mitigating the defendant's culpability, United States Supreme Court precedent requires consideration of any evidence that a reasonable juror could believe favored *mitigated punishment*, and it treats accomplice-leniency evidence as falling into the second category.

Appellant is confident that the Court will find errors that arguably bore on the jury's penalty determination. When it does so, and it needs to determine whether they were harmful or prejudicial, its analysis could basically take one of two forms. It might, quite frankly, look something like this:

> Appellant was convicted of three senseless murders. According to the prosecution's evidence, he initiated two of them. He instigated another shooting incident. When facing trial on these offenses, he armed himself, assaulted other inmates, and began to carry out an escape plan that involved taking a guard hostage. The case in mitigation provided evidence of serious abuse and neglect during appellant's childhood but, as the prosecutor pointed out, it was somewhat vague, and it was uncorroborated by non-family sources. There was no explanation of how any abuse and neglect led to the formation of a young man who, at age 21, suddenly started committing terrible crimes. We are confident that, given the ample reasons for imposing death, the jury did not rely on the error of _____, in reaching its verdict. It tended to show _[e.g., appellant's violent character]_, but on that point it was merely cumulative. And while it depicted appellant in an unfavorable light, it paled in comparison to the crimes themselves.

If this is the Court's approach, this appeal is basically a fruitless exercise for all concerned. For this reason, appellant's first contention is not a claim of error at all, but an analysis of how questions of harmlessness should be viewed in this case. It shows that, instead of the preceding paragraph, a constitutionally appropriate discussion would read more like this:

> Appellant was convicted of three senseless murders. Although the accomplice-informant portrayed him as the initiator of two and of another shooting incident, we cannot know whether all—or any—of the jurors credited Jose Munoz's self-serving, uncorroborated versions of who did what. Appellant had no prior record. Some jurors could have recognized that the misconduct in which he engaged for part of his pretrial confinement was not unusual and decided that it did not counterbalance the mitigation.

> There was evidence of serious abuse and neglect during appellant's formative years. As a young adult, appellant was well loved and was often loving and respectful, including giving his young son the affection which he himself had been denied. He had tried to change his life before the crimes began. Many jurors could have seen a complex young man, whose terrible actions during a two-month period may have been related to both substance abuse and to his background. From this perspective, he had caused tremendous harm, but a sentence severer than most murderers get, life without parole, could be enough.
>
> Nothing permits us to rule out the possibility that, absent error, one or more jurors would have seen the evidence in this light. We also cannot, therefore, exclude the possibility that the error contributed to the verdict. Even as the case was tried, it took the jury two days to reach that verdict.
>
> Respondent argues that the error only gave the jury more reason to believe a point already proven, [e.g., appellant's violent character]. But in weighing the case for death, the jury *cumulates* the factors in aggravation. The abstract trait named by respondent may have been already proven, but being specifically invited to consider the matter permitted by the error allowed more, and different, information to weigh on the side of death. We cannot know that no juror found the balance tipped by that information, which the prosecutor himself urged as a reason why life without parole was inadequate.

The remainder of this brief shows that there were serious errors in this case, and jurors could indeed have gone either way. The confidence needed for the members of this Court to sign off on a death sentence is therefore lacking.

//

//

I

ANY SUBSTANTIAL ERROR COULD HAVE AFFECTED THE PENALTY VERDICT, AND ANY SUCH ERROR REQUIRES REVERSAL UNDER THE FEDERAL CONSTITUTION AND SHOULD ALSO LEAD TO REVERSAL UNDER STATE LAW

Appellant's claims of prejudicial error can be reviewed more easily if the means by which prejudice will be evaluated are established first. Harmless-error analysis should be conducted by this Court in the manner that it conducted it from 1959 through 1986, rather than by continuing a major unacknowledged change introduced in the late 1980s. Former Chief Justice Roger Traynor—who in modern times is most frequently quoted for the proposition that needless reversals erode public confidence in the judiciary[52]—insisted that

> an appellate court cannot possibly determine what errors influenced a jury to impose the death penalty. Any error, unless it related only to the proof of some fact otherwise indisputably established, might have tipped the scales against the defendant. Hence, an error in the penalty phase of a capital case usually compels reversal.

(Traynor, The Riddle of Harmless Error (1970) p. 73 (Traynor).) Appellant would add that errors that were unquestionably trivial or that were cured in a manner that was indubitably effective could also be held harmless, but no such errors are raised in this brief. As will be shown below, any analysis that depends on the Court's weighing of the strength of the aggravating and mitigating evidence, or, similarly, on comparing the pro-death impact of a substantial error to other evidence already before the jury, is improper.

---

[52]See, e.g., *Rose v. Clark* (1986) 478 U.S. 570, 577; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681; *People v. Flood* (1998) 18 Cal.4th 470, 507; *People v. Cahill* (1993) 5 Cal.4th 478, 509.

Nevertheless, since this Court sometimes has considered the relative strength of the aggravating and mitigating evidence in considering whether respondent has met its burden of showing harmlessness, appellant will also review the evidence pertaining to penalty.

A. In the Penalty Context, Harmlessness Review Must be Concerned with the Potential Impact of an Error on Jurors' Unknowable Subjective Processes, Not with the Relative Strengths of Aggravation and Mitigation

"As to the issue of guilt, [the harmless error] test is quite clear in its application. . . . But in deciding the effect of the errors on the penalty phase of the trial the problem is not so simple." (*People v. Hamilton* (1963) 60 Cal.2d 105, 136, overruled on another point in *People v. Daniels* (1991) 52 Cal.3d 815, 864, and *People v. Morse* (1964) 60 Cal.2d 631, 637.) Because some of this Court's cases seem to have lost sight of the difference, it is necessary to recapitulate the basic principles underlying appropriate harmless-error review. Where legal phrases alone do not provide "a simple and infallible formula to determine whether in a given case" relief is warranted, "[i]t is necessary to examine the facts in the light of the polic[ies]" underlying the rules. (*Jorgensen v. Jorgensen* (1948) 32 Cal.2d 13, 19.)

1. Numerous Factors Constrain Harmlessness Analysis in Death Cases

a. Purpose of Harmless-Error Rule

"[T]he evaluation of an error as harmless or prejudicial is one of the most significant tasks of an appellate court, as well as one of the most complex." (*United States v. Lane* (1986) 474 U.S. 438, 465, quoting Traynor, *supra*, p. 80.) "What harmless-error rules all aim at is a rule that will save the good in harmless-error practices while avoiding the bad, so far as possible." (*Chapman v. California* (1967) 386 U.S. 18, 22–23.) The "bad" is to use

harmlessness analysis simply "as a means of affirming criminal convictions." (*Hays v. Arave* (9th Cir. 1992) 977 F.2d 475, 481, fn. 9.) The "good" is to avoid having to

> set[] aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. . . . [T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless, not requiring the automatic reversal of the conviction.

(*Chapman v. California*, *supra*, 386 U.S. 18, 22.) Thus, before a 1911 state constitutional amendment requiring, and authorizing, full harmless-error review, "[I]t sometimes became necessary for the Courts of Appeal and for this court to grant new trials to defendants on account of technical errors or omissions . . . ." (*People v. O'Bryan* (1913) 165 Cal. 55, 64.)

b. A Possible Pitfall

An important reason to avoid reversing for errors that could not have affected the outcome is to avoid "eroding the public's confidence in the criminal justice system." (*People v. Cahill*, *supra*, 5 Cal.4th 478, 509; see also *People v. Flood* (1998) 18 Cal.4th 470, 507.) But the judiciary's relationship to public opinion has another side as well: "In times of stress, public excitement, and hysteria, this court, the highest tribunal in the state, must stand as a bulwark in protecting the rights of every citizen within its borders." (*Pierce v. Superior Court* (1934) 1 Cal.2d 759, 772 (conc. & dis. opn. of Langdon, J.) That can be difficult, under "the 'hydraulic pressure' of public opinion that Justice Holmes once described" (*Payne v. Tennessee* 501 U.S. 808, 867 (dis. opn. of Stevens, J.)):

> One . . . California justice, speaking of his vote in a controversial 1982 decision shortly before his retention election later commented: "I decided the case the way I saw it. But to

> this day, I don't know to what extent I was subliminally motivated by the thing you could not forget— that it might do you some good politically to vote one way or the other."

(Champagne, *Political Parties and Judicial Elections* (2001) 34 Loyola L.A. L.Rev. 1411, 1420; see also Culver, *The Transformation of the California Supreme Court: 1977–1997* (1998) 61 Alb. L.Rev. 1461, 1463–1464.) The difficulty has, in this era, been most prominent in capital cases because we live "in a political culture in which the death penalty has become such a useful 'hot button' issue." (Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and The Impulse to Condemn to Death* (1997) 49 Stan. L.Rev. 1447, 1450.)

Reasonable minds can and sometimes do disagree about whether or not to reverse after finding error. Moreover, "[i]t is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." (*Herrera v. Collins* (1993) 506 U.S. 390, 415.) It is conceivable, therefore, that pressures to maintain public confidence may have sometimes caused this Court to deviate from a fair application of harmlessness analysis in capital cases, as several critics have suggested.[53]

---

[53]See, e.g., *People v. Morris* (1991) 53 Cal.3d 152, 236 (dis. opn. of Mosk, J.) ("principled application of harmless-error analysis is often a difficult task. . . . Regrettably, in order to salvage judgments of death that have been tainted by error, this court has often failed in this task in recent years"); Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique* (1991) 26 U.S.F. L.Rev. 41, 84–85 (Lucas court's approach to harmlessness of penalty-phase error "repudiated the underpinnings which have been the basis of the California Supreme Court's death penalty jurisprudence since 1957"); *id.* at p. 90 (Lucas and Bird courts both paid "lip service" to "reasonable possibility" harmlessness standard without applying it, as they pursued opposite ideological agendas); Kelso, *A Tribute to Retiring Chief*

(continued...)

c. Appellate Review and the Jury-Trial Right

The bare principle that judgments should not be reversed for errors that could not have affected the outcome leaves important questions of implementation unanswered. First, how can an appellate court determine what a jury would have decided, absent certain errors, without invading the jury-trial right by deciding for itself what the evidence shows? (See, e.g., *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 ["The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered"]; *Rose v. Clark* (1986) 478 U.S. 570, 593 (dis. opn. of Blackmun, J.) ["The Constitution does not allow an appellate court to arrogate to itself a function that the defendant . . . can demand be performed by a jury"]; *Satterwhite v. Texas* (1988) 486 U.S. 249, 263 (conc. opn. of Marshall, J.) ["allowing a court to substitute its judgment of what the sentencer would have done in the absence of constitutional error for an actual judgment of the sentencer untainted by constitutional error" impinges on the reliability of outcome]; Traynor, *supra*, pp. 18, 20–21.) Indeed, concern about the respective roles of finders of fact and appellate courts, not hypertechnicality, was the basis for this Court's pre-1911 belief that courts could find harmlessness only in trivial errors or those where the record showed harmlessness without a weighing of the evidence. (*People v. O'Bryan*, *supra*, 165 Cal. 55, 64; see also *People v. Williams* (1861) 18 Cal. 187, 195.)

Moreover, actually discerning what 12 other people would have done had the trial been different can be "a difficult task in any case." (*Hays v.*

---

[53](...continued)
Justice Malcolm M. Lucas (1996) 27 Pac. L.J. 1401 & fn. 6; Bright, *The Death Penalty as the Answer to Crime: Costly, Counterproductive and Corrupting* (1996) 36 Santa Clara L.R. 1069, 1077.

Arave, *supra*, 977 F.2d 475, 480; see also *People v. Hill* (1992) 3 Cal.App.4th 16, 35–36.) As will be explained in more detail below, the difficulties are dramatically compounded with jury sentencing in death cases, since the jurors are exercising such broad, essentially unfettered discretion. (*Satterwhite v. Texas*, *supra*, 486 U.S. at p. 258; *People v. Brown* (1988) 46 Cal.3d 432, 447–448.)

It is easy to forget that these competing considerations, along with changes in the political climate, have caused courts—including this one—to experiment with quite different methods over time, sometimes without changing the formulas being invoked.[54] A focus on the unique aspects of death verdicts is required in order to ground harmlessness analysis in the correct guiding principles.

d. The Unknowability of Jurors' Penalty Decision-Making

> The validity of the harmless error doctrine is based on the assumption that the effect of the error is determinable. If the effect of the error on the verdict is minimal, the error is harmless. If the effect of the error on the verdict is too speculative, the reliability of the verdict is suspect.

(Carter, *Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied* (1993) 28 Ga. L.Rev. 125, 149, fn. omitted.)

---

[54]See, regarding California's history, Kessler, *Death and Harmlessness*, *supra*, 26 U.S.F. L.Rev. 41, 46–49 (1911 constitutional amendment ended former presumption of prejudice), 57–65 (shift from no separate review of error affecting penalty, because of unitary trials without aggravation evidence, to reversal for any substantial error affecting penalty phase of bifurcated trials), 67–68 (reasonable possibility standard as gloss on any-substantial-error rule), 74 (same), 81–91 (shift from Bird court's to Lucas court's application of same rules); see generally Traynor, *supra*.

When the current rules for ascertaining harmlessness were developed, this Court recognized a core fact about error potentially affecting penalty, a fact that received less attention as those rules became familiar formulas. For most civil and criminal juries, "the usual function [is that] of finding whether or not certain events occurred and certain consequences resulted from them." (*People v. Morse*, *supra*, 60 Cal.2d 631, 643.) Even in such a case,

> it is virtually impossible to determine what influenced a particular juror's vote[, as opposed to considering the inherent likelihood of an error's affecting a reasonable juror]; an unlimited number of factors may contribute to such a decision. In order to assess fully the impact of any one factor it would be necessary to analyze the personality of each juror and recreate the entire deliberation process, a virtually impossible task.

(*People v. Hill*, *supra*, 3 Cal.App.4th 16, 35–36 ; see also *Hays v. Arave*, *supra*, 977 F.2d 475, 480.) Nevertheless, determining whether a disputed *factual* proposition could have appeared significantly different to a jury, absent an error, can, depending on the evidentiary picture, be an attainable goal.

In contrast, this Court and others have recognized that in death-penalty cases, any attempt to evaluate harmlessness confronts daunting epistemological difficulties. The problem is in imagining how 12 jurors, told not just to determine facts, but to each rely on their unique moral frameworks in determining what weight to give each fact, would have responded if the circumstances had been different. The absence of requirements for unanimity or an expression of findings regarding anything but the ultimate outcome, along with the lack of any burdens of proof or persuasion, go even further in making it virtually impossible to know what was determinative for each juror. As Chief Justice Lucas wrote in 1988, "For over two decades . . . we have recognized a fundamental difference between review of a jury's objective guilt phase verdict, and its normative, discretionary penalty phase determination.

Accordingly, we have long applied a more exacting standard of review . . . ." (*People v. Brown*, *supra*, 46 Cal.3d 432, 447; see also *Deck v. Missouri* (2005) 544 U.S. 622, 633 [jury is weighing "considerations that are often unquantifiable and elusive—when it determines whether a defendant deserves death"]; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 340, fn. 7 [appellate court "would be relatively incapable of evaluating the 'literally countless factors that [a capital sentencer] consider[s,]' in making what is largely a moral judgment of the defendant's desert"; bracketed insertions in original]; *Satterwhite v. Texas*, *supra*, 486 U.S. at p. 258 ["evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer"]; *id.* at p. 262 (conc. opn. of Marshall, J.) ["Because of the moral character of a capital sentencing determination and the substantial discretion placed in the hands of the sentencer, predicting the reaction of a sentencer to a proceeding untainted by constitutional error on the basis of a cold record is a dangerously speculative enterprise"]; *Sanders v. Woodford* (9th Cir. 2004) 373 F.3d 1054, 1062 [jurors' freedom to weigh factors as they wish "makes it difficult for an appellate court that later reviews the jury's sentencing decision to surmise what weight the jury gave to a particular factor"], reversed on other grounds sub nom. *Brown v. Sanders* (Jan. 11, 2006, No. 04-980) __ U.S. __ [126 S. Ct. 884; 163 L. Ed. 2d 723]; *People v. Robertson* (1982) 33 Cal.3d 21, 54 [emphasizing "the broad discretion exercised by the jury . . . and the difficulty in ascertaining '[t]he precise point which prompts the [death] penalty in any one juror,'" bracketed modifications in original]; *People v. Hamilton*, *supra*, 60 Cal.2d 105, 136–137; *Blair v. Armontrout* (8th Cir. 1990) 916 F.2d 1310, 1350 (dis. opn. of Heany, C.J.); *State v. Finch* (Wash. 1999) 975 P.2d 967,

1007–1008; Kessler, *Death and Harmlessness*, *supra*, 26 U.S.F. L.Rev. 41, 55–57.)

With some important exceptions, the subjective nature of capital sentencing makes it difficult to determine that all jurors were unimpacted by error, even where the case for death may seem relatively clear-cut. This Court stated the problem starkly over 40 years ago, when it reaffirmed that any substantial error affecting penalty met even the *Watson* test:

> The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.
>
> We cannot determine if other evidence before the jury would neutralize the impact of an error and uphold a verdict. Such factors as the grotesque nature of the crime, the certainty of guilt, or the arrogant behavior of the defendant may conceivably have assured the death penalty despite any error. Yet who can say that these very factors might not have demonstrated to a particular juror that a defendant, although legally sane, acted under the demands of some inner compulsion and should not die? We are unable to ascertain whether an error which is not purely insubstantial would cause a different result; we lack the criteria for objective judgment.
>
> Thus any such substantial error in the penalty trial may have affected the result; it is "reasonably probable" that in the absence of such error "a result more favorable to the appealing party would have been reached."

(*People v. Hines* (1964) 61 Cal.2d 164, 169, disapproved on another ground in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40.)

The problem of ascertaining the effect of error is exacerbated by the fact that the possibility of a difference in one juror's vote is enough to throw the verdict into question and entitle an appellant to reversal: "If only one of

the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another." (*People v. Hamilton, supra*, 60 Cal.2d 105, 137; accord, *In re Lucas* (2004) 33 Cal.4th 682, 734, quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 537.)

That these are not just theoretical concerns is borne out at the trial level, in the total unpredictability of jury verdicts. The federal constitutional rules that all mitigation (1) must be considered and (2) can be given effect by a juror despite disagreement by colleagues

> make the outcomes of penalty phase proceedings unpredictable. This unpredictability is most manifest in cases that have a low to moderate level of aggravating circumstances, but sometimes the outcome can be a surprise even in a seemingly slam-dunk, highly aggravated case . . . .

(McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should it Be?: An Assessment of United States and Louisiana Supreme Court Case Law* (1999) 59 La. L.Rev. 1105, 1142–1143 (McCord); see also *McCleskey v. Kemp* (1987) 481 U.S. 279, 311 [acknowledging "the inherent lack of predictability of jury decisions" in capital sentencing].) After detailing a highly aggravated case which resulted in a life verdict, the same author concludes, "[G]iven the highly subjective nature of a death penalty decision, it can never be clear what might have turned the verdict in the opposite direction had the jury heard—or not heard—it." (McCord, *supra*, 59 La. L.Rev. at p. 1144.) California juries, too, have rejected death in a number of extremely aggravated cases.[55] And presumably juries hang in such

---

[55]See, e.g., *People v. Rodriguez* (1997) 53 Cal.App.4th 1250 (two killings a month apart: lying-in-wait shooting followed by pursuit to deliver (continued...)

circumstances more frequently than they agree on life.

e. Functional Limits of Appellate Review

The simple unknowability of how a verdict was obtained from every juror constitutes the main reason why harmless-error review cannot be conducted in the normal fashion, but there is an additional problem as well:

> [A]n appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate

---

[55](...continued)
coup de grace, and 2nd-degree murder committed by stabbing victim after returning with knife after initial fight); *People v. Scott* (1991) 229 Cal.App.3d 707, 710–711 (planned, execution-style killings of drug dealer and three people who lived with him); *People v. Henderson* (1990) 225 Cal. App. 3d 1129, 1137–1139, 1155 (murder, to obtain funds to travel home, of the couple with whom perpetrators stayed—one with a bullet to forehead while tied up—along with voluntary manslaughter of their one-year-old baby, and second-degree murder of their viable fetus); *People v. Brown* (1985) 169 Cal.App.3d 728, 732–734 (over four-day period, defendant committed four home-invasion robberies, shooting one victim to death; went to another apartment to "find a woman" and pistol-whipped and raped her; and, in order to rape another woman, which he did repeatedly throughout the night, shot her common-law husband in the back, killing him, as he turned to get a shirt so he could give defendant a ride); *People v. Singh* (Cal.App. 2003) 2003 WL 264698 *1–*6, *15 (defendant said he would kill pregnant ex-girlfriend because her child-support demands could interfere with his career, then shot her in the head three times—killing her and the fetus—and shot their six-month-old baby in the head three times, then tried to get current girlfriend to give him alibi); *People v. Lopez* (Cal.App. 2003) 2003 WL 22183862 *1 (defendant killed purported witness in trial of member of defendant's gang, along with 15-year-old bystander).

The last two opinions are unpublished, but they are cited "for reasons other than reliance upon" their legal holdings. (*Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 443, fn. 2; see also *In re I.G.* (2005) 133 Cal. App. 4th 1246, 1255; *Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, 219.)

> record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed "[those] compassionate or mitigating factors stemming from the diverse frailties of humankind."

(*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 330, bracketed insertion, in internal quotation, in original.) Put differently, even in the guilt phase, "[a]ssessment of harm [from error] is often a blind exercise, for records cannot convey a 'feel' for the emotional environment of the courtroom. That is why doubt as to the extent of harm is resolved in favor of the defense." (*People v. Keene* (Ill. 1995) 660 N.E.2d 901, 913.)

f. Role of Reliability Requirement

A state's decision to put one of its citizens to death is subject to "extraordinary measures" to avoid its being based on "passion, prejudice, or mistake." (*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 329, fn. 2, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 118 (conc. opn. of O'Connor, J.).) This Eighth Amendment reliability requirement applies not only to proceedings at trial, but to how the case is reviewed on appeal. "[T]he severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." (*Zant v. Stephens* (1983) 462 U.S. 862, 885.) Harmless-error review undertaken without regard for the extreme limits on a court's capacity to know how a penalty jury would have responded to different evidence, instructions, or argument undermines the reliability requirement. Unless a reviewing court can say that an error "had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

2. The *Chapman* Test Prohibits Speculation on the Relative Strengths of Aggravation and Mitigation in the Jurors' Minds

The concerns set forth above are met by the United States Supreme Court's classic formulations of the beyond-a-reasonable-doubt standard of *Chapman v. California*, none of which invite speculation about how jurors weighed the circumstances before them and would have voted in the absence of the error. Instead, they require a showing that the error was not one which "might have contributed to" jurors voting the way they did. (*Chapman v. California*, *supra*, 386 U.S. 18, 23.) Respondent's burden is to show that the error is not one "which possibly influenced the jury adversely . . . ." (*Id.* at p. 23.) Thus, the *Chapman* question is whether the "verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279.)

What these formulations say is that if the error could have helped a juror make up his or her mind, reversal is required; the degree of likelihood of the same verdict in a hypothetical trial without the error is not the issue. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279.) Thus, again, reversal is required in a capital case where "we cannot say that [the error in question] had no effect on the sentencing decision . . . ." (*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 341.) The issue is not whether "'an average jury would have found the State's case [for death] sufficient'" absent the error, "but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' *Chapman* . . . ." (*Satterwhite v. Texas*, *supra*, 486 U.S. 249, 258–259.) Or, again, the question

is whether error "might have affected a capital sentencing jury"[56] or, more precisely, a member of that jury.[57]

To determine whether the error "possibly influenced the jury" (*Chapman, supra*, 386 U.S. at p. 23), as Chief Justice Rehnquist explained, "a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to" the question at issue. (*Neder v. United States* (1999) 527 U.S. 1, 19.)

Chapman, *Sullivan*, and *Neder* were all non-capital cases. "[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." (*California v. Ramos* (1983) 463 U.S. 992, 998–999.)

Appellant stresses this point because, in truth, neither the United States Supreme Court nor this Court has been consistent in applying the "might-have-contributed-to-the-result" test. Both have sometimes instead relied on overwhelming evidence of guilt alone as a basis for a finding of harmlessness on guilt verdicts. On penalty this Court (but not the high court) has similarly concluded that the case was so aggravated that no other result was possible. Neither court has acknowledged that there are actually two approaches. (See Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review* (1994) 82 Cal. L.Rev. 1335; Carter, *Harmless Error in the Penalty Phase*, *supra*, 28 Ga. L.Rev. 125, 135–138; Kessler, *Death and*

---

[56]*Id.* at p. 258; cf. *Rompilla v. Beard* (2005) __ U.S. __, __ [62 L. Ed. 2d 360, 379; 125 S. Ct. 2456, 2469] (even under *Strickland* prejudice standard and deferential AEDPA review, "although . . . it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. . . .[T]he undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal," citations and quotation marks omitted).

[57]*Wiggins v. Smith*, *supra*, 539 U.S. 510, 537.

Harmlessness, *supra*, 26 U.S.F. L.Rev. 41, 48–49; see, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 761–762; *People v. Beardslee* (1991) 53 Cal.3d 68, 112–113; *People v. McLain* (1988) 46 Cal.3d 97, 109.) Parenthetically, former Chief Justice Traynor,[58] the commentators just cited, and others[59] have criticized the "overwhelming evidence" version of the test in general (i.e., even as applied to guilt determinations) as depriving litigants of the jury-trial right, in favor of less reliable appellate fact-finding. In that view, the alternative of focusing on whether the error could possibly have contributed to the actual jurors' actual decision still avoids needless retrials, still permits considering the state of the untainted evidence—but within an appropriate context—and permits greater consistency in voiding convictions that may have been achieved via constitutional violations.

When it comes to considering whether errors of substance were clearly harmless in the determination of penalty, meticulous observation of the effect-on-the-judgment approach emphasized in *Chapman* and in many other cases is essential. With the unknowability of the jurors' discretionary decision-making processes, the individual nature of each of the 12 necessary votes, the right to have a jury—not an appellate court hypothesizing a jury deliberating after a trial that differed from the actual trial in some substantial way—decide sentence, and the unreliability of making penalty decisions based on a written record, nothing suffices but the *Chapman/Neder* focus on whether a juror (a) could have rationally gone the other way—which is *always* true of a penalty judgment—and (b) could have been pushed over the line for death, or

---

[58]Traynor, *supra*, pp. 20–23.

[59]E.g., Justice Brennan, with Chief Justice Warren and Justice Marshall, dissenting in *Harrington v. California* (1969) 395 U.S. 250, 255 et seq.

prevented from finding a sufficient case for life, by error.

This approach still leaves room for acknowledging the harmlessness of errors such as those unquestionably remedied by subsequent rulings or which produced evidence relating "only to the proof of some fact otherwise indisputably established." (Traynor, *supra*, p. 73; see, e.g., *People v. Roldan* (2005) 35 Cal. 4th 646, 734 [untimely aggravation notice harmless where defendant still had time to prepare]; *id.* at p. 739 [no prejudice from erroneous sustaining of objection to general question on mitigation where specific questions on same subject matter were subsequently answered]; *People v. Cotter* (1965) 63 Cal.2d 386, 392–398 [four admissible confessions preceded inadmissible ones].)

Significantly, even though the United States Supreme Court has wavered on how it applies *Chapman* with regard to guilt-phase error, it has never crossed the line identified here in analyzing how error might have affected penalty. It was invited to do so in *Jones v. United States* (1999) 527 U.S. 373, but no justice was willing to take that step. (*Id.* at pp. 402–404 (maj. opn.), 421 (dis. opn. of Ginsberg, J.).) The five-person majority did find harmlessness, but it was because the error had been cured. (*Id.* at pp. 404–405; cf. *id.* at p. 402 [dictum assuming possibility of considering whether jury would have reached same verdict absent error].) Similarly, a five-person majority in *Clemons v. Mississippi* (1990) 494 U.S. 738 remanded to offer the state supreme court a chance to explain its finding of harmlessness in misinstruction on an aggravating factor, in the face of dissents about the propriety of harmlessness review in the circumstances. Even the majority—without summarizing aggravation and mitigation—expressed extreme skepticism that harmlessness could be found on the basis that the jury was unaffected by considering the aggravator, noting simply that the prosecutor

had stressed it in argument. The majority was willing to allow for an alternate possibility: that the error was harmless because a properly-instructed jury would have found the aggravator in any event. (*Id.* at pp. 753–754.) Notably, this would have been harmlessness in *fact-finding*, not in weighing.[60] (See also *Johnson v. Mississippi* (1988) 486 U.S. 578, 586; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.)

In sum, there is no basis in fairness, logic, or high court precedent for holding harmless federal constitutional error which is claimed to affect the penalty determination, where such a holding would require speculating as to how all the jurors viewed the relative cases for life and death, based on the reviewing court's view of aggravation and mitigation. (See *People v. Armstead* (2002) 102 Cal.App.4th 784, 795 [when "it is impossible to know" whether error "contributed to" the verdict, respondent cannot show harmlessness beyond a reasonable doubt].) This Court must use the version of the federal test that asks "not whether, in a trial that occurred without the error, [the same] verdict would surely have been rendered, but whether the . . . verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279.)

3. The *Brown* Test, Properly Applied, Is Subject to the Same Constraints

Understood in its context, the "reasonable possibility" test reaffirmed in *People v. Brown*, *supra*, 46 Cal.3d 432 invokes the same principles involved

---

[60]On remand the Mississippi Supreme Court was unwilling to find harmlessness on either basis. It, too, stated simply that, given the prosecutor's arguing the factor, it could not hold that the jury was unaffected by considering the aggravator. (*Clemons v. State* (Miss. 1992) 593 So.2d 1004.)

in the federal test. These are: (1) error that could have possibly[61] affected a juror's decision requires reversal, and (2) given that each juror's decision was a normative one, based on multiple, subjectively-evaluated factors, errors that could not have affected such a decision are limited to those which were trivial, only tended to prove a fact otherwise established beyond any doubt, or were nullified by unquestionably efficacious remedial measures.[62]

a. Origin of "Reasonable Possiblity" Test

The "reasonable possibility" language of *Brown* is frequently quoted as if it were a freestanding test of harmlessness, but this is misleading. It evolved as a gloss on the long-standing rule, mentioned above, that "any substantial error" affecting penalty requires reversal, again because of the inability of a reviewing court to know what actually produced each vote for death:

> In determining prejudice and reversible error at the penalty phase, we agree with Justice Broussard's refinement of the traditional test in *People v. Robertson*, *supra*, 33 Cal.3d 21 . . . . The lead opinion [in *Robertson*] abides by the traditional test that "'any substantial error occurring during the penalty phase of the trial . . . must be deemed to have been prejudicial.' [Citations.]" . . . In his concurring opinion, Justice Broussard suggested that "substantiality" "should imply a careful consideration whether there is any reasonable possibility that an

---

[61]Qualifying *possibility* with *reasonable* does not imply some quantitative test of likelihood. It only "exclude[s] the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." (*People v. Brown*, *supra*, 46 Cal.3d 432, 448, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 695.) This is because "[a] defendant has no entitlement to the luck of a lawless decisionmaker . . . ." (*Ibid.*)

[62]This Court considers the *Brown* test equivalent to that of *Chapman*. (*People v. Guerra* (2006) 37 Cal. 4th 1067, 1144–1145.) Because the tests' origins were different, it seems appropriate to show that the equivalency still holds, even with the possibly new—to this Court—view of *Chapman* which appellant presents here.

error affected the verdict."

(*People v. Phillips* (1985) 41 Cal.3d 29, 83 (plur. opn.); see also *People v. Allen* (1986) 42 Cal.3d 1222, 1281 (plur. opn.) [reaffirming any-substantial-error test, with substantiality evaluated in light of reasonably possible effect on outcome]; *id.* at p. 1289 (conc. & dis. opn. of Broussard, J) [arguing error was "substantial"].)

Justice Broussard had based his proposal on the observation that the any-substantial-error-rule "was prompted by the fact that the jury at the time [that the rule was announced] was required to decide the question of penalty 'without benefit of guideposts, standards, or applicable criteria,'" while the 1977 statute applied in *Robertson* had "standards to guide jury discretion." (*People v. Robertson, supra*, 33 Cal.3d at p. 63 (conc. opn. of Broussard, J.).) On that basis he argued that, although the any-substantial-error test was still appropriate, the question of a reasonable possibility of an impact on the outcome should inform the consideration of substantiality. This was so because the Court was no longer invariably unable to determine "what seemingly insignificant factor might have tipped the scales" for a juror. (*Ibid.*)

While Justice Broussard did not elaborate, clearly the only post-1977 improvement in a reviewing court's ability to determine the impact of error on the outcome would be where the new guidelines for guiding the jury's discretion would themselves plainly negate the capacity for the error to have any impact. This would be true, for example, where evidence of non-criminal misconduct—not a statutory aggravator—was erroneously admitted, the trial court instructed the jury to disregard it, and the evidence clearly was not so prejudicial that there was a risk of the admonition's being ineffective. There remains, however, a large universe of still-unguided choices in the weighing of circumstances for and against death. The list of criteria in section 190.3

"may indeed serve to structure the process whereby discretion is exercised. But it simply does not even purport to limit that discretion itself." (*People v. Johnson* (1992) 3 Cal. 4th 1183, 1260 (conc. opn. of Mosk, J.).) Within the universe of unguided choices, knowing what "tipped the scales" remains impossible.

b. Reaffirmation in *Brown*

"In the beginning of its tenure, the Lucas Court never cited the 'reasonable possibility' standard, but rather found penalty phase errors harmless under 'any' standard of prejudice." (Kessler, *Death and Harmlessness*, *supra*, 26 U.S.F. L.Rev. 41, 73, fn. omitted.) The Attorney General tried to get the newly-reconstituted Court to diminish the harmlessness standard: "In this and numerous other capital cases, the Attorney General asks us to retreat from the reasonable-possibility standard and adopt the *Watson* standard . . . ." (*People v. Brown*, *supra*, 46 Cal.3d 432, 447.) The Court rejected this proposal, emphasizing, as noted above, its historical recognition of the "fundamental difference between review of a jury's objective guilt phase verdict, and its normative, discretionary penalty phase determination" and the corresponding need for "a more exacting standard of review [of penalty-phase] . . . errors . . . . (See *People v. Hamilton*, *supra*, 60 Cal.2d 105, 136–137, . . . and *People v. Hines*, *supra*, 61 Cal.2d 164, 169 . . . .)" (*Ibid.*) Significantly, the cases cited in *Brown*—*Hamilton* and *Hines*—were the cases that firmly established the any-substantial-error test, based on a reviewing court's "dark ignorance" (*People v. Hines*, *supra*, 61 Cal.2d. at p. 169) of how each juror reached a decision.[63]

---

[63]The test was a refinement of even earlier holdings in *People v. Terry* (1962) 57 Cal.2d 538, 569, and *People v. Love* (1961) 56 Cal.2d 720, 733, that (continued...)

The Attorney General's proposal for a new rule was based on the 1977 and 1978 death penalty statutes' having guidelines for the jury. (*People v. Brown*, *supra*, 46 Cal.3d at p. 447.) But Justice Broussard's refinement of the any-substantial-error test had accounted for that change. (*People v. Robertson*, *supra*, 33 Cal.3d 21, 63 (conc. opn. of Broussard, J.).) Chief Justice Lucas's opinion for the *Brown* Court acknowledged "that today's death penalty statutes (more than the former statutes) channel and guide the capital jury's sentencing decision" but emphasized that, constitutionally, "a capital jury must retain and exercise vast discretion different from that possessed by any guilt phase jury." (*People v. Brown*, *supra*, 46 Cal.3d at p. 447.) When reviewing a jury's factfinding, *Watson* review is "appropriate and workable" because "the reviewing court can determine if the error likely affected the jury's factfinding and hence its guilt-innocence determination." (*Id.* at pp. 447–448.) However, because the penalty jury's "role is not merely to find facts, but also—and most importantly—to render an individualized, *normative* determination about . . . whether [the defendant] should live or die," the Court had to "abide by the reasonable-possibility test" in order to meet Eighth Amendment reliability standards. (*Id.* at p. 448.)

Both the line of opinions culminating in *Brown* and the logic of its reasoning demonstrate that, if the Court was truly "abid[ing]" by that test (46 Cal.3d at p. 448) and not silently modifying it (without drawing a protest from

---

[63](...continued)
any error "tending to affect the jury's attitude in fixing the penalty" required reversal, absent extraordinary circumstances, and in *People v. Linden* (1959) 52 Cal.2d 1, 27, that error that "relates to the jury's selection of penalty implicitly . . . invites reversal in every case." (See *People v. Hamilton*, *supra*, 60 Cal.2d 105, 137.)

Justice Broussard[64]), the question of whether there was a reasonable possibility that error affected a juror's vote belongs in a certain context: recognition that any substantial error affecting penalty requires penalty reversal. *Hamilton* and *Hines* formalized the any-substantial-error rule because harmlessness of such error could not be determined when the basis for jurors' votes was indeterminate; Justice Broussard noted that the guided-discretion statutes removed enough indeterminacy so that the reasonable-possibility question could be introduced in the context of deciding "substantiality"; and the *Brown* court stated that it was abiding by Justice Broussard's test and acknowledged that the scope of harmless-error review remained constrained by the "vast discretion" still retained by the jury. (46 Cal.3d at p. 447.) Thus *Brown* neither enunciated nor sought to justify a major change in prior law.

Appellant submits that the Court should re-articulate the any-substantial-error part of the formula, as set forth in *People v. Hines*, *supra*, 61 Cal.2d at p. 169. What is more important, however, is that it must remember how, in the many contexts in which various harmless-error standards are applied, error affecting penalty in a capital case is unique. This is so, first, because the usual assessment of probabilities of an error's effect on a jury's factual determinations remains impossible, and, second, because the ultimate question is whether a human being is to be put to death. As noted above, Chief Justice Traynor believed that, under the old law, since any error "might have tipped the scales[,] . . . an error in the penalty phase of a capital case usually

---

[64]See *People v. Brown*, *supra*, 46 Cal.3d at p. 471 (conc. & dis. opn. of Broussard, J.); see also *id.* at pp. 464, 465 (conc. opn. of Mosk, J.) (explaining *Hamilton*'s continuing vitality and describing reaffirmed reasonable-possibility test as "the strictest meaningful standard" of harmlessness review).

compels reversal." (Traynor, *supra*, at p. 73.) The same approach has been advocated post-*Furman*,[65] and this Court in *Brown* emphasized that there has been no qualitative shift in a reviewing court's ability to know what contributed to a penalty verdict. (*People v. Brown*, *supra*, 46 Cal.3d at pp. 447, 448.) While something short of an absolutist approach may be appropriate, nothing in the current state of the law justifies a retreat to reweighing aggravation and mitigation, or otherwise guessing how every juror must have viewed the evidence.

The approach appellant advocates is not altogether foreign to this Court in recent times. Thus, in *People v. Sturm* (March 6, 2006, No. S031423) __ Cal.4th __, [2006 Cal. LEXIS 2977], the Court found substantial error to be reversible simply on the basis of the likely impactfulness of the errors and the Court's inability to find that a death sentence was a foregone conclusion. (*Id.* at pp. *50–*54.) In doing so, it implicitly rejected a dissenting opinion's suggestion that it should not "remove[] . . . the aggravating nature of the capital crimes from the prejudice analysis" but instead should weigh the aggravating and mitigating circumstances. (See *id.* at pp. *55, *60 [quotation], *61 (dis. opn. of Baxter, J.).)

The more cautious approach does not eliminate review for harmlessness; it scales it back to what is appropriate under the circumstances. As noted above, there is no reasonable possibility that an error relating "only to the proof of some fact otherwise indisputably established" could have contributed to a penalty verdict. (Traynor, *supra*, at p. 73.) As also

---

[65]See, e.g., Carter, *Harmless Error in the Penalty Phase*, *supra*, 28 Ga. L.Rev. 125; *People v. Brown*, *supra*, 46 Cal. 3d 432, 469–470 (conc. opn. of Mosk, J.), quoting Comment, *Deadly Mistakes: Harmless Error in Capital Sentencing* (1987) 54 U.Chi. L.Rev. 740, 754–756.

acknowledged above, in discussing the federal test, the same would be true of errors that were subsequently remedied in an incontrovertibly effective way, such as by allowing wrongly excluded information to reach the jury by another route. (*People v. Roldan, supra*, 35 Cal. 4th 646, 739.) It would be true as well of errors that were clearly technical and insubstantial, such that they could not influence any rational person's vote on penalty.

But under state law, as under federal, this Court should not assess the evidentiary picture and decide that even error that could assist a juror's eventual decision to vote for death could not have made possible the unanimous death verdict. (See *State v. Finch, supra*, 975 P.2d 967, 1007–1008 [unlike the guilt phase, prejudice at penalty "cannot necessarily be overcome by objective and overwhelming evidence"].) In deciding for itself the relative weight of aggravation and mitigation, this Court would effectively arrogate to itself the power to decide whether appellant should be executed, in the face of the jury-trial guarantee, decades of the Court's own acknowledgment that substantial errors ordinarily compel penalty reversal because of the inability to ascertain that they were harmless, and the requirement of reliability throughout the process.

B. If the Court Were to Assess the Strength of the Case for Life in Appellant's Trial, It Would Have to Conclude that a Unanimous Death Verdict Was Not Inevitable

Should the Court nevertheless undertake to measure the probabilities of a different outcome, the result of such an analysis in appellant's case must be that a unanimous death verdict was not inevitable. If there is such a thing as a case where the trial was futile because death is the only conceivable

sentence,[66] and where the subsequent appeal is therefore a useless exercise (because the outcome at trial was so foreordained that no error could have helped enable it), this case is not it.

There was, of course, evidence in support of the verdict. Nevertheless, "the record contains evidence that could rationally lead to a contrary finding," i.e., one different from that rendered by a jury exposed to prejudicial and inadmissible testimony or misleading instructions. (*Neder v. United States*, *supra*, 527 U.S. 1, 19.) On the aggravation side, appellant was implicated in three killings. To any juror who would fully credit Jose Munoz, appellant killed Joey Mans himself, for no apparent reason, and in doing so he arguably initiated his brother's killing of Timothy Jones, besides aiding and abetting that homicide. He held up several people at gunpoint. Per Munoz, again, he was the most energetic advocate of finding Randolph Rankins after the bad drug deal, and he may have tried to shoot towards the fleeing Rankins. When Self or Munoz decided to fire a shotgun towards Ken Mills, appellant—as driver of the car the perpetrators were in—was willing to engage in further pursuit, and (per Munoz again) shooting was appellant's idea. After his arrest, appellant, not unlike many other inmates, attacked known child molesters who were housed with him and armed himself for the jail environment when he could, although he caused no serious injuries, and his actions could be

---

[66]But see *People v. Caro* (1988) 46 Cal.3d 1035, 1067 (jury understands its power to extend mercy, even without specific instruction to that effect); *People v. Easley* (1983) 34 Cal.3d 858, 875–880 (sympathy for the defendant is an appropriate part of the weighing process); *id.* at pp. 877–878 (jury may not be precluded from considering as mitigation any aspect of defendant's character or record proffered by defendant as basis for sentence less than death), quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110, and *Lockett v. Ohio* (1978) 438 U.S. 586, 604.

interpreted in part as posturing, given his setting himself up for a shank bust and talking on a monitored visit line about what he would do to a child molester. He and a cellmate made what appeared to be serious preparations for an escape attempt. The case in mitigation, while providing evidence of abuse and neglect, was somewhat vague, and it was lacking in disinterested corroboration. There was no expert explanation relating appellant's background to his criminality.

1. Jurors Could Have Found Enough Mitigation to Motivate a Vote for Life

But this is only half the story, and it is not for this Court to say that there was not one juror who would have been persuaded by the other half, absent the errors identified below. As the statement of facts indicates in detail, appellant's early life was characterized first by gross parental discord and the trauma of witnessing violence between his parents. This was soon followed by paternal abandonment and ongoing physical and emotional abuse, neglect, and chaos at the hands of an immature, battered, sexually promiscuous, deeply unhappy, rageful, substance-abusing mother, along with abuse by some of her boyfriends. (See pp. 61–72, above.) Most fundamentally, rather than being welcomed into this world by parents who loved him and wanted him, the consistent message he received was that he was no good and unwanted. (See RT 52: 7703–7704, 7716, 7719; 53: 7905.) This Court's caseload shows that such environmental factors in early childhood, along with perhaps some unknowns, such as genetic predisposition or organic damage caused by maternal drug use or physical abuse, an absence of countervailing outside supports, and a person's own eventual use of intoxicants and alcohol to self-

medicate against pain, anger, or feelings of worthlessness,[67] will combine in some people to produce tragically destructive acting out. In an age of talk radio, bare-all television, and self-help books, there probably were, among appellant's jurors, people with enough sophistication to know this as well.[68] This Court has recently reaffirmed that evidence like that which was before appellant's jury, even in the face of substantial aggravation and unbuttressed by expert testimony, can "produce sympathy and compassion in members of the jury and lead one or more to a more merciful decision." (*In re Lucas*, *supra*, 33 Cal.4th 682, 735.) This is neither a new nor a controversial proposition. (See *Wiggins v. Smith*, *supra*, 539 U.S. 510, 535 [referring to "the kind of troubled history we have declared relevant to assessing a defendant's moral culpability"]; *Penry v. Lynaugh* (1989) 492 U.S. 302, 319 [referring to "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse," ellipsis in original, quoting *California v. Brown* (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.)].)

Moreover, despite what turned appellant into a youth who committed terrible crimes, the jury heard considerable evidence that he had other sides as well. A number of appellant's caregivers, with whom he stayed in contact as he grew older—Maria Self (appellant's mother), Carmen Burrola (his aunt), Mona Quezada (his older cousin), Peggy Lopez (another aunt, appellant's

---

[67]As mentioned previously, it appeared that appellant, like his partners was using speed, marijuana, and alcohol. (See record citations at p. 9, above.)

[68]This is admittedly a speculative supposition. However, it is no more so than the hypothesis that the jury was devoid of anyone with such understanding. The latter claim is what would be required to argue that there were no jurors who could have voted for life without parole based on appellant's background.

godmother), and Corinna Leon (another older cousin)—testified that they loved appellant, and that their experience of him was as a loving and caring person, for whom the crimes seemed shockingly out of character. (RT 52: 7774, 7795–7797, 7818, 7821, 7825, 7831, 7838–7840, 7845.) So did Catherine Mejia, a cousin with whom appellant had lived for a time when he was around 18. (RT 52: 7848, 7852.)

In a sense, of course, these witnesses were tragically wrong: appellant had a dark side to his character which they had missed. But they also provided the jury with evidence that he was not just the sum of his crimes. He was respectful, polite, and a good boy during the years he lived with Burrola, which started around second grade. (RT 52: 7787–7789.) Lopez knew him—in his junior high school and high school years—as respectful of her, her family, and her rules, and open in conversation about his life. (RT 52: 7830–7831.) Leon described him as really good as a teen, quiet, very friendly, and very kind. He played with her children and got along well with them. (RT 52: 7839–7840.) When appellant was in junior high and older, and his mother could no longer prevent his contact with his father's family, he visited Lopez, his paternal aunt, whenever he could. (RT 52: 7830–7831.)

But Leon "kind of lost" appellant when he was in high school, and she felt that he withdrew from the family into his own life somewhat. (RT 52: 7840–7841.) Appellant's mother noted appellant's lack of self-esteem as a teen. (RT 53: 7940–7942.) During this period, appellant tried to get to know his father, and he moved out of his mother's house to live with him for a time, despite having been abandoned by his father and having lived with his mother's intense criticism of his father. (RT 52: 7719–7720; 53: 7896.) Maria Self testified that appellant had a drug problem. Shortly before the robberies started, he was willing to go into treatment, but—tragically, it turns

out—there was a seven-month waiting list. (RT 52: 7774–7775.) During at least the time that appellant lived in Mejia's household, in 1990, he was looking for work. (RT 52: 7849.) When Quezada last saw him, in the summer of 1991, he seemed very unhappy. (RT 52: 7825.)

Christine Arrabito and her mother, Janice Babish, described appellant's 1991 attempt, which ultimately ended unsuccessfully less than 10 months before the charged crimes began to change patterns that he knew were not good for him and "turn his life around" by moving to a new environment with their family in Pacifica. (RT 53: 7871–7883, 7884–7890 [quotation at 7885].) As Arrabito put it, "he showed my family that he really wanted to do something to change—to change what, I wasn't sure—but he wanted a fresh start." (RT 53: 7881.) He hoped for better surroundings, meeting new people, and maybe finding better work. (RT 53: 7873.) Some jurors may have recognized the truth in counsel's argument that the ultimate failure of the attempt was not a matter of choice, but rather "because he never had the tools to ever turn his life around." (RT 54: 8045.) Though Arrabito had a crush on appellant for a long time, they always remained just good friends, even during the times in 1991 when appellant stayed with her. (RT 53: 7876, 7881.) She described him as someone who could be both sincere and caring (RT 53: 7938), which was consistent with his not taking advantage of her attraction to him.

Appellant had no prior record. (See RT 54: 8042.) While in junior high and high school, he had baby-sat for Lopez's children. (RT 52: 7831.) The jury knew that he was only 21 at the time of the two-month crime spree that he was part of. (See RT 54: 8023, 8042; see also RT 42: 6405; 52: 7698, 7700, 7702.) He had a young child, Kevin, and it was clear to Mejia that he liked to spend time with him. (RT 52: 7849–7850.) Maria Self testified that he used

to bring Kevin over to the family's house, and "we would all sit around and chitchat and play with him . . . ." (RT 52: 7723.) Despite the abusive parenting that was modeled for him by his mother, he was "never" abusive towards Kevin, and he constantly told his son that he loved him. (RT 52: 7723–7724.) His unpaid phone bill at the Babish residence was all for calls to the Riverside area; relatives never called him, and he was trying to reach his son and the boy's mother. (RT 53: 7887.) Christine Arrabito testified that one of his reasons for moving up north with her family was "[t]o find work and to get himself back together," because "he wanted to take care of his son and take care of his family." (RT 53: 7873.) After his arrest, he maintained the relationship with Kevin, who was five at the time of trial. Sometimes Stephanie Stinson brought the little boy to jail visits, and Maria Self took him to visit "as often as I can." (RT 51: 7522–7523; 52: 7723–7724 [quotation at 7724].)

2. Appellant's Role in the Offenses Was Unclear

Every juror's assessing appellant's culpability had to grapple with his actual role in the offenses, given the conflicts in the accounts that he and Munoz had presented, Munoz's obvious lies, and the state's inability to corroborate its informant's version. As noted previously, both defense counsel and the prosecutor saw this issue as so important that it became a focus of their *guilt*-phase arguments, even though the prosecutor made it eminently clear that guilt did not require appellant to have ever fired a shot or intended to kill, and defense counsel did not disagree. (RT 45: 6905, 6909–6914, 6923–6931, 6949–6950; 46: 6958–6962, 6971–6972, 6979–6982, 6985–7010, 7018–7035, 7037–7040; see also RT 31: 4848–4849.) Appellant's role as a major participant was unquestioned, but whether he was the initiator or actual shooter in any of the violent offenses could very reasonably have been seen as

unknowable by some jurors, since there was neither forensic nor disinterested testimonial evidence tending to show either.

It was undisputed that appellant came to Perris to see his brother after neighbors Self and Munoz already knew each other, and it appeared that Chavez—the boyfriend of Munoz's cousin and housemate of Munoz and his sister—knew the other two before appellant arrived as well. (See RT 37: 5573–5575; 39: 5878–5881, 5894; 40: 6231; 42: 6405; 3SCT 2: 279, 325–326.) Thus, it may have been true that—as he said in his statement—his prior criminality had involved only burglarizing unoccupied businesses, before the night that the others took him out with them without telling him what they would be doing. (3SCT 2: 325–326.) As is shown in detail below, appellant never hurt—clearly never even frightened—any of the robbery victims whom he confronted alone, and he seemed to make a point of protecting Jerry Mills and his son, the beekeeper Knoeffler, and even—in a weirdly half-hearted and ineffective way—Jose Aragon. Munoz's and Self's joint presence at any of the crime scenes was both a necessary and sufficient condition for a shooting to occur, while appellant's presence was neither.

Clearly there was evidence—Munoz's account—that appellant was something of "the heavy" in the group. But it was the accomplice-informant's testimony and nothing else. It was he who portrayed appellant as the first in the group to kill someone (at Lake Mathews) and having chased Timothy Jones down the hill with Self, as having said he had a feeling that somebody was going to die that night and—later—that they had to go back to make sure that Mans was not moving, as the instigator of the shooting of Ken Mills and subsequent pursuit, as the most vocal proponent of going after Rankins for a refund after the drug burn, and as saying after Munoz and Self robbed Feltenberger that they had to kill him. There was no corroboration on any of

these points. The jury knew that this was the testimony of an accomplice saving his own life by exculpating himself. It was essentially a repeat of the first story Munoz came up with after backing off his denials of any involvement other than helping the others use stolen ATM cards. (See 3SCT 45: 12911–13048; RT 41: 6339–6341.) It was anybody's guess whether, after deciding he had to change his story from no involvement to only using stolen cards, he then somehow went to total forthrightness. But there were plenty of indications that he did not, starting with his failure to mention the Williams/Rankins incident.[69]

---

[69]Obviously, some jurors could have believed Munoz. Just as obviously, some may not have, which is all that is important in the current procedural context. "[C]onsider[ing] only the evidence in support of the judgment and . . . assum[ing] that the trier of fact, having decided against the appellant, believed all properly admitted evidence against him and disbelieved all evidence in his favor" is part of a sufficiency-of-the-evidence analysis, but it has no place in harmless-error review. (Traynor, *supra*, p. 28.) Because the issue is whether reasonable jurors could have found in appellant's favor (*Neder v. United States*, *supra*, 527 U.S. 1, 19), the evidence must be taken in a light most favorable to the appellant, except to the extent that the verdicts show a rejection of his evidence. (See also *Holmes v. South Carolina* (2006) __ U.S. __, __ [164 L. Ed. 2d 503, 512; 126 S. Ct. 1727, 1734]; *Laird v. Horn* (3d Cir. 2005) 414 F.3d 419, 429; *People v. Garcia* (2005) 36 Cal. 4th 777, 805–806 & fn. 10, 807, n. 10 [noting, in prejudice analysis of guilt-trial error, reasons why jury might have had difficulty with prosecution's case and rejecting dissent's failure to consider weaknesses in prosecution case and conflicts in evidence]; *People v. Haley* (2004) 34 Cal. 4th 283, 312 [in harmlessness analysis, canvassing evidence in support of appellant's factual theory]; *Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673–674; *Logacz v. Limansky* (1999) 71 Cal.App.4th 1149, 1156.) Here, appellant's admissions of robbery-murder and the physical corroboration of those admissions were all the jurors needed to arrive at their guilt verdicts and related findings. Since they did not need to credit Munoz to arrive at any decision they made, the degree, if any, to which they did so is unknown.

Munoz's portrayal of appellant's behavior in these situations, where there was no one to contradict him, was in stark contrast to how the living victims of the various robberies described appellant. Significantly, the prosecution's evidence showed that appellant neither hurt nor particularly frightened any of the robbery victims whom he faced alone. Robert Greer successfully negotiated with appellant for the return of personal items and credit cards in his wallet, as well as for permission to remove books and manuals that were in his car. (RT 36: 5532–5533; 5535–5536.) Greer told appellant that the latter would not be able to use the credit cards because Greer would have them blocked before appellant could use them. (RT 36: 5532–5533.) This was a statement that one would never make to an armed robber who seemed like he might shoot, since the card-cancellation problem could have been solved as well by shooting Greer as by giving him his cards back. The same thing had happened when appellant, Self, and Chavez had robbed Jerry Mills and his son of their guns. Appellant went to the telephone pole some distance away, where the Millses had been made to stand. He took Mills, Sr.'s money but let him keep his credit cards when Mills said that they would be no good to appellant. (RT 35: 5388; 3SCT 309–310.)

Similarly, Roger Beliveau was comfortable enough to ask appellant—successfully—for the return of keys other than his car key. (RT 37: 5564.)

Beekeeper Albert Knoefler testified that appellant invited him to take any equipment he needed from his pickup before giving up the truck, and appellant stopped Knoefler from giving up all his cash. (RT 34: 5342–5343.) Knoefler was so unruffled that he went back to work after his encounter with appellant, before finally getting help because it was, "well, time to go and let someone know where I was, you know, because I had no transportation to get

home." (RT 34: 5342, 5345 [quotation].) He seemed reluctant to testify that when he gave up his property, it was because he feared appellant. (RT 34: 5344–5345.)

Similarly, appellant may well have protected or tried to protect some of the other robbery victims from comrades who, at those moments and others, were more aggressive. (See 3SCT 2: 309–310 [Jerry Mills & his son]; RT 35: 5386–5387 [same]; 3SCT 45: 12976 [Munoz: Chavez said Self wanted to kill Millses]; 3SCT 2: 302–304 [Aragon]; RT 39: 5979–5983; 48: 6258–6260 [same]; 3SCT 2: 310 [Knoeffler].) Jurors could see, therefore, that Munoz's portrayal of appellant as a habitual violent aggressor not only was self-serving, but presented a different Orlando Romero than the one described by the unbiased witnesses. That information was not only relevant to their assessment of whether Munoz's account of each person's role was any more reliable than appellant's, but also directly pertinent to their decision on whether they thought he should be executed.

Other than a footprint consistent with Self's shoes down by Jones's body, there was not a stitch of corroboration of Munoz's accounts of who played what role.[70] There was no reason to believe that Munoz's position as

---

[70]The record includes repeated claims by appellant's primary interrogator that his footprint was also found at the lower crime scene, but this was false. (3SSCT 2: 290–294, 296; RT 38: 5867–5870.)

The prosecution did go to some lengths to corroborate Munoz's testimony, but it was on details like Munoz's familiarity with some of the items in the Subaru and his knowledge of where the Colt was when Jones's boots and keys were tossed out of it. (RT 33: 5164–5166, 5171–5174, 5186–5187; 39: 5906–5907, 5921; 33: 5164–5165, 5172; 43: 6539.) These were facts which Munoz could have known no matter what his, appellant's, and Munoz's friend Chavez's respective roles in the shootings of the victims were. The one exception is mentioned above: Munoz had Self running down

(continued...)

the prosecution's presenter of the facts that would clear the cases and get convictions was due to anything other than his status as the first to be arrested and interrogated and perhaps the only one to immediately offer to testify.[71] When being questioned, it was several hours before he began to admit being at any of the crime scenes. For a long time before that, he denied any criminal liability at all, then shifted to saying that all he had done was go to automatic-teller machines with stolen ATM cards which the others had given him. (RT 40: 6045, 6057; 41: 6339–6341; 3SCT 45: 12911–12963.) The prosecutor argued that—once he started talking about his involvement in the crimes—"Munoz tells too many details throughout this tape to just be making it up as he goes along." (RT 46: 7030.) But Munoz made up all kinds of details as he went along. One was that appellant and Self told him about the Lake Mathews killings, but he did not believe it, and he checked the newspapers and could find nothing about it until he finally read about it some time later. (3SCT 45: 12942– 12943.) Another false detail was that he knew much about the brothers' criminal activities only "cause little by little they

---

[70](...continued)
the hill after Jones, and a shoe print placed Self at that location. (RT 33: 5135–5136, 5143–5144; 38: 5838; 39: 5914.) But appellant also said that Self chased Mans down the hill (3SCT 2: 289), so the footprint, too, failed to bolster Munoz's credibility relative to appellant's.

[71]In the experience of a seasoned prosecutor and judge, "capital codefendants were offered widely disparate plea bargains that, though intended to secure testimony against the supposedly more culpable offender, sometimes punished the less culpable and rewarded the more culpable." Gerber, *Survival Mechanisms: How America Keeps the Death Penalty Alive* (2004) 15 Stan. L. & Pol'y Rev. 363, 374. Even if no juror knew that the drive to clear cases can produce such results—something we cannot be sure of—the intrinsic evidence of its possible truth in this case was striking.

start, you [know], they talk about stuff, right, nothing directly," but they would make allusions and "say, like, little things . . . ." (3SCT 45: 12926.) Munoz gave a elaborate explanation of why he did not "run with" Gene[72] and Chris, including that he told his sister that he did not want them around, that Gene was just using Sonia Alvarez for her car and her money, and that they only came around to Jose when they needed money from him. (3SCT 45: 12929.) Further on, when he was finally admitting more, his "details" included saying that he and Chavez accompanied Self and appellant the night of Lake Mathews only on the understanding that the plan was to steal a car, not rob anyone:

> I was gonna put window—the screwdriver, open up the button with a big fat screwdriver, stick in this side of the ignition, pop it. That was the plan[,] right[?] At the first[,] right [?] You mean, you mean that's why me and Danny decided to go.

(3SCT 45: 12970.) It was only after they were driving around that appellant started talking about a robbery and the possibility that someone might die. (*Ibid.*) But Munoz abandoned this position by the time of trial, when he admitted preparing masks and bringing along the guns, which were hardly needed for the theft of an unoccupied vehicle. (RT 39: 5895, 5897–5898.) Similarly, when he was still claiming that he used the Aragon ATM card without knowing its source, he had an elaborate narrative about when and how and why Self and appellant gave it to him, including, among other things, their offering him $50 to do a withdrawal for them, their saying that the card came from "some dude" in a funny voice that let Munoz know he did not want to know more, his asking why they did not do it themselves, and their giving him Aragon's PIN—which Munoz had in fact personally obtained from Aragon and committed to memory (RT 39: 5990–5991)—on the back of a business

---

[72]At the time appellant was known by his middle name, Gene.

card from Sonia Alvarez's place of employment. (3SCT 45: 12920–12923, 12938.) At trial he admitted that the entire story was "a complete lie."[73] (RT 40: 6061.)

The Munoz interrogation provided the jury with yet more evidence of how accomplished a liar the young man was. Claims that he had been identified by Feltenberger as his shooter and been identified as present at other shootings, along with a statement that he was about to be booked for murder, finally scared him enough that—on the tape played for the jury—he sounded close to tears at one point. (Ex. 370A, side 1, portion corresponding to 3SCT 45: 12958–12963.) This led to an admission of being present at the Feltenberger shooting, beginning with, "Okay. Let me tell you straight out what happened." (3SCT 45: 12964.) The narrative that followed was very credibly punctuated by expletives, sharp exhalations, and other indications of intense distress at Self's surprise shooting of Feltenberger. (Ex. 370A, side 1, portion corresponding to 3SCT 45: 12964.) Munoz explained why seeing the shooting was so upsetting: "I heard th-that he [Self] had did some shooting before, right, but I was. I didn't believe it." (*Ibid.*) And again, "And he fuckin', when he did that, uh, I didn't never see nobody get shot, I never, nothing like that, and it's like . . . ." (3SCT 45: 12965.) But what the jury knew was that the Feltenberger shooting was *after* the Lake Mathews shootings, *after* Munoz shot at Ken Mills and Vicky Ewy, *after* his point-blank

---

[73]He also effortlessly colored his fictitious stories with details drawn from actual events. (Compare, e.g., 3SCT 45: 12924 [Chris and Gene had a stack of ATM receipts when they picked him up to use Aragon's card] with RT 5989 [he and Self took box with change and stack of ATM receipts from Aragon's pickup].)

shooting of Paulita Williams, and only five days after the killing of Jose Aragon. (See CT 4: 821–827, 831.)

During the interrogation, Munoz still thought he had killed Paulita Williams with a point-blank shotgun blast to the head (RT 34: 5232–5233; 39: 5945–5946), but he asked detectives rhetorically, "[H]ow can you kill somebody jus' fer nothin . . . . Money . . . . ," then added "I didn't think anybody[,] that you would . . . want to kill anybody." (3SCT 45: 12943–12944; see also 3SCT 45: 12957 ["I swear to God, I would not ever shoot anybody, I could not . . ."].) When interrogators finally came down hard on him—including claiming that they had been interrogating Self and implying that he was implicating Munoz (3SCT 45: 12965–12966)—he repeatedly brought up the subject of how he could help the detectives and deputy district attorney in exchange for their helping him. (See pp. 54–55, above, and cited portions of record.) Then he began telling them what they had said he would have to tell them to make a deal, as he was insisting that he wanted to: that he was present but never a shooter.[74] When he did, the pressure from his questioners for taking more responsibility ceased.[75] (3SCT 45: 12969 et seq.)

---

[74]See 3SCT 45: 12962–12963 (sergeant: we're not saying you shot anyone, but you were there, and you need to clear it up with us), 12967–12968 (deputy D.A.: *if* Munoz did not shoot the victims, he could "save his tail" by saying what had happened), 12969 et seq. (Munoz's accounts of the crimes). This portion of the interrogation begins with the newly-arrived sergeant assuring Munoz, "We don't believe that you did any shooting." (Ex. 370A, side 1 [citation is to a tape that the jury heard (see RT 42: 6366–6367) because the sentence was mistranscribed (3SCT 45: 12962)].)

[75]The sole exception was when a new detective came in to ask about the shot into Ken Mills's and Vicky Ewy's car. Apparently aware of Mills's statement that the shotgun blast came from the passenger window, where Munoz sat, he pressed Munoz on his "bullshit" claim that Self had somehow

(continued...)

His mendacity did not, however. He continued to "swear to God, I did not shoot nobody." (3SCT 45: 12965.) In court he denied saying, "Die, Bitch," to Paulita Williams, though that was the response she heard from him as she pleaded for her life. (Compare RT 34: 5233 with 39: 5947.) He responded to officer Feltenberger's certain testimony that Munoz—who was only 10 to 15 feet away from him—repeatedly commanded Self to shoot him, by insisting that he was actually saying, "Don't shoot." (Compare RT 39: 6017 with 32: 4965–4966.) Ken Mills saw the muzzle flash from the shotgun blast that hit him come from a person leaning out of the front passenger window, which was facing him and which was where Munoz was sitting, but Munoz maintained that Self managed to get his torso out the left rear window and fire over the top of the car. (RT 33: 5194–5196; 39: 5929, 5931–5932.) He made the preposterous claim, given the group's modus operandi, that he—5'9" tall, weighing 140 pounds, unarmed and on foot—was approaching Aragon to rough him up and make him turn over his property. This was with a victim who was an athlete, dressed in full motorcycle body armor, and sitting astride or standing next to a machine on which he could speed away. (RT 39: 5983; 40: 6218–6219; 35: 5413–5414, 5431.) But the story had the advantage of placing him away from Self when Self fired the initial long-distance shot. (RT 40: 6219.)

Regarding Lake Mathews, he said he heard appellant speak of planning to shoot Mans and then doing it, but described himself as being shocked minutes later—as Self and appellant were supposedly chasing Jones after failed attempts to shoot him—to find out that appellant had shot Mans. (RT

---

[75](...continued)
shot over the roof of the car from its left rear window. (3SCT 45: 13010, 13017–13025, 13023 [quotation].)

39: 5911–5917.) A kitchen knife was found at the Lake Mathews scene, between the upper crime scene and Jones's body. (RT 33: 5108; 43: 6552–6553; Exs. 145, 400.) Munoz—who claimed never to have left the top of the hill—acknowledged that, when he went up to the victims' car, he was carrying the weapon that needed a knife to be reloaded and a box of ammunition. He first said he did not know if he had the knife for reloading with him, then claimed that he did not have it with him, and then admitted that "maybe" his reason for carrying the cartridges was for reloading and that, if so, he would have needed the knife as well. But he still claimed that he did not have the knife. (RT 40: 6183–6184, 6246.)

Munoz was evasive and inconsistent about his role in the purchase of the shotgun used in several of the offenses. (RT 39: 5927; 40: 6106, 6135, 6188–6189, summarized at p. 20, above.) He portrayed himself as a lesser participant in a group in which appellant and Self took all the initiative, and he described himself as afraid of them. (RT 41: 6315–6316; 3SCT 45: 12931–12932, 12975–12976, 12980, 12992.) Yet, in a group of four people who went to rob Mans and Jones, he carried one of the two firearms. (RT 39: 5903–5904.) The killings there, allegedly by others in the group, so "freaked [him] out" that he was "too hysterical" to drive. (RT 39: 5916, 6101–6102.) But a few days later he was involved in purchasing the shotgun, apparently with Self (RT 33: 5090–5091; 38: 5719; 39: 5927; 40: 6135, 6188–6190), and a few nights after that—when Ken Mills and Vicky Ewy were shot at (probably by him)—he had again gone out, personally armed, to do a robbery with appellant and Self. (RT 39: 5930–5931, 6109, 6190.) He carried the shotgun when approaching Randolph Rankins and Paulita Williams. (RT 34: 5261; 39: 5942; 40: 6125–6127; see also RT 40: 6115.) He bought shells for the shotgun, and he felt free to use the weapon whenever

he was around it. (RT 40: 6126–6127, see also RT 40: 6115, 6125.) It was he who disposed of the Lake Mathews murder weapon. (See RT 46: 7025–7026.)

Munoz's tendency to minimize his conduct was palpable. He did not think he "personally" stole cars in San Diego, since he only took his friends to the theft sites, disabled anti-theft devices or hot-wired ignitions, and helped go through the booty after the friends drove the cars back to the neighborhood while he went back in the car they came in. (RT 40: 6051–6052, 6063–6064.) He claimed he carried a gun in San Diego only the one time he was caught with one, but that was untrue. (RT 37: 5610; 40: 6170–6171.) As far as the Riverside crimes, he went out with the others when they robbed Knoeffler because "I was just going along for, for the ride so they would get me some lunch." (3SCT 12979.) He did not reveal the Paulita Williams incident until his plea bargain had been signed and he had been assured that he would get no more time. (RT 40: 6166, 6168; see also RT 46: 7027.) After saying that he, Self, and appellant armed themselves and went to either get their money back from Rankins or kill him, he later denied an intent to rob or kill—he just thought they were going to talk to Rankins about his ripping them off. (Compare RT 39: 5939–5941 with RT 40: 6200, 6205.) He testified that his first shot was just at the back of Williams's car as she slowly backed up, to stop her from backing into the car he had arrived in, but he actually shot her in the side, through her window. (RT 34: 5230–5231; 39: 5942–5943; see also RT 45: 6943; 34: 5232, 5234–5237, 5239, 5261–5262; 39: 5943.) He even minimized the benefits of his testimony, claiming that he was pleading guilty to "everything," although a count each of attempted murder (Count XII), shooting at an occupied vehicle (XIV), and robbery (XVI) were to be dismissed, along with three less serious felonies (VI, XI, XVII). (Cf. RT 39: 6035 with CT 1: 143–154 and 45 3SCT 12907; see also 8/1/97 RT 9–13,

22–23, 26.) This falsehood, from which—because of its transparency—there was nothing to gain, showed how his mind worked.

In contrast, appellant, in his interview with the police, acknowledged at least accessorial liability in every incident he was asked about, from the very moment he was asked about it.[76] Without pressure, only a question in each instance, he even admitted being a perpetrator of the Jerry Mills firearms robberies, the Greer kidnap/robbery, and the Beliveau robbery, none of which he could be tied to by any other evidence. (See page 55, above.) While the prosecutor was able to point out some contradictions in appellant's statement (RT 45: 6923–6928, 6940), they were far less than the indicia of Munoz's story-telling. Where his and Munoz's accounts varied, some jurors may have believed Munoz, but some had to have concluded that where the truth lay was at best unknowable.

It is particularly noteworthy that the jury unanimously acquitted appellant of kidnaping and robbing Alfred Steenblock. It reached that decision despite Munoz's testimony that he saw appellant with Steenblock's property and that appellant said he had stolen it from the owner, and Steenblock had testified that he was robbed by Self, Chavez, and a perpetrator whom he could

---

[76]Munoz lied to detectives for "several hours" before admitting any involvement in these crimes. (RT 40: 6045–6046, 6057.) Appellant was willing to discuss his activities from the beginning of his interview. After receiving *Miranda* warnings and being asked if, having his rights in mind, he wished to talk, he answered, "Sure." (3SCT 2: 27; see also RT 38: 5862.) Each time officers brought up a particular incident, he immediately gave his account of being there and what happened. (3SCT 2: 276, 299, 307, 308, 313, 315–316, 317, 319; see also 3SCT 2: 321.) His answers to their questions about weapons, the sabot rounds, and background issues like his and his brother's flight similarly give an impression of willingness to provide the information. (3SCT 2: 301–302, 306, 311, 321–323.)

not identify.[77] (RT 39: 5954–5957 [Munoz]; RT 34: 5310–5315, 5318–5319, 5331–5332 [Steenblock]; see also RT 34: 5321–5326; 37: 5655, 5659.) Since there was no evidence that Munoz was involved in the Steenblock offenses, the jury was not bound by the accomplice-corroboration rule. Rather, it decided for itself that Munoz's uncorroborated testimony was not enough to satisfy it. That being the case, many jurors must have recognized the unknowability of the extent to which each of the conflicting "I-was-there-but-the-others-initiated-the-violence" accounts given by Munoz and appellant was true. Such jurors were about to sentence appellant for his undisputed involvement in the murders, his continuing to participate in robberies with the others after it was clear that victims might be killed,[78] and his post-arrest conduct. But they were setting aside all the prosecution theories about his initiating the shootings at Lake Mathews, predicting "someone's going to die tonight," etc., which rested on the informant's testimony alone.

3. The Jail Offenses Presented as Penalty-phase Aggravation Could Also Be Viewed in More than One Way

Even appellant's misconduct in jail did not make a death sentence unavoidable. It could quite reasonably have been viewed as mostly showing that he had a chip on his shoulder, or something to prove, for some time after his arrival. (The last incident was in March, 1995;[79] appellant's penalty trial

---

[77]The evidence pertaining to Steenblock is summarized at pp. 29–30, above.

[78]Until the Aragon shooting. After that, the only offenses involved Self and Munoz without appellant (Feltenberger), or appellant on his own (Greer, Beliveau).

[79]See summary of other-crimes evidence at pages 57 et seq., above.

began 14 months later (RT 48: 7259).) He apparently participated in the battery of Rodney Medeiros to force his sharing of his commissary items on a day when no one else got them, although the testimony was unclear. (See RT 50: 7375–7396.) The misconduct was neither unusual in the jail environment nor serious enough to cause any of those involved to be disciplined. (RT 50: 7386, 7397–7398.) Appellant also took part in an incident of battery against Walter Jutras, when authorities negligently or intentionally (see RT 50: 7412) moved Jutras, in a trustee's green jumpsuit, to non-trustee housing. Jutras was uninjured. (RT 50: 7400–7412.)

Appellant assaulted Olen Thibedeau, soon after the known child molester was moved to his pod. The prosecutor saw it as a potentially deadly attempt to spear Thibedeau. (RT 48: 7269; 54: 8027.) Thibedeau, however, said it left a blood blister on his skin and "[m]ight have bled just a little bit" (RT 50: 7432); guards said it left an inch-long "reddish mark" or "superficial scratch" (RT 50: 7452, 7458). The ineffectiveness of the attack, which was executed with one hand through the food slot in appellant's cell door (see RT 50: 7430), may not have been an accident. The "spear, or whatever you want to call it"[80] was a newspaper rolled into a four-foot pole, what a guard called a "channel changer" (RT 50: 7452–7453),[81] with possibly just a jagged, unsharpened piece of a broken toothbrush handle tied to the end. (Compare RT 50: 7459 with RT 50: 7431 and 7453.) The toothbrush was attached so poorly that it came off. (RT 50: 7431.) Razor blades that appellant could have fixed to the tip were still in his cell. (RT 50: 7461–7464; see also RT

---

[80]This is Thibedeau's language at RT 50: 7436.

[81]A television was mounted outside the doors of some of the cells, "close enough to where they can—you could take a rolled newspaper pole and push through to change the channels." (RT 42: 6429.)

50: 7471–7472; 51: 7487–7488.) Appellant was still a very young man at the time of the incident, and it would not have been unreasonable for a juror to see him as grandstanding for his county-jail peers rather than truly attempting a deadly assault. (Cf. RT 51: 7414 [another child molester testifies that various inmates harassed him "to make themselves look like, you know, a cool inmate"].)

Tyreid Hodges, another child molester, was harassed by all the inmates around him. Appellant did his share, flooding Hodges's cell with water, squirting feces under his cell door and squirting urine at him, and flinging a hairbrush, shampoo bottle, and perhaps a bar of soap at his feet from the gap under appellant's cell door. (RT 51: 7501–7516.)

Two officers testified that possession of shanks was extremely common in the Riverside County Jail. (RT 50: 7423–7424; 51: 7492.) Appellant was caught with them four times, but there was no evidence that he ever used one, displayed one, or even mentioned having one, despite his aggressive actions towards certain other inmates. (RT 42: 6427, 6449–6450, & 6455–6459; RT 50: 7416–7426; RT 51: 7484–7495; RT 51: 7495–7499.) In these circumstances, staying armed could have been a matter of self-defense, as some of appellant's jurors may have recognized. (See *Barney v. State* (Tex.Cr.App. 1985) 698 S.W.2d 114, 130 (dis. opn. of Teague, J.) [noting that the commonality of prison weapons and the need to possess them for self-defense was well publicized in the media].)

Appellant also participated with a cellmate in the sawing of bars on his cell door and, if an informant with a colorful history as a con man was to be believed, he had boasted of plans to take a guard hostage in order to gain freedom. It was unclear whether the purported plan was abandoned, was never really a plan at all, or was interrupted before an escape could be attempted.

(See pp. 51–52, above.) Notably, the sawing of the bars seemed to give appellant and his cellmate no hostage-taking opportunities that they did not have when they were taken from their cell together for their periodic recreation time. (RT 42: 6465–6466.) Moreover, the jail did not take the "attempt" seriously enough to even separate the two inmates, and when it moved them, it moved them to a less secure area. (See RT 42: 6444–6445, 6474–6475.)

The point is not to minimize this misconduct, nor to deny that the Thibedeau incident and the escape preparations in particular could reasonably be viewed as more serious than the interpretations suggested here, nor to deny that the entire package of other-crimes aggravation probably had a considerable impact on some jurors. But in the context of a harmless-error analysis, none of these things matters. For the issue is only whether one or more jurors could, without abandoning rationality, have had a different point of view and have voted for life in the absence of trial error. (*Neder v. United States*, *supra*, 527 U.S. 1, 19; cf. *Holmes v. South Carolina*, *supra*, 164 L.Ed. 2d 503.) It is incontestable that a reasonable juror could hold that appellant's jail conduct was neither excusable nor, in light of the mitigation evidence, a reason to put him to death, especially given its cessation more than a year earlier. (Cf. *People v. Gonzales* (June 12, 2006, No. S072946) __ Cal.4th __, __, slip opn., p. 36 ["The aggravating evidence of defendant's other crimes (possession of an assault weapon, two assaults on inmates, and possession of a shank in jail), although serious, was not overwhelming"].)

4. A Different Outcome Was At Least Reasonably Possible

As shown above, it is highly likely that for some of the jurors, the attempt to show appellant as the initiator at Lake Mathews or in other crimes was not persuasive. For some the jail misconduct probably lacked appreciable

weight. On the other side, the mitigation case addressed prolonged neglect and physical and psychological abuse, as well as appellant's redeeming qualities, including his attempts to straighten out his life. Appellant was only 21 at the time of the crimes.

All of the jurors, knowing that appellant was charged with three murders, had stated that they could be fair and that they were open to both of the available sentences. Most had also indicated openness to taking into account information about his background.[82] In these circumstances, absent error favoring the prosecution, a juror clearly could have decided that appellant was not simply a monster, but a complex person in whom something had gone terribly wrong, for reasons that were partly understandable. For that juror, another death and more grieving family members were not necessary. It would be enough to give appellant a sentence unheard of in most countries—imprisonment for his entire natural life, no matter how much he reformed himself or how elderly he became. (See *In re Lucas*, *supra*, 33 Cal.4th 682, 735 [recognizing, in prejudice analysis, that childhood abuse, turbulent family background, and positive human qualities could have produced LWOP verdict even with "the brutality of the charged offenses, the vulnerability of the victims, and the existence of a prior violent assault"].)

Some part of appellant's jury did see the case that way for a while. The penalty issue was submitted to it on Wednesday, May 22, 1996, and it did not come back with verdicts until approximately the same time on Friday, May 24. (CT 8: 1956–1957; 9: 2025.) One or more jurors did not find this case a "slam dunk."

---

[82]See their questionnaires at SCT 1: 15, 28–30, 37, 65–67, 102–104, 139–141, 175–178, 213–214, 250–252; 2: 287–288, 324–326, 361–362, 398–400, 435–437.

C. Conclusion

As the first part of this argument shows, even an abstract analysis establishes that review of a capital trial requires recognition that any error of substance could have affected the outcome, as this Court long held. The concrete circumstances of appellant's trial further demonstrate the truth of that proposition. In other words, twelve votes for death were not inevitable. The Court could be confident that the eventual outcome of two days of deliberations was not the product of error, but only if there were no more than insubstantial errors on matters that could affect the penalty choice.

As the remainder of this brief shows, that was not the case.

//

//

II

APPELLANT WAS PROSECUTED USING SO MUCH AND SUCH POWERFUL VICTIM-IMPACT TESTIMONY THAT IT FLOODED THE COURTROOM WITH EMOTIONALITY, MISLED THE JURY AS TO APPELLANT'S CULPABILITY RELATIVE TO THAT OF OTHERS WHO HAVE KILLED, AND ORIENTED THE JURY TOWARDS SEEING THE QUESTION AS WHETHER THE VICTIMS OR THE PERPETRATOR WAS MORE DESERVING OF SYMPATHY, THEREBY PREVENTING A FAIR PENALTY TRIAL AND A RELIABLE PENALTY DETERMINATION

Introduction

"[I]n some cases, victim impact evidence is properly described as 'the most problematical of all of the aggravating factors and may present the greatest difficulty in determining the nature and scope of the "information" to be considered.' [Citation.]" (*United States v. Williams* (S.D.N.Y. 2004) 2004 U.S. Dist. Lexis 25644 *82, fn. 39.) When this Court first ruled that such evidence could be admitted in a capital trial, it emphasized that it was "not now explor[ing] the outer reaches of" the use of such evidence. (*People v. Edwards* (1991) 54 Cal.3d 787, 835 (*Edwards*).) Fifteen years later, the Court still has not done so. But after a new procedure is permitted and experience shows how it works in practice, refinements are invariably required. (*Dickerson v. United States* (2000) 530 U.S. 428, 441.) In the case of the victim-impact innovation, it is time to refine the rules, and the lack of clear standards prior to appellant's trial greatly undermined its fairness. The most dramatic support for this assertion is that the victim-impact case presented against appellant would have been severely curtailed under rules adopted by the courts of Texas, Georgia, Tennessee, Louisiana, New Mexico, Florida, and New Jersey, along with the Illinois legislature. (See *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, 336; *Turner v. State* (Ga. 1997) 486 S.E.2d 839, 841–842 & fn. 5; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872,

891–892; *State v. Bernard* (La. 1992) 608 So. 2d 966, 971–972; *State v. Taylor* (La. 1996) 669 So.2d 364, 372; *State v. Clark* (N.M. 1999) 990 P.2d 793, 808; *Windom v. State* (Fla. 1995) 656 So.2d 432, 438; *State v. Muhammad* (N.J. 1996) 678 A.2d 164, 179–180; 725 Ill. C.S.A. 120/3(a)(3), 120/4(a)(4).)

Here, the nature and quantity of the victim-impact evidence injected undue emotionality into the penalty-determination process and impermissibly confused the jury as to the issues. Appellant's jury was exposed to a day of extremely potent, emotional testimony from people who loved those whom he or his partners had been convicted of killing. In the powerful, dramatic way that only personal anecdotal accounts can do, that testimony went straight to the heart, providing searing accounts of most of the types of extreme grief reactions that can be triggered by a sudden, traumatic death, along with detailed, moving portrayals of who each victim was.

The in-depth presentation of such testimony ignored a crucial fact that is unquestioned among traumatic bereavement specialists: the severe traumatic reactions suffered by the victim-impact witnesses were common among survivors of one who dies suddenly through any violence, and certainly via any other homicide.

> Sudden loss, death without forewarning, understandably creates special problems for survivors. Three of the most common include intensified grief, the shattering of a person's normal world and the existence of a series of concurrent crises and secondary losses.

(Doka, *Sudden Loss: The Experiences of Bereavement*, in Doka, ed., Living With Grief After Sudden Loss: Suicide/Homicide/Accident/Heart Attack/ Stroke (1996) p. 11 (*Sudden Loss*).) As appellant shows below, beyond these generalities, each of the painful and poignant specifics described by the

witnesses reflected consequences that attend even non-death-eligible offenses. Presenting them as proof that this was an aggravated case of death-eligible murder, therefore, was entirely contrary to the bedrock constitutional requirement of procedures that "provide a '"meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not."'" (*Godfrey v. Georgia* (1980) 446 U.S. 420, 427.)

The problem was compounded by the uniquely heart-rending nature of the testimony itself, as reflected in the trial judge's own description of how painful it was to hear the evidence. Six years after the trial, Judge Ronald Taylor noted his difficulty remembering day-to-day events in the five-month trial, except, he added, for the victim-impact testimony. The day that it was presented was "the day that I will always have with me." (9/9/2002 RT 318.) He had "a very vivid recollection of" it, as it "was a very painful and agonizing [day] for everyone who was in the courtroom." He added,

> I would say there wasn't a dry eye in the courtroom. Everybody was crying that day. It was a very emotional day for everyone. . . . And that's something that—that had, had an impact on myself and everybody else that was in the court that day. That day is a day I remember quite distinctly . . . .

(*Ibid.*) At the trial itself, the prosecutor made comparable statements regarding the intense emotions which his witnesses were arousing in the jury. (RT 54: 8003, 8087.) "The determination of penalty," however, "like the determination of guilt, must be a rational decision. Evidence that serves primarily to inflame the passions of the jurors must therefore be excluded . . . ." (*People v. Love* (1960) 53 Cal.2d 843, 856.) In other words, the decision to impose death must "'be, and appear to be, based on reason rather than caprice or emotion.' [Citation.]" (*Monge v. California* (1998) 524 U.S. 721, 732.)

Different factions in the United States Supreme Court's debates on whether victim-impact testimony is admissible at all argued theoretically about potential problems with it. (See *Payne v. Tennesee* (1991) 501 U.S. 808 (*Payne*), overruling in part *Booth v. Maryland* (1987) 482 U.S. 496 [Eighth Amendment forbids use of evidence of the personal characteristics of the victim, the effects of the murder on family members, and family members' opinions about the crime and its perpetrators] and *South Carolina v. Gathers* (1989) 490 U.S. 805 [extending *Booth* to prosecutorial argument].) As appellant shows below, it is by now well documented that extensive, unrestricted victim-impact testimony—which was not presented in *Payne*—involves serious problems, in addition to its masquerading as aggravation, and doing so in a grossly inflammatory manner. In-depth portrayals of the loss of a loved one, and of the person lost, are in part unreliable because of a human tendency to portray such things in black-and-white terms and the defense's tactical necessity to forgo meaningful cross-examination. Moreover, the heavy use of bereavement-trauma evidence relies on a premise so illogical—that a person's culpability is closely coupled to the unanticipated ripple effects of a crime on people other than the direct victims—that it is rejected in every other context where the law exacts punishment. Its one justification—balancing the scales during the penalty trial in case the murder has become an abstraction for a jury hearing a strong mitigation case—can be met by far less reliability-threatening means than the outpouring of trauma and victim-characterization material used in appellant's trial. Finally, large quantities of victim-impact testimony ineluctably convey the impression that the question before the jury is who deserves their sympathies more, the defendant or the families of the victims. In every case

the answer is obvious, but it's the wrong question for an entity charged with sentencing a defendant based on who he is and what he has done.

Current California law is in an unusual state: the door was opened to victim-impact evidence in a case involving a slight quantity of such evidence, and this Court emphasized that it was only holding that the evidence was not per se inadmissible as irrelevant to any statutory aggravation. (*Edwards*, *supra*, 54 Cal.3d 787, 832–833, 835–836 [three photographs of two victims while alive, relevant for other reasons as well], overruling *People v. Gordon* (1990) 50 Cal.3d 1223.) Similarly, the United States Supreme Court has only held that such evidence is not per se banned by the Eighth Amendment, again in a case where the testimony was minimal. (*Payne*, *supra*, 501 U.S. 808 [one question about impact of crime on a survivor who witnessed it, six-sentence answer].) Neither court has yet clarified the outer reaches of such testimony or even how to define them. Neither has provided a rationale for permitting a prosecutor to increase the quantity and quality of such testimony by several orders of magnitude, to the point where the proceedings become dominated by an emotionally-felt sense of both the tragedy of the victims' deaths and also the grief and the trauma faced by the survivors. Yet this is what happened at appellant's trial.

"*Payne* has produced considerable commentary, almost all critical. [Citations.]" (Vitiello, Payne v. Tennessee: *A "Stunning Ipse Dixit"* (1994) 8 Notre Dame J.L. Ethics & Pub. Policy 165, 167 & fn. 14; accord, Eisenberg, et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases* (2003) 88 Cornell L.Rev. 306, 307 ["Legal scholars have almost universally condemned the use of [victim-impact evidence]"]; Greenberg, *Is Payne Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings* (2000) 75 Ind. L.J. 1349 & fn. 3

[referring to "[a] flood of critics"].) The weaknesses of *Payne* do not make it any less the law of the land. They do, however, make it a weak foundation for any attempt to extend its holding from its own de minimis facts to those of this case, in which the quantity of victim-impact evidence was 200 times as great as the half-page of testimony in *Payne*.[83]

To assess how these considerations affected appellant's case, it is necessary to revisit the applicable federal constitutional principles and the issues that victim-impact testimony raises under them, in a way that neither this Court nor the high court has done since 1991. The briefing that follows on this issue, therefore, is extensive. It begins by outlining the procedural background in which appellant's claim arises (Section A). Section B summarizes the testimony which came in, in enough detail to provide a sense of its emotional power. Section C reviews applicable Eighth-Amendment and due-process principles restraining prosecutorial attempts to win a death verdict. Section D sets forth the development of California law on victim-impact evidence and argues for a constitutionally-required revitalization of principles which this Court embraced when it opened the door to such evidence. These boil down to a particularly cautious use of the probative-value/prejudicial-effect test, although there are other issues as well.

Section E shows that there was error in this case, because of the weaknesses in probative value mentioned earlier in this introduction, coupled with the intensely inflammatory nature of the testimony and the confusion of

---

[83]As appellant shows below, other courts consider much less voluminous victim-impact cases than the one at issue here to be extensive. (See p. 176, fn. 96.) He also shows that prosecutors have been able to obtain death verdicts with far more truncated presentations. (See p. 226, fn. 119, below.)

the issues which it introduced. Section F, drawing on elements of the analysis that precedes it, urges the Court to either end the use of victim-impact evidence in California or to adopt the careful restraints on its use that have been implemented elsewhere, sometimes with the concurrence of prosecutorial authorities. Chief among these are keeping the testimony brief and unemotional. This is sometimes accomplished—as it should be in California—by having witnesses read a short statement vetted by the trial court, one which does not go into the particular details of family members' traumas.[84] Finally, Section G shows that the errors here, whether conceived of as violations of such prophylactic rules or as breaches of the underlying constitutionally-informed probative/prejudicial test and related standards, had to have contributed to the death verdict against appellant.

Overall, the argument shows that the use of victim-impact testimony at appellant's trial rendered virtually useless all the other safeguards that are put into place to protect the rationality, reliability, and fairness of the penalty determination. Since that result was a denial of appellant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, and 17 of the California Constitution, as well as contrary to the state's own interest in a reliable penalty determination (*People v. Koontz* (2002) 27 Cal.4th 1041, 1074), the death judgment must be reversed.

A. Appellant Sought Limitation or Exclusion of the Victim-Impact Evidence

The prosecutor informed the trial court that testimony of a parent and sibling of each victim, along with a close friend of one of them, would be

---

[84]Nothing about appellant's demonstration that there was reversible error here requires that this Court agree with any particular measures suggested for future cases.

offered. (RT 48: 7175–7176.) The purpose of the testimony, he said, would be to show the mental pain, anguish, turmoil, suffering, and despair they experienced, and to speak of their broken hearts and shattered dreams, so that the jury would be aware of the uniqueness of each victim and the totality of the harm caused by the defendant. (CT 8: 1869–1870.)

Appellant moved in limine for the exclusion of the evidence, pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments. (CT 8: 1836 et seq. [Self motion]; RT 48: 7173 [Romero joins].) He acknowledged that *Payne v. Tennesee*, *supra*, 501 U.S. 808, and *People v. Edwards*, *supra*, 54 Cal.3d 787, found no per se Eighth Amendment or statutory bars to the use of victim-impact evidence but also pointed out that neither case requires that such evidence be admitted. (CT 8: 1841, 1856, 1858.) He stressed that both opinions cautioned that irrelevant and inflammatory evidence should be excluded and that both seminal cases involved very limited evidence, particularly as contrasted with what the prosecution proposed to introduce here. (CT 8: 1843–1844, 1845, 1859–1860.) The motion pointed out that, in *Edwards*, this Court also cautioned that it was not exploring the outer reaches of evidence admissible as a circumstance of the crime or holding that what was statutorily authorized in California was coextensive with what *Payne* permits. (CT 8: 1859.) Arguing that *Payne's* conclusion was controversial and overrode significant reasons that had previously compelled a ban on all victim-impact evidence,[85] the motion urged that to extend the case well beyond its limited facts, in the manner intended by the prosecution, would violate the general restrictions on such evidence which this Court outlined in *Edwards*, *supra*, the Eighth Amendment's requirement of extraordinary measures to

---

[85]CT 8: 1838–1841, 1846, 1847, 1849–1855.

ensure the reliability of capital sentencing proceedings, the fundamental fairness requirements of the Fourteenth Amendment, and Evidence Code section 352. (CT 8: 1836, 1859, 1860; see also RT 55: 8227 [denying motion for new trial, court acknowledges that defense has claimed that the victim-impact evidence was unduly prejudicial].) Citing *Payne*, *Edwards*, *People v. Ashmus* (1991) 54 Cal.3d 932, 991, and *People v. Fierro* (1991) 1 Cal.4th 173, 236, the court denied the motion and imposed no restrictions on the prosecution. (RT 48: 7173–7176.)

B. The Victim-Impact Evidence Was Overwhelming

The suffering described by the six victim-impact witnesses "is so overwhelming that," as the prosecutor said, "it's hard to even listen to it . . . ." (RT 54: 8003.) And it's hard to read about it. Nevertheless, appellant earnestly requests the Court not to peruse this material as it might the factual background to another contention, but to take it in as a juror would, while at the same time maintaining enough objectivity to observe how the material arouses the emotions. When the Court is confronted with a claim that unduly gruesome photographs were admitted, it examines the photographs, not a verbal description of them. (*People v. Navarette* (2003) 30 Cal.4th 458, 495; *People v. Gurule* (2002) 28 Cal.4th 557, 625.) The same is true of videotapes (*People v. McDermott* (2002) 28 Cal.4th 946, 998) and issues pertaining to photographic lineups (*People v. Cunningham* (2001) 25 Cal.4th 926, 990) or audiotapes (*People v. Ochoa* (1998) 19 Cal.4th 353, 414; *People v. Ray* (1996) 13 Cal.4th 313, 333, 334). Because appellant is claiming both that the victim-impact testimony was so inflammatory as to render the penalty trial fundamentally unfair and that the testimony's prejudicial effect greatly outweighed its probative value, appellant similarly requests that the Court read the record in a manner that allows an experiential testing of appellant's

contention that it unduly pulled on the emotions. But to request this—and to present the following summary in a way that seeks to be faithful to the tone and impact of the testimony—is an uncomfortable resolution to a dilemma which appellant faces in presenting the material to the Court. For it is difficult to stay objective while reading it; it is the kind of material respondent might present in order to engender hostility for appellant and a disinclination to take his claims of error seriously.

According to the prosecution's evidence, appellant had far greater roles in the killings of Mans and Jones than in that of Aragon, which he opposed, albeit ineffectively. However, the bulk of the victim-impact case dealt with Aragon, and the testimony began with his survivors. (Compare RT 49: 7275–7329 with 7330–7372.) As will become apparent, Aragon was a more attractive victim than Mans and Jones, who apparently had some of the same problems with substance abuse and inability to hold a job that appellant had. And the lead-off witness among Aragon's survivors had the most evocative presentation style. She provided far more than "a quick glimpse" of Aragon's life (*Payne*, *supra*, 501 U.S. 808, 822), and her choices of both content and phrasing could not have tugged on the heartstrings more had she made a conscious attempt to do so.[86]

Lydia Roybal-Aragon was Jose Aragon's stepmother, having married his father Steve Aragon in 1984, when Jose was 12 or 13. When Jose died, at

---

[86]The victim-impact case was presented to both juries simultaneously, but the emphasis on Aragon and his survivors cannot be attributed to this fact. Closing arguments were presented to each jury separately and, in arguing to appellant's jury, the prosecutor quoted twice as much Aragon testimony—and he quoted a great deal—as he did testimony regarding either Jones or Mans. (RT 54: 8008–8018.)

age 22, he was a senior in engineering at California State Polytechnic. Roybal-Aragon detailed his dedication as a student. (RT 49: 7276–7277, 7279.)

Jose and his brother Steven, who was 11 months younger, were always involved in sports. The two were like twins, inseparable. They were each other's support, especially going through their parents' divorce. Their father taught them soccer, basketball, and tennis. (RT 49: 7278–7281.)

Jose was a soccer player who would always give the ball to someone else to let him take the shot. He spent his last summer playing soccer with his brother Carlos, who was about 15, teaching him. Carlos idolized Jose. Jose made Carlos promise that he would study hard and make something of himself, to make their Dad proud. Now, therefore, whenever Carlos feels depressed and angry, he studies harder. The two played video games together, and Carlos took up badminton because Jose played on the high school team. (RT 49: 7278–7279, 7281–7282.)

Roybal-Aragon identified photos showing Jose, as a teen, playing soccer and tennis, and showing him with Steven and their tennis trophies. (RT 49: 7279; Exs. 415, 407, 411.) Another photo was of Jose at 11 or 12, with friends, holding their skateboards. (RT 49: 7280; Ex. 408.) Another showed him taking a dramatic jump on his motorcycle. "That was probably what he loved to do the best," i.e., ride the motorcycle. (RT 49: 7280; Ex. 414.) "He had a dresser full of trophies," and he went out riding almost every week, usually in the canyon where he was killed. (RT 49: 7280; see also RT 35: 5429–5431.) A photo showed the trophies lined up, near Jose's well-made bed and his picture of Jesus. Roybal-Aragon told how he kept all his things—model cars, magazines, shoes, trophies—nicely organized, clean, and "just so." (RT 49: 7297; Ex. 409.)

Jose also had a half-sister (Roybal-Aragon's daughter), Laura, who was about five when Jose died. She would run to the door when he came home, and he would scoop her up in his arms and call her "my little princess," or by a tender nickname he had given her. He played with her a lot; they would roll around on the floor together laughing. When the family went to Carlos's soccer games, Jose would hold Laura and feed her. (RT 49: 7282–7283.)

Another sister, Stephanie, was 16 and living in Albuquerque with her mother when Jose was killed. According to Roybal-Aragon, he was a big brother to her. She would come to visit and spend her whole day with Jose and Steven. If Jose went to ride, Stephanie would watch all day. Even at races, which were mostly just waiting for his turn, she would go and just stay with him the whole time. (RT 49: 7283–7284.)

Jose's father had taught him how to ride, and sometimes they went out together. Steve also taught Jose all he knew about basketball, tennis, and soccer, and they played basketball and soccer together. In recent years they would hang out and shoot hoops in the backyard. (RT 49: 7285.) She added, "Nobody shoots hoops at our house anymore." (*Ibid.*) Jose and his father, she testified, went out together to buy the materials for a soccer goal which Jose built for himself for practice. They fought, too, like all kids and parents; but Jose always made a point of saying, "I love you, Dad." (RT 49: 7285–7286.)

Jose was

> a quiet presence. He was shy, studious. . . . [¶] [H]e rarely asked for anything. He wasn't a gimme, gimme, gimme kind of person. He just wasn't that way. [¶] And I think we found out from other people how much he touched them. Because we found out things we never knew about him after he died, how people respected him, how he conducted himself around other people in a very respectful way. . . . [H]e was more of a

> stabilizing person and kind of a grounding for his brothers and sisters.

(RT 49: 7284–7285.)

Some of the most poignant testimony was about how the family learned of Jose's death. The Aragons had planned on a family Thanksgiving. (RT 49: 7285.) The day before the holiday, Roybal-Aragon got home from work at about 5:30. Laura was with her, and Carlos and husband Steve were home. Steven was in New Mexico to have Thanksgiving with Stephanie there. It was a sunny day, and the family was getting ready for the holiday weekend. They started cooking and winding down, but then they started wondering where Jose was. Steve checked the garage, since Jose had left a note about riding in San Timoteo Canyon. His bike was not there, so the family thought maybe he went from riding to his girlfriend Shannon's, but he would have come home to wash his bike first. So Steve went looking for him. After half an hour the phone rang. (RT 49: 7286–7287.)

> It was Steve. And he said that Jose's dead. And I said, "No, no." And then I said, "Where are you?" And he said it again. And I said, "How? How?" And he says, "They won't tell me how." So Carlos was there. And I said, "Carlos, you are babysitting. I've got to go to the canyon. Take care of your sister. Jose is dead."

(RT 49: 7287–7288.) Roybal-Aragon drove, first to the wrong canyon, then the right one. By then it was cold, black, and windy. Her husband was there. There were floodlights where Jose used to park his truck. It was taped off, and they wouldn't let anyone near the truck, which she could see in the distance. She had assumed that there had been an accident on the bike. Steve told her that Jose had been murdered, shot, but that officers would not tell him more. Her reaction was to wonder why. Why anyone would do something like that to a kind, gentle soul who never hurt anyone? It was much worse than an

accident.[87] Accidents can happen, but no one should do that to someone else. It was senseless, sadistic meanness, to intentionally go out and find someone vulnerable, pretend to be interested and friendly, shoot him, ask if it hurts or burns, to laugh, shoot him six more times, try out your new shotgun on him. "And to say, 'Oh, look at the big hole I left.' That hole was our son. He was a grandson, a friend." (RT 49: 7288–7289.)

Told there was nothing they could do and to go home, they did. They started calling their relatives and friends. Jose's girlfriend called about 10:00 p.m. and asked for him. "And I just said, 'Jose's dead. Jose's dead.' And she screamed . . . ." (RT 49: 7290.) The girlfriend was at a pub with friends, and she dropped the phone and ran out. "All his friends came to the house. And we all just sat there and cried and cried." (*Ibid.*) Five- or six-year-old Laura was there, but Roybal-Aragon did not recall what she was doing. She speculated about the child's reaction: "I don't think I was paying attention. . . . [She was p]robably sitting there shocked." (*Ibid.*) When Steven heard, during his visit to Albuquerque, "he just lost it." He went out back and started screaming and kicking and yelling. (RT 49: 7291.)

On Thanksgiving, they made more phone calls, including trying to reach the mortuary and make arrangements, and they wandered around the house lost. "People started coming over, bringing food, bringing comfort where there was no comfort." (RT 49: 7291.) They had to go to the coroner's

---

[87]At the prosecutor's prompting, other witnesses expressed the same belief. But apparently none actually was also a survivor of an accident victim. Such a person, too, can be tormented by the loved one's being taken, before his or her time, because of some occurrence which never should have happened (e.g., a driver's being drunk or the failure of an inadequately-maintained machine). Their agony—different in the content of the obsessive thoughts but experientially similar overall—is documented in section E.1.a, below.

office to identify Jose's body. They were not, however, permitted to see it because it was too mutilated, and they made the identification from a photo that showed half of his body covered. (RT 49: 7291, 7292.) The next stops were the funeral home and the priest, to make arrangements. After telling this, Roybal-Aragon added, in terms that would evoke many parents' worst fears, "You know, you take care of your kids, and you feed and you clothe them, and you are left with one last job to do, and that's to buy them a wooden box . . . ." (RT 49: 7292.)

Steve later picked up the impounded truck, and it was "full of blood" and had dents from the bullets. "[H]is life's blood was just splattered all over. And so we all just stood there and stared at it." (RT 49: 7292.) They could not handle cleaning it up, so Jose's uncle did it. (*Ibid.*)

The witness continued by discussing funeral arrangements and the memorial. There was a long and difficult wait for the release of the body, because of the holiday weekend. (RT 49: 7292–7293.) "[A]fter they desecrated his body even more for an autopsy, they released him to us" at the end of the following week. (RT 49: 7293.) The family moved the planned service from the chapel to the church, but even there it was standing room only. "And he had touched so many hearts that the church was just packed." (*Ibid.*) The family had finally seen him a few hours earlier, "cold and swollen. And we just couldn't even stay for the people to come for the viewing. We had to go. We just couldn't stay." (*Ibid.*)

Roybal-Aragon explained, eloquently, that, when the people who are around near the time of the funeral get back to their lives, "you come home to a house that's empty. And you have to deal with that agonizing pain and the fact that somebody isn't there." (RT 49: 7294.) At the time of the trial, her husband wandered around the house, "a shadow of the man he was." He

comes home, she said, every day and goes into the bedroom, shuts the door, and turns on the television, and they would not see him again. "It goes on forever." (*Ibid.*) Steven does the same, with the television in his room. Carlos plays Nintendo and more Nintendo, and studies, and the family never sees him. "Then I kind of walk around and cook dinner and do the things that I'm supposed to do." (RT 49: 7294.) Young Laura lost everybody—not just her brother—because no one was there for her. Roybal-Aragon would experience rage, "[a]nd you would have this little five-year-old staring up at you" wondering what she did, or who was the monster over her. (RT 49: 7294.)

For two and one-half years, the family left Jose's room unchanged. In explaining this, Roybal-Aragon's gift for conveying pathos came through again: "I think somewhere we thought that maybe if we didn't touch anything or move anything that he would come back. But he never did. And we yearn for him, but he never comes back." (RT 49: 7297.)

She explained her view of the effects on Laura, who by the time of trial was nine, but who was five when they lost Jose. A young child, she said, does not understand death, and it was a year or two before Laura asked if Jose wasn't ever coming home. (RT 49: 7298.) "One of the things that they never talk about when they talk about grief, and boy we've been to all the grief classes, is what it does to your self-esteem, because a part of you is ripped out and you don't know where it went and what to fill it with." (RT 49: 7295.) As an adult, you have a sense of self and maybe after a time you can pull it together, remember who you are. A teen like Carlos can wall himself off from what is happening. But, continued the witness, a five-year-old does not know who she is. She was actually beautiful and smart, but she thought she was neither and could not be convinced otherwise. She had become the most sarcastic child Roybal-Aragon had ever seen. Her ability and willingness to

concentrate in school fell apart. She went from being a "sweetheart" to a serious behavioral problem. (RT 49: 7296–7297.) Roybal-Aragon and her husband set up a plan stating what was or was not acceptable and what the consequences of her behavior would be, but she would thumb her nose at them, "And we didn't have the energy to discipline her." (RT 49: 7296.) For reasons that are explained below, there was no cross-examination to test Roybal-Aragon's assumption that her five-year-old would have lost none of her sweetness and compliancy without the murder. Laura, the witness said, also became fearful, did not want to sleep alone or be alone. And she would run around saying, "Are you crying again? . . . When are you going to stop crying, Mom? What are you mad at now, Mom?" (RT 49: 7297.)

Roybal-Aragon and her husband would explain to Laura and Carlos that it was not their fault, that the anger was not really at them. Carlos, who was 18 or 19 at the time of trial, said that he used to have parents who never fought, but now he had parents who were irrational, who took out their pain on everybody. He complained that every place he wanted to go, the answer was always, "No," because of his parents' fear of his going where someone could hurt or kill him. (RT 49: 7279, 7295.)

Whenever Steven, the son 11 months younger than Jose, did not come home, they would wait. And three and one-half years later, Steven still stayed up all the time; he just never slept. (RT 49: 7295.)

Roybal-Aragon testified that Steve, her husband, wondered every single day why he was on earth. She said that she was not sure he would still be alive if they did not have other children. (RT 49: 7298.) Carlos noticed that Steve used to love his job, but that now he could barely stand it. Roybal-Aragon added that Steve wants to run and hide, but he cannot hide from the pain. (RT 49: 7299.) Every year, he does a ritual that Jose used to do, cutting a form out

of the paper for keeping track of the NCAA results, watching all the games, and carefully recording all the results and scores. (RT 49: 7298.)

Asked what holidays are like now, Roybal-Aragon said that her family went through the motions the first Christmas, for Laura's sake. But holidays were not holidays without Jose.

> We spend every birthday without Jose, every wedding that we go to reminds us that he is not going to get married. Every baby that's born means that Jose is not going to have any children. And every day is a day without Jose.

(RT 49: 7298.)

Jose had an heirloom in the garage, a beat-up vintage Studebaker pickup from around 1950. After his death, nine of his friends got together and restored it, fixing it mechanically and restoring the body and upholstery, and painting it yellow, his favorite color, as a memorial. They also painted the pickup that he drove around in, and was killed in, yellow. Pictures of the young men with the restored vehicles were shown to the jury. (RT 49: 7299–7300; Exs. 412, 413.)

Having testified to this, Roybal-Aragon added an anecdote.

> One of the things that I forever kind of imprinted . . . is that we had gone to bed after all this had come about, and it was really late into the night, and we were just kind of laying there, kind of pretending to be asleep, because you can't sleep. And out of somewhere came just this agonizing wail. And you kind of thought, gosh, did I do that, did I wail? Was that me? Because that's what you want to do. But it wasn't. And we all jump out of bed, ran into the living room, and there was Jose's friend just wailing and crying, just beside himself.
>
> Q. Who was it?
>
> A. It was Joe, his friend Joe. They were all part of the funeral. They were pallbearers. And probably one of the things that just really sticks in my mind is how in New Mexico at the

> memorial home[,] it was Jose up at the front, and scattered back and staggered were all his friends in suits just standing there, just unbelieving that this thing could happen.

(RT 49: 7300–7301.) She concluded her testimony by saying that she thinks all the time about the last few minutes of Jose's life and what he went through. In an invitation to the jurors to recreate her son's last moments, through her eyes, she added,

> Just imagine him lying there with a gunshot to the abdomen, and then six more bullets in the chest. And the one in the neck. And them laughing and leaving, leaving him there to die alone with no one to cradle him, hold him, and say that you love him and to say good-bye. And no one to comfort him. And then for him to just lay there by himself for God knows how long.
>
> And to know that while he is laying there they are using his ATM card and stealing his money . . . .
>
> And so then a poor ten-year-old finds him and doesn't sleep for months and months and months.[88]
>
> So he is all alone, and he dies alone. And we aren't there to do anything. Even if we were there, we couldn't have saved him, because they left him for dead. They made sure that he was dead.

(RT 49: 7301.)

After Roybal-Aragon's stirring testimony, there was already a serious threat to the jurors' ability to make a decision which would "reflect a reasoned moral response to the defendant's background, character and crime." (*People*

---

[88]The cyclist who found Aragon's body was riding with his young son. The boy rode by Aragon's pickup truck and then told his father that something was wrong and that he should go look. (RT 35: 5423–5424.) There was no evidence of what the boy thought he saw or how it affected him, or that Roybal-Aragon had even second-hand knowledge of those facts, as opposed to imagining the impact on him.

v. Crew (2003) 31 Cal. 4th 822, 855–856, citing *Penry v. Lynaugh* (1989) 492 U.S. 302, 319.) But this was only the beginning.

# # #

Leighette Hopkins had been a friend of Jose's since they were in high school together, i.e., five or six years. Before his death she saw him almost daily. Their relationship was not romantic; rather, he was one of her best friends. They frequently studied together, and they also played board games, watched television, hung out together, and visited others in the group of friends of which they were a part. In describing Jose, she emphasized his calmness— "anywhere we went he was just the calm and collected one" (RT 49: 7305)—and said that he was friendly with everyone, always smiling, and that he made people laugh. When he died he was dating Shannon Urenizis, another good friend of Hopkins's. (RT 49: 7303–7306.) His sister Laura was his little pride and joy. He always found time for her, was patient with her, and played with her all the time. (RT 49: 7310.)

Jose was a bright student but had to work hard in school, and he did. She believed that he would have gone far. She last saw Jose the night before he was killed. He often helped her study, and he was helping her prepare for a chemistry test. They made plans to go, the following evening, to a club where their group would congregate. She went there that night, the night before Thanksgiving, and all of their friends were there. They were expecting Jose, and they had been calling the house and leaving messages. Finally Shannon talked to Lydia Roybal-Aragon and came back screaming that Jose was dead. Hopkins did not believe it, and she and Shannon drove to the house. (RT 49: 7307–7309.)

> We went to the door, and his dad answered, and that's when I knew. I could just tell by looking at his face, his eyes, the pain. I knew it was true, but I didn't know how.

(RT 49: 7309.) Hopkins had assumed that whatever happened was a riding accident and was stunned when he said Jose had been shot; nothing like that had crossed her mind. At trial she could not remember a lot of what she thought about it, but she knew that she had wanted to talk to her parents. Other friends came up to the house that night, but she and Shannon did not stay long. They went back to Hopkins's house in shock. (RT 49: 7309–7310.) "[T]here was a lot of crying and just comforting one another." (RT 49: 7310.) After a long time she fell asleep, and she dreamed that Jose was alive. (RT 49: 7310–7311.)

Hopkins's parents were planning to go out of town for Thanksgiving, and Hopkins was staying home and making Thanksgiving dinner for Jose. She asked her parents to stay home because she did not think she could handle being alone, and they did. (RT 49: 7311.)

The hardest thing was that her best friend was gone, and she was not going to have anyone to talk to, or laugh with, anymore. Shannon moved in with her for a few days. When they went to get Shannon's things, a hair of Jose's was on her pillow, and Shannon wept again and put the hair in an envelope to save it. Hopkins herself found a Pepsi bottle in her home that Jose had drunk from the night before he was killed, while they were studying, and she kept it. She left it on the counter for eight months—her family understood and left it alone—but later moved it to her room. (RT 49: 7311–7313.) She displayed it during trial, still with Pepsi in it. (RT 49: 7313; 6SCT 1: 133, ¶ 55.) "It is kind of the only thing I have left of him." (RT 49: 7312.)

Hopkins made a point of seeing Jose's body at the funeral, to ground herself in the reality of his being gone, but she walked in and saw the body in front of her sooner than she expected and before she had prepared herself. She "just stood there and cried," and a friend came up and held her. (RT 49: 7314.)

This was the first time she had lost anyone. Their group of friends, like others their age, thought nothing bad could ever happen to them. And yet Jose, the calmest person, the person no one ever had a problem with, was killed. Now they knew that things can happen, and a lot of them were "paranoid." At the time of trial, she was still fearing getting killed by someone breaking into her car or her house; her feeling of safety was lost.

Hopkins had kept in touch with Jose's brother Steven. He was noticeably sad at times, and always seemed to be stressed and have a lot on his mind. (RT 49: 7314, 7315.)

She had thought about what Jose's last few minutes must have been like. He was in some ways a fearful person—dogs frightened him, and so did sudden noises. "So I can't imagine his fear at that time." (RT 49: 7316.)

Thanksgiving became the hardest holiday. Sometimes she wanted to be alone then, sometimes with others. Sometimes she tried not to remember, because it is not good to break down and cry in front of her whole family, which happens. The hardest thing for her, three and one-half years later, was sometimes still thinking that it was not true. She could be thinking about Jose without realizing that he was gone, then have to tell herself that he was, and that he was never coming back. (RT 49: 7315–7316.) Little things still reminded her of him frequently. For example, he used to play Clue with her, and she had avoided the game since he died. But a few days before testifying, she had to open it to get some dice for another game she and friends wanted

to play. And there was a game sheet with his writing on it. (RT 49: 7316.) Taking the freeway past the area where he had been killed was also difficult for her. (RT 49: 7316–7317.)

Hopkins told a story about Jose's boyish enthusiasm when he saw a deer near his home. He insisted that Hopkins come over to see it and tried to find it again when she arrived. She shared the story with Jose's father upon hearing that the latter, trying to collect himself and to understand why his son had been killed, suddenly saw a deer right in front of him. The deer left across an open muddy field; the father tried to follow it, but suddenly the tracks just disappeared. (RT 49: 7306–7307.)

# # #

By now the jury had a clear sense that Aragon had been a flesh-and-blood human being, whose loss was devastating to many people, but **Stephanie Aragon** was also called to testify. She was 15 when her older brother died. Their parents had divorced eight years earlier, and she had stayed in New Mexico with her mother, while Jose and Steven moved to California with their father. From then on she saw Jose about four times a year; sometimes she would visit him in California, and sometimes he would come to New Mexico. She described Jose as quiet and shy. She said that he always made her laugh, usually by making faces. He always looked after her and protected her. (RT 49: 7318–7319.)

Stephanie was planning to go out to California for Thanksgiving in 1992. The day before, her father called and spoke to her mother, and Stephanie assumed it was about her travel arrangements. (RT 49: 7319–7320.) Her mother was on the phone for awhile. Then she told Stephanie that her father was on the phone and "just went and sat down." (RT 49: 7320.) Her father told Stephanie that Jose had been shot. She asked if he was okay, and

her father said, "No." She described herself as in shock, and she did not really believe it until she saw him at the funeral. Her mother, too, was in shock; she just sat there, said nothing, and started crying later. Then they held each other and cried. She and her mother flew to California the next day, as did Steven, who had been visiting them and left on an earlier flight so he could get there as soon as he could. When their mother told him Jose was shot, he too asked if Jose was okay. They said that he was not, that he was dead. Steven cried, then got angry. He went outside and started punching and kicking the car. (RT 49: 7320–7321.)

They all stayed at her father's house for the week before the memorial service. Everyone just sat and didn't say much. (RT 49: 7321.) When she saw the body before the service, she understood that she was never going to see him again, nor hear his voice, and she felt really bad. In the ensuing months she felt really lonely and sad, and she had a hard time dealing with the question of why it happened. (RT 49: 7322.)

In court she read parts of a letter that she wrote Jose's girlfriend Shannon three months after his death. Sometimes she was fine, but sometimes, in a class or out seeing a movie, "[A]ll of a sudden it just hits me, and I'll just break down crying." (RT 49: 7324.) A month earlier she had been dreaming of Jose almost nightly. The dreams stopped, until the night before she wrote the letter, when she dreamed that she was at a mall with Jose and Steven. Jose was just laughing, like he did last summer when they were on a ride at Magic Mountain. She also wrote that she felt like a big part of her had been ripped out of her, and she regretted not being able to spend more time with Jose before he died. She had been trying to keep herself occupied by playing on her high school tennis team. She was not too sure if she wanted to, but she remembered that Jose always told her to stick to tennis, and that it

would have made him happy. She and he used to play tennis, and he was talented in that, like he was everything else. "I try and study hard now for Jose, but I find it difficult to concentrate . . . ." (RT 49: 7323.) She went on to tell Shannon how glad she was that Shannon had been in Jose's life, because Shannon made Jose happy. She was also glad that Jose and his father had been getting closer. Her brothers were everything to her, and she wanted to be just like them. And Jose's death was so hard to understand, in contrast to that of her grandfather, who lived a full life and did not have someone come up to him and take him away like they owned him. (RT 49: 7323–7324.)

Stephanie read another letter, a long one that she had written a couple of months before trial. It described experiences that were still true as of the time of trial. She said that she was blessed to be able to spend 16 years of her life with such a wonderful brother. She thought of him every day of her life and wondered why this happened to her family. Now she was living in fear for her own safety. Though she knew it was irrational, she could only watch a movie if she sat in back and was aware of who was around her, for fear that she would be killed. Driving home from school daily, she wondered if someone was following her to rape and kill her. Jose had missed class the day he was killed; Stephanie, if she missed a class, would dread that something terrible would happen to her. (RT 49: 7325.)

She did not know if she should be afraid of a death like her brother's, or look forward to death to be with him. There were so many things that she missed about her brother. One was the way he had to do things just perfectly. Another was his spending time with her all the time when she was younger and, when he got older, taking her with him when he went out with his friends. One time in California, everyone had left the house but Jose and her, and he

was planning to go out. Rather than leaving her, he took her with him. (RT 49: 7325.)

Still reading the letter, Stephanie recalled that, when Jose died and Stephanie saw Shannon in California, Shannon told her that Jose adored her. Stephanie felt so loved, but she broke out in tears. When she spoke to Jose on the phone, she always told him she loved him. Now it hurt so bad—it was like a constant pain in the chest. It was not easy to go on and be happy, as he would want her to. She felt like she had been cheated out of so much, having only grown up with him for seven years, and only seeing him two months out of each year after that. When visiting California, she spent the majority of her time with Jose, and she cherished every moment she spent with him. He would go out with friends, then wake her up late at night to watch television with him. She described other memories of being with him as well. She cried whenever she saw a television show with a character that reminded her of Jose. (RT 49: 7325–7327.)

What happened made her question her religion, as well as justice. She was constantly angry. She also felt sadness, loneliness, and especially emptiness. (RT 49: 7327.)

Most family members had gotten license plates with some variant of Jose's name on them. She and her mother still went to the cemetery every weekend

> to take my brother cards, flowers, and flags. We have a Christmas tree and Easter basket that we take for him. Jose has got the cleanest and shin[i]est headstone there. We take care of him as if he was still alive.

(RT 49: 7327–7328.) Stephanie's mother still cried a lot and was always sad, and she was very concerned about keeping track of Stephanie's comings and goings, very protective. Stephanie also identified a few more photos, of her,

Jose, and Steven working on the old Studebaker; of Jose and Steven; and of Jose in his motorcycle gear, with Steven and their mother. (RT 49: 7328; Exs. 404–406.)

# # #

Finally the testimony moved on to the young man whom appellant was accused of shooting. **Catherine Mans** testified about the loss of her son, Joe, who to her was "Puncken." Understandably, she testified about his strengths, not the deficits which would have concerned any parent. (Regarding those, see p. 212, below.) He was raised in southern California, but the family moved to Florida when he was 18 or 19. He was doing well in a trade school there, but he did not like the weather, and he missed his friends, as well as the mountains. He loved the outdoors, and camping, which is not available in Florida. When they lived in California, they would go to their cabin in Big Bear every month, and Catherine had very fond memories of camping with him. So he returned to California, where his older sister Charlotte also lived. (RT 49: 7331–7334, 7336.) Catherine came out to visit Charlotte and Puncken about a year before the latter's death, "and that was the last time I saw my son." (RT 49: 7332.) During that visit, he told her that there was a place in Riverside that he liked to go to, a hangout for kids, where they drink beer and hang out, a place overlooking Lake Mathews. She was worried about his going up there in the old pickup he owned before he bought his Subaru, but he assured her that he would be okay. (RT 49: 7334.)

Mans described her son's childhood, interests, and aspirations. As a child he was a marvelous boy, happy, very smart, always joking around, and he never had any problems. He kept his room very clean, and he was a very clean, neat, well-mannered person. The only son among six children, he was highly protective of his family. He was particularly close to Charlotte, who

was the first born and a year older than he. As he grew older he enjoyed riding his dirt bike, and he loved to draw. He wanted to be an architect, and he was very adept mechanically—he could fix anything. (RT 49: 7333, 7334.) He was sensitive enough that he cried when he had problems with some of the advanced mathematics in air-conditioning school, and he was very shy, sometimes speaking with a stutter. It was very hard for him when a fiancée dropped him. (RT 49: 7335.) He saved his money carefully, but he was very generous with his mother. "If he had $10, he'd give you 5." (RT 49: 7336.)

The last time she spoke to him was about a month before he died. He could not find work, and he called her and told her that he wanted to come back to Florida, with his friend Timmy Jones. Her son and Timmy had been friends on and off since they were 12 or 13, and they were very close at the end. They understood each other. Timmy was very quiet, polite, and nice. (RT 50: 7377; 49: 7343–7344.) Catherine moved from Fort Lauderdale to Orlando and bought a house big enough for her son to stay in. But he never made it. (RT 49: 7337; see also 7340, 7343.)

Catherine was asked to tell how she heard about her son's death. She was at work and was told to call her parents, but the person who passed the message would not say why. She called her father, who told her to go home. He, too, refused to say why. She went home. The house was full of family, and her brother said, "Puncken got shot." "What do you mean he got shot? Is he okay?" Someone said he was, but "my mom started screaming, and my mom says, 'No, he's not okay. He's gone,' and I—I went outside. I started screaming and banging on the car . . . . I couldn't believe my kid is gone." (RT 49: 7338.)

Part of her was taken away from her. (RT 49: 7341.)

As of the time of trial, Catherine still could not believe it. She did not attend the funeral—"I don't want to see my son in a box"—and had not seen his grave. (RT 49: 7338–7339.) "When this is over, I've got to go to his grave. I have got to go to the cemetery to see my son's grave." (RT 49: 7338.) She felt that she was supposed to die before her son. Three and one-half years later she was still very upset and angry "all the time," but that was better than the first year, when she was "going nuts" and going to doctors for medication. (RT 49: 7339.) Now she was more depressed. (RT 49: 7341.)

As with other witnesses, some of her most touching testimony was about dreams. Things started getting better when she had two dreams about her son. She was holding him, and kissing him.

> [A]nd I said, "Puncken, you're here." And he said, "yeah, Mom, I'm here. I'm okay. I'm okay. Don't worry." And it was so real. . . . I said, "What happened?" He says, "It hurts me back here." He kept pointing [apparently to his back] . . . . And that was the end, but he kept saying, "I'm okay."

(RT 49: 7339.) The other thing that helped was prayer: "I just prayed and prayed and prayed." (*Ibid.*) She still often dreamed of him as a little boy. (RT 49: 7342.)

She had a job that involved using a microscope, but she had to leave. She got a job cleaning classrooms and cleaned "like a maniac." At the time of the trial, she still needed constant activity to keep from thinking about her son all the time, and her sense was that the thoughts would never go away. She thought about him daily, and talked to him, too, feeling him around her. "He is here now, and Timmy is here. I know they are here. They brought the strength for me to be here." A year earlier, she would not have been able to come and talk about it. (RT 49: 7340.)

She continued to cry a lot on holidays, as well as at other times. A week before she testified, she was on long drive in Florida. Suddenly she could not stop crying, because she did not know how long her grief was going to keep going on, and she had to pull off the road, and she cried and cried. "I get this way every so often, I just—." (RT 49: 7341–7342.) Her daughters still talked with her about it all the time, and they, too, would cry. (RT 49: 7342.)

She showed the jury photos of Puncken with a sister, when he was four, of him in a backyard pool when he was eight, and of him with her ex-husband—his father—when Charlotte married, about a year before Puncken's death. (RT 49: 7342–7343; Exs. 428, 427, 429.) Like Roybal-Aragon and Hopkins, she was asked to conclude her testimony with material like that long relied on in argument by prosecutors seeking a death verdict. (See *People v. Haskett* (1982) 30 Cal.3d 841, 863 (*Haskett*).) She described what went through her mind on those occasions where she imagined the last few minutes of her loved one's life:

> I always think that he was gasping for air or he was struggling to get to breathe or something, because he was shot in the back of the neck.[89] I just don't want—I always think if he was in pain or what. I hope it just—I just don't want to talk about that.

(RT 49: 7344.)

# # #

Catherine's daughter, **Angela Mans**, was 20 when her brother died at 26. She described him as very kind, and he was innocent and trusting to the point of gullibility. But he also was always joking with her by making up

---

[89]Mrs. Mans' avoidance of anything connected to her son's death permitted a misconception about it. He received a single shot to the back, which went through the spinal cord and heart. (RT 38: 5743–5745.)

stories and pretending they were true. He loved to draw pictures. He drew her one of his '57 Chevy truck the last time she saw him. She saved it. He also loved playing the guitar, and he made up his own pieces, which he made her listen to when they were younger. He loved working on cars, and he loved being outdoors. She thought of him as always happy. (RT 49: 7346–7348.)

He was very upset about their parents' separation, but he helped her through it and through her struggles with moving across the country and away from her mother at age 13. He was there for her every night, and he sometimes took her to school. (RT 49: 7346–7347.) For her, "[h]e was everything." (RT 49: 7347.) At the time of trial, thinking of him made her think how much she missed him, how she wished he were there. Seeing her parents' pain, she wondered if it would be easier if it had been one of the girls, instead of the only boy. She, too, was invited to give a portrayal of her brother's last moments, but was less helpful to the prosecutor than other witnesses. She was not, however, able to think about him without remembering that he was murdered and imagining what he went through. She would try to tell herself that he went peacefully and was somehow okay. But she saw a lot of fear on the face in the casket, and there was not a day that went by without her thinking of his expression. (RT 49: 7348–7349.)

She last spoke to him when he telephoned her a couple of months before his death. Then one night her father woke her up and told her that her brother was murdered. She could remember little of what happened after that, except that she screamed and went into the living room. She was mostly numb. An hour after she heard the news, she went to church, where she waited for her brother to come say goodbye to her, to tell her that he was okay. He did not do so then, but he came to her in dreams later. In these dreams she

would be at the cemetery, and he would walk up to her and tell her to stop crying, that he was okay. (RT 49: 7349–7350.)

The funeral was the hardest experience of her life.

> It was like he was sleeping and I kept talking to him[,] waiting for a response and he wouldn't—he wouldn't talk back.
>
> But I kept looking at his face, and he looked so scared, and I wanted, I wanted to tell him that he was okay now. He was the one that always protected me.
>
> And I felt so bad that I couldn't protect him.

(RT 49: 7350.)

Her father took Joey's murder very hard. It was the first time she saw him cry. He was very numb, very quiet, and he was trying to get himself through it. He was in a daze when he saw Joey in the casket. His doctor gave him a lot of tranquilizers to help him get through that time, and he drank more now. (*Ibid.*; see also RT 49: 7352.)

After the funeral, the hardest thing was to head back to her home in Arizona and not be able to take Joey with her. She wanted to bring him along, and he would wake up, and "we'd all be the same again." She felt like he was going to get hurt if she left him, and she wanted to protect him, as he had protected her his whole life, "and I wanted him with me." (RT 49: 7351.)

Angela, too, testified on the theme of fear. When she returned home, she did not leave the house, except to go to work, for two months. As of the time of trial, she still would not go out at night, because she had a lot of fear. She would not walk out to her car alone, and she called home every night before leaving work. Her sleep was impaired—she woke up at least once a night to recheck that the house was locked up, and every sound would wake her up. She described herself as paranoid. "I always feel somebody is breaking in or they are going to hurt me or hurt one of my family. I'm always

thinking, are my sister's [*sic*] okay? I'm afraid to go through what I went through again." (RT 49: 7351–7352.) She continued to have a lot of pain, along with anger that she could not share her life experiences with her brother like she used to. She made a point of trying to have peaceful thoughts about him being in a better place, being happy, "and I always imagine him looking down and telling me, 'Angela, you're okay,' and everything is going to be okay now." (RT 49: 7352.)

Angela described her father, too, as being "paranoid" regarding his daughters' safety, and she said he aged a lot. She repeated that he drank more, but she also mentioned that he valued his daughters more. He stopped celebrating Christmas, however—he could not deal with it. Every year he left town on Christmas. (RT 49: 7352–7353.) This left the family incomplete. "It is empty, and it is hard, and it is cold." (RT 49: 7353.)

Their sister Charlotte had become constantly irritable. Joey always looked after her, and she ended up feeling like she had nobody now. She talked about him "constantly," visited the cemetery "all the time," and cried "a lot." Sometimes Angela tried to get her to move to Arizona, but Charlotte always said she couldn't leave Puncken. In Angela's opinion, Charlotte still had not accepted that he was really gone; part of her still thought he was there. (RT 49: 7353–7354.) Charlotte had a son after Joey was killed; she named him Joey. (RT 49: 7355.)

Angela—asked, like others, to speculate on an experience she had not had—felt she could have accepted an accident more easily, interpreting it as meaning that God wanted her brother. Instead, she felt that it wasn't his time. He never had his own family, or time to experience many other things that he wanted to and to meet his goals. And if it had happened differently, it would not have brought so much fear into his survivors' lives. (RT 49: 7353.)

Angela identified photos showing Joey and another sister playing at Big Bear when he was younger, her at her brother's grave on Valentine's Day, and her niece and nephews holding 28 balloons at the graveside on his most recent birthday, when he would have been 28. Every year they took the appropriate number of balloons, said a prayer, and let them go. (RT 49: 7354–7355; Exs. 403, 424, 425; cf. *Welch v. State* (Okla.Crim.App. 2000) 2 P.3d 356, 373 [testimony about putting flowers on victim's grave and brushing dirt from it after another family member's funeral "had little probative value of the impact of [the victim's] death on her family and was more prejudicial than probative"].) Other photos showed the grave marker, with birthday flowers, and Joey at Charlotte's wedding, with their father and Timmy Jones. (RT 49: 7355–7356; Exs. 422, 423, 421.)

Angela knew Timmy Jones since she was five or six. He was her brother's friend and a friend of the family, often sleeping over at their house. Like Joey, he was quiet, shy, and gullible. (RT 49: 7355–7356.)

# # #

Although by now the jury had been immersed in the families' pain for hours, the testimony was not yet over. **James Jones** testified about his son, starting with "Timmy's" childhood. Again, his testimony covered only what a prosecutor and a grieving parent would want a jury to know.

Although James took care not to mention it to the other children, Timmy was always his favorite. James noticed that Timmy was a nervous, shivering baby from the moment of his birth, and that touched his heart. (RT 49: 7362.) The boy also had a speech impediment as a child, but he overcame it with help at school. (RT 49: 7361.) As a boy he loved playing all kinds of sports, including Little League baseball. Hacky-sack was a favorite. He also

became a sports fan, and he particularly liked watching, and rooting for, the Dallas Cowboys. As a boy he was the

> [m]ost wonderful kid in the world. He would do anything for you. Everyone he saw, he would tell them "I love you," you know, his friends. And always hugging me and telling me, "Pop, I love you" . . . . Just all around good kid and wouldn't hurt a fly.

(RT 49: 7361–7362.) He was still the same after he grew up. And he was loving not only to family, but to others, too. (RT 49: 7362, 7363.)

Timmy and Joey Mans had gotten very close in the last couple of years. Joey, too, was a very good kid. Very polite, and helpful and generous with his time, helping James fix his car, for example. (RT 49: 7364.)

James identified a photo of Joey Mans with his truck, which was his pride and joy, and various family photos that included Timmy. (RT 49: 7364–7365; Exs. 426, 416, 420, 419, 418.)

He was asked about his last interaction with his son and how he learned of his death. James last saw Timmy the night before his death. Timmy was staying with a friend, and James usually went by to see if he needed anything. (RT 49: 7365–7366.) When they separated, they hugged, "[a]nd of course, like always, he always—he told me, 'I love you, Pop.'" (RT 49: 7366.)

He learned of his son's death at about 4:00 a.m. His daughter Dotty, very upset, came over with an officer. He thought one of her children must have gotten hurt. They told him that Timmy was dead, shot in the head. His reaction was disbelief. He found the next day devastating, and he still could not believe that Timmy was dead. (RT 49: 7366–7367.) When he saw the body at the funeral parlor, he wanted to die, and he wished it was him dead instead of Timmy. (RT 49: 7367.)

James had separated from the children's mother in 1977, which was hard on the children. They stayed with him, and he tried to be their mother and father. Darlene, the children's mother, came to the funeral, and she was devastated, too. She was older, and in poor health already. She could not control her emotions at the funeral, and another son practically had to carry her in. Her health deteriorated quickly after that, and she had a stroke. Two years later, she was dead. (RT 49: 7367–7369.)

Dotty, too, had had a very hard time of it, and would cry sometimes. "Of course myself the same way, you know you just—the moment you start thinking about him and the next thing you know you're crying." (RT 49: 7369.) The hardest thing after the funeral was to realize that Timmy was dead and that he, James, had to go on with his life. At the time of the trial, he still never really got Timmy off his mind, and it remained hard to accept that he was gone. "[A]nd I'm just—you know, my nerves are shot." And he would never forget him; you don't ever forget your son. (RT 49: 7369–7370.) Holidays are very, very hard, and everybody cries. (RT 49: 7370.) The day before he testified, he had been visiting another son, who was in a convalescent hospital. "And he pointed at this one kid, and he looked almost exactly like Timmy, and he said, 'Timmy, Timmy.' . . . And we both started crying at the same time." (RT 49: 7370.)

This witness, too, became a proxy for the prosecutor's forthcoming "imagine-what-the-victim-felt" argument. (See RT 54: 8016.) Asked if he thought about what his son went through at the end of his life, James replied, "Oh, God, yes." He pretty much stayed away from the trial because he could not stand the thought of the terrible turmoil he knew Timmy went through, knowing that he was going to die and being unable to do anything about it. Thinking of that "just tears me up." (RT 49: 7370.) It was impossible to think

about him without remembering the way he died. He still wished it could have been himself instead of Timmy. (RT 49: 7370–7371.)

He, too, was invited to speculate on an experience he had not had. His response: he could have understood death by illness or accident better.

> But I can't see that anyone would want to take a kind and generous kid like he was, and probably who would have hugged him and kissed him and told him that he loved him, how they could take his life. Because he didn't hate anyone. He didn't hate anyone.

(RT 49: 7371.)

James would visit the cemetery and put flowers on the grave. He would think about his son, and how much he suffered. He would "more or less just sit there and think and talk to him, even though I know he's not there, but just to more or less console myself, I guess." (RT 49: 7371.) He would tell him that they would all be together again some day. "And that everything is going to be okay, that you don't have to worry no more about anything." (*Ibid.*)

C. Under the Eighth and Fourteenth Amendments, Emotionality Has No Place in Deciding to Sentence a Person to Death

It should now be clear why the victim-impact testimony brought tears to all who heard it. (See 9/9/2002 RT 318.) And why there is considerable doubt that, in this case, the "decision to impose the death sentence [was] . . . based on reason rather than . . . emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.)

Most of the constitutional constraints on capital sentencing proceedings are pertinent to appellant's claim, so he outlines them here. The first of these is "the United States Supreme Court's repeated admonition that '"the penalty of death is qualitatively different from a sentence of imprisonment, however long,"' and that, as a result, '"there is a corresponding difference in the need

for reliability in the determination that death is the appropriate punishment in a specific case.'" [Citations.]" (*People v. Horton* (1995) 11 Cal.4th 1068, 1134, emphasis omitted.)

This means that the Eighth Amendment requires procedures that avoid arbitrary and capricious imposition of the death penalty. (*People v. Williams* (1988) 44 Cal.3d 883, 950, citing *Pulley v. Harris* (1984) 465 U.S. 37, 53; *California v. Ramos* (1983) 463 U.S. 992, 999.) "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*People v. DeSantis* (1992) 2 Cal.4th 1198,1231, quoting *Beck v. Alabama* (1980) 447 U.S. 625, 637–638.)

It is impermissible to supply the jury with a vague aggravating factor to weigh in the penalty-selection process. Doing so "creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." (*Stringer v. Black* (1992) 503 U.S. 222, 235.) Such a risk violates the Eighth Amendment because it "creates the possibility not only of randomness but also of bias in favor of the death penalty." (*Ibid.*) It thus also violates the Eighth Amendment requirement of individualized sentencing. (*Id.* at p. 231.) This Court has concluded that, for this purpose, the test for vagueness of aggravators is whether they are "defined in terms sufficiently clear and specific that jurors can understand their meaning, and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination." (*People v. Bacigalupo* (1993) 6 Cal.4th 457, 477.) "[A]ny aggravating factor that was . . . 'seriously and prejudicially misleading . . .'" would fail this test. (*Ibid.*)

In "selecting from among [death-eligible persons] those defendants who will actually be sentenced to death, '[w]hat is important . . . is an

individualized determination on the basis of the character of the individual and the circumstances of the crime.'" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1267–1268, second bracketed change in original, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 879.) "[T]he factors listed in . . . section 190.3 'properly require the jury to concentrate upon the circumstances surrounding both the offense and the offender, rather than upon extraneous factors having no rational bearing on the appropriateness of the penalty.'" (*People v. Musselwhite*, *supra*, at p. 1268, quoting *People v. Sanders* (1995) 11 Cal.4th 475, 564.)

If a case involves penalty-phase evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."[90] (*Payne*, *supra*,

---

[90]The wording of this dictum can cause confusion. After finding victim-impact evidence not per se inadmissible under the Eighth Amendment, *Payne* itself mentioned only one of the constitutional limits governing its future admission, the due-process constraint quoted above. (*Payne*, *supra*, 501 U.S. 808, 825.) This does not mean that the Eighth Amendment no longer applies.

Those who assume otherwise apparently proceed from the notion that the expression of one thing always implies exclusion of others. That method of reasoning, however, is "always to be cautiously invoked and applied." (*Ex parte Wolters* (1884) 65 Cal. 269, 271 (conc. opn. of Thornton, J.); accord, *In re J. W.* (2002) 29 Cal. 4th 200, 209 [principle not "applied invariably and without regard to other indicia of . . . intent"].) Here, nothing in the six opinions filed in *Payne* remotely suggests that the Supreme Court was taking the revolutionary step of placing victim-impact evidence beyond the reach of the Eighth Amendment. It is impossible to imagine a rationale for doing so. In any event, *Booth* had explained how the Eighth Amendment was implicated in evidentiary rulings. (482 U.S. 496, 502 [directing jury's attention to inappropriate evidence could, e.g, permit arbitrariness and non-individualized sentencing].) *Payne* detailed its disagreements with *Booth*, but the premise that Eighth Amendment constraints apply to evidentiary issues was not among

(continued...)

501 U.S. 808, 825; see also *McGuire v. Estelle* (9th Cir. 1990) 902 F.2d 749, 753–754, reversed on other grounds sub. nom. *Estelle v. McGuire* (1991) 502 U.S. 62 [use of evidence so prejudicial in relation to its probative value that it denies fundamental fairness violates due process]; accord, *Dudley v. Duckworth* (7th Cir.1988) 854 F.2d 967; *Osborne v. Wainwright* (11th Cir.1983) 720 F.2d 1237.)

In sum, capital sentencing procedures must preclude arbitrary and capricious imposition of the ultimate penalty; recognize the primacy of an individualized sentencing determination based on the character of the defendant and the circumstances of his or her actual crime; ensure reliability and rationality, and remove caprice and emotion, from the decision as to which capital defendants will live and which will die; contain sufficient specificity

---

[90](...continued)
them. (501 U.S. at pp. 818–827.) The holding was only that, contrary to *Booth's* conclusion, "the Eighth Amendment erects no *per se* bar" to the use of any victim-impact testimony and argument. (501 U.S. at p. 827; see also *id.* at pp. 817–818.)

The end of the per se bar does not mean that anything that can be characterized as victim impact now gets a pass on arbitrariness, irrationality, biasing the proceedings, etc. Rather, "[t]here is no reason to treat such evidence differently than other relevant evidence is treated." (*Payne*, *supra*, 501 U.S. at p. 827.) And the presentation of relevant evidence is not exempt from review, on a case-by-case basis, for compliance with Eighth Amendment standards. (*Booth*, *supra*, 482 U.S. at p. 502; see also *Zant v. Stephens*, *supra*, 462 U.S. 862, 887–888 [no Eighth Amendment violation if information before the jury is accurate and properly before it]; *Barefoot v. Estelle* (1983) 463 U.S. 880 [rejecting Eighth Amendment attack on purportedly unreliable evidence only because evidence was reliable]; *id.* at pp. 923–928 (dis. opn. of Blackmun, J.); *Kansas v. Marsh* (June 26, 2006, No. 04-1170) __ U.S. __, __, __, 2006 U.S. LEXIS 5163 *15, *20–*22 [restrictions on mitigating evidence conflict with Eighth Amendment's individualized sentencing requirement]; *Gardner v. Florida*, *supra*, 430 U.S. 349, 362–364 (conc. opn. of White, J.).)

in describing aggravating circumstances to achieve the goals just mentioned and avoid biasing the process; and respect the Due Process Clause's requirement of fundamental fairness in the trial. Perhaps limited and carefully controlled victim-impact testimony need not conflict with these constraints. In contrast, introduction of tremendous misinformation about what is aggravating, along with heavy emotionality and confusing of the issues, violates all of them.

Thus, when this Court first upheld prosecutorial comment on the homicide victim's own experience, a predecessor to use of victim-impact testimony, it cautioned that "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason." (*Haskett, supra*, 30 Cal.3d 841, 864.) "In each case," therefore, the trial court "must strike a careful balance between the probative and the prejudicial" and exclude "irrelevant information . . . that diverts the jury from its proper role or invites an irrational, purely subjective response . . . ." (*Ibid.*) Clearly, adherence to those principles is constitutionally required. If limits are *not* placed on emotional evidence and argument, a careful balance between the probative and the prejudicial is *not* struck, and material that diverts the jury's attention from its proper role or invites an irrational, purely subjective response *is* permitted, it is impossible to meet the Eighth Amendment demands of reliable, rational, and individualized—not arbitrary and capricious—capital decision-making; that Amendment's command to avoid bias in the proceedings; and the Fourteenth Amendment requirement of fundamental fairness.

The next section of this argument outlines the development and current state of California law on victim-impact evidence, a review required to understand how little foundation there is for some of today's assumptions

about what is permissible. Then appellant will show how, considered under proper standards, the victim-impact case against him was grossly excessive.

D. California Cases Allowing Some Victim-Impact Evidence Do Not Justify a Major Assault on the Jury's Emotions with Barely Relevant Testimony

On a blank slate, it would be easy to assess whether exposing jurors to a day of highly emotional—and emotion-evoking—testimony, characterized as showing aggravating circumstances even though it does not show that there was an aggravated instance of special-circumstance murder, poses an intolerable risk to the jury's ability to rationally arrive at a verdict based on the nature of the offense and the offender. However, the slate is not blank. "[M]indless incrementalism"[91]—failure to see when quantitative increases in the evidence permitted in each case amount to a qualitative change from what first justified opening the door—could create the illusion that appellant's trial met constitutional standards.

Victim-impact testimony is a relatively new development in the law.[92] Its use swept the country in the 1980's, a result of the political success of a Victims' Rights Movement that was linked to increasing public concern about crime and a perception that judicial protections for the accused were partly

---

[91]McDonald, *Lex Mentis* (Spring, 2000) Employee Relations L.J., as quoted in *Misek-Falkoff v. McDonald* (S.D.N.Y., 2001) 177 F.Supp.2d 224, 231.

[92]*Payne v. Tennesee, supra*, 501 U.S. 808, 821; Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime* (1999) 25 New Eng. J. on Crim. & Civ. Confinement 21, 21–31, 69–70 (Toblowsky).

responsible for the problem.[93] Indeed, according to some observers, the claims of the victims' movement were exploited by those with more cynical political agendas.[94]

In response to these developments, this Court, like the United States Supreme Court, has experimented with varying approaches to victim-impact evidence (including excluding it altogether), recognized serious problems with it, and ultimately established that a less powerful victim-impact case than the one presented here is acceptable. Neither court has established the outer limits of acceptability, and neither has disturbed the principles under which what happened here was beyond the pale.

1. This Court Long Banned Victim-Impact Evidence While Allowing the Jury to Consider the Crime From the Victim's Perspective

The first pertinent California case was *People v. Love*, *supra*, 53 Cal.2d 843. It concerned evidence introduced to show the suffering of the homicide victim, not survivors, but it applied principles that bear on all victim-impact

---

[93]See *Payne v. Tennesee*, *supra*, 501 U.S. 808, 821; *id.* at p. 834 (conc. opn. of Scalia, J.); Toblowsky, *supra*, 5 New Eng. J. on Crim. & Civ. Confinement 21, 21–22, 28–31, 69; Caudill, *Professional Deregulation of Prosecutors: Defense Contact with Victims, Survivors, and Witnesses in the Era of Victims' Rights* (2003) 17 Geo. J. Legal Ethics 103, 103–104 & fn. 4; LaFree, *Too Much Democracy or Too Much Crime? Lessons from California's Three-Strikes Law* (2002) 27 Law & Soc. Inquiry 875, 894; see also *Atkins v. Virginia* (2002) 536 U.S. 304, 315 (noting popularity of anticrime legislation).

[94]E.g., Bandes, *Victim Standing*, 1999 Utah L.Rev. 331, 333; Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike* (1993) 41 Buff. L.Rev. 85, 127 (Dubber); see also Henderson, *The Wrongs of Victims' Rights* (1985) 37 Stan. L.Rev. 937, 1002 (by largely ignoring victims' survivors until the point where they can be used to help obtain a harsher sentence, "the process continues to use the victim for an instrumental purpose").

evidence.[95] In *Love*, a penalty judgment was reversed because the prosecution had introduced a photograph of the victim and a tape-recording of her statement, both dramatically showing that she was in great pain before her death. This Court rejected the Attorney General's contention that the evidence tended to show the enormity of the defendant's crime. Justice Traynor wrote, stating a principle which the Court has not directly disputed since: "Proof of such pain is of questionable importance to the selection of penalty unless it was intentionally inflicted. . . . [I]t is doubtful that the penalty should be adjusted to the evil done without reference to the intent of the evildoer." (*Id.* at p. 856 & fn. 3.) The Court applied the rule that potentially inflammatory evidence is admissible only when its probative value outweighs its prejudicial effect and found that "[t]he main impact of the evidence was to inflame the passions of the jurors." (*Id.* at pp. 856–857.) The penalty judgment was reversed. (Id. at p. 858.) This Court cited *Love* with approval as recently as 2001. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1172.)

People v. Haskett, *supra*, 30 Cal.3d 841, did not involve victim-impact testimony, but it is part of the lineage of this Court's victim-impact cases. *Haskett* permitted a prosecutor to urge jurors to place themselves in the shoes of the victim and imagine her suffering. Since "assessment of the offense from the victim's viewpoint" helped show the nature of the crime which the defendant actually committed, the argument was appropriate. (*Id.* at p. 864.) The Court wrapped this conclusion, however, in the language quoted on page

---

[95]The term *victim-impact evidence* has been used to refer to several types of evidence. Usually only two are pertinent, "the victim's personal characteristics" and "the emotional impact of the crime on the victim's family (and perhaps others)." (*Edwards*, *supra*, 54 Cal.3d 787, 852 (conc. & dis. opn. of Mosk, J.).) It can also, as in *Love*, concern the suffering of the actual victim. (*Ibid.*)

170, above, cautioning trial courts to carefully control such argument. (*Ibid.*; accord, *People v. Lewis* (1990) 50 Cal.3d 262, 283–284.)

People v. Gordon (1990) 50 Cal.3d 1223, found error when a prosecutor argued, "Not only did the defendant take William Wiley's life and his entire future and destroy his family, he now wants to take sympathy away from him too. The sympathy that is rightfully due William Wiley." This Court held that neither the effect of the crime on the victim's family nor sympathy for the victim was relevant to any of the statutory circumstances in aggravation. (50 Cal. 3d at p. 1266–1267.)

As of 1990, then, evaluating a defendant's actions from the perspective of their recipient—within careful limits—was an acceptable part of sentence determination. Considering unforeseen suffering of the victim or the effect on the victim's survivors was not.

2. Later Cases Admitted Victim-Impact Evidence While Acknowledging Limiting Principles

Gordon was overruled a year after it was decided, in *Edwards*, the first California case to state that victim-impact evidence was admissible. The evidence at issue was extremely limited—three photographs of two victims while alive, along with nine words of prosecutorial argument inviting the jury to imagine the effect of a murder on the victim's family. (54 Cal.3d 787, 832, 839.)

The only issue before the *Edwards* court was whether victim-impact evidence was an authorized aggravating factor under section 190.3. (*Edwards*, *supra*, 54 Cal. 3d at p. 833.) Thus, it did not weigh in on the questions which had divided the high court in *Booth* and *Payne*, the most prominent of which was whether the effect of a homicide on the victim's survivors, or who the victim was, showed anything about the perpetrator's culpability and

appropriate punishment. Over vigorous dissents, the *Edwards* court answered the statutory question by holding that victim impact was a circumstance of the crime under factor (a). (*Id.* at p. 835; cf. pp. 849–850 (opn. of Kennard, J., conc. in judgment), 852–856 (conc. & dis. opn. of Mosk, J.).) The Court cautioned that it was "not now explor[ing] the outer reaches of evidence admissible as a circumstance of the crime" (54 Cal.3d at p. 835), not holding that factor (a) extended as far as *Payne* permitted state law to go (*id.* at pp. 835–836), and not retreating from *Haskett's* cautions about the need for "limits on emotional evidence and argument," and especially the requirement to "'strike a careful balance between the probative and the prejudicial . . . [and exclude material] that diverts the jury's attention from its proper role or invites an irrational, purely subjective response . . . . ' [Citation.]" (*Id.* at p. 836). This Court has restated those principles as recently as its opinion in *People v. Panah* (2005) 35 Cal.4th 395, 495.)

Soon after *Edwards*, this Court upheld, in *People v. Fierro*, *supra*, 1 Cal.4th 173, two three-sentence prosecutorial comments on the impact of the crimes on the victims. (*Id.* at pp. 234–236.) *Fierro* repeated a statement "that evidence of the specific harm caused by the defendant is admissible under California law (§ 190.3, factor (a))." (*Id.* at p. 235, citing *Edwards*, *supra*, 54 Cal.3d at pp. 833–836.) This was an extremely broad formulation, not tethered to the minimal facts of either case. Such language creates great mischief if it is relied on, as it was at appellant's trial (RT 48: 7173–7176), in isolation from *Edwards's* multiple caveats, and as justification for failure to provide a detailed analysis of the probative value and prejudicial effect of each subject on which it is proposed that a witness is to testify.

3. Post-*Edwards* Cases Expanded Victim Impact Without Analyzing the Effects of the Expansion

Justice Mosk was correct in predicting, shortly after *Edwards*, "the practically unimpeded introduction of so-called 'victim impact' evidence and argument . . . —which always threatens to pass the bounds of materiality and often does so . . . ." (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 152 (conc. opn.).) The evidence-of-harm-caused formula was relied on by the trial court in appellant's case, in admitting the massive[96] amount of testimony received here. (RT 48: 7174–7175 [quoting *Edwards* and *Fierro*].)

None of this Court's cases which expanded the concept of victim-impact evidence beyond *Edwards's* three photographs or *Fierro*'s six sentences of argument analyzed the propriety of doing so. *People v. Mitcham* (1992) 1 Cal.4th 1027, was apparently the first to take the concept farther, other than dictum, unsupported by analysis, in a prior case. (See *People v. Clark* (1990) 50 Cal.3d 583, 629.) The *Mitcham* defendant shot two people

---

[96]There were 90 pages of testimony here. (RT 49: 7275–7371.) A prosecutorial victim-impact argument that was reproduced in just two pages of the United States Reports was considered "extensive" by both the United States Supreme Court and the Supreme Court of South Carolina. (*South Carolina v. Gathers*, *supra*, 490 U.S. 805 , 808–810, 810 [quotation]; *State v. Gathers* (S.C. 1988) 369 S.E.2d 140, 144.) In Texas recently, victim-impact testimony that covered less than two pages of the case reports was characterized as a witness's testifying "at length." (*Haley v. State* (Tex. App. 2003) 113 S.W.3d 801, 816–817, aff'd (Tex.Crim.App. 2005) 173 S.W.3d 510.) The Indiana Supreme Court found 29 pages of testimony by three witnesses, which was admitted erroneously, to be such a major presentation that it found it prejudicial without even needing to consider the remaining evidence before the jury. (*Lambert v. State* (1996) 675 N.E.2d 1060, 1065.) This Court recently described 37 pages of testimony that was of a quality like that provided here as "extensive[]." (*People v. Robinson* (2005) 37 Cal. 4th 592, 644.) See also the cases cited on page 226, footnote 119, below.

in one incident, killing one. The surviving victim testified "at length" regarding ongoing psychiatric problems. (*Id.* at p. 1062.) The Court cited its rule that argument urging consideration of the crime from the victim's perspective was appropriate and stated that the evidence appropriately drew the jury's attention to a circumstance of the crime. (*Id.* at pp. 1062–1063.) It then simply asserted that the temporal extension of her perspective (to post-offense consequences) did not alter that fact. (*Id.* at 1063.) It recognized that the testimony "tended to arouse emotion and evoke strong feelings of sympathy for her condition," but concluded that it was not "*so* inflammatory" as to have diverted the jury or invited irrationality. (*Ibid.*, emphasis added.) There was no acknowledgment that this was a considerable extension of California victim-impact law. And there was no longer the sense that such testimony needed to be treated cautiously, such as by examining to what extent such "temporally extended" circumstances of the crime helped prove the defendant's culpability, or what it means to "arouse emotion" or "strong feelings of sympathy" when a jury is making its subjective penalty decision. Indeed, neither *Mitcham* nor the other progeny of *Edwards* and *Payne* acknowledged what a radical shift in death-penalty law is involved in moving from a strict emphasis on rationality, to consciously permitting strong emotions to enter the picture. They certainly did not undertake to regulate the degree and consequences of that shift.

The first case to uphold evidence of the impact of a murder on non-victim survivors came nine years after *Mitcham*, in *People v. Taylor*, *supra*, 26 Cal.4th 1155. Citing *Payne* and *Edwards*, the Court upheld, against a due-process attack only, the use of testimony from two surviving family members of a murder victim about "the various ways they were adversely affected by their loss of [the victim's] care and companionship." (*Id.* at p. 1171; see also

p. 1170.) Again, the extension to further new ground was unacknowledged. The Court stated that its review of the record showed that the evidence was "not so voluminous or inflammatory as to divert the jury's attention from its proper role or invite an irrational response." (*Id.* at p. 1172.) The appellant had cited only 20 pages of testimony, and it was, in fact, much less evocative than that introduced here. (AOB[97] in No. S025121, pp. 107–108, citing RT 7862–7869, 7873–7884.)

4. Current Tests for Excessiveness of Victim-Impact Testimony Were Adopted Without Explanation and Are Inadequate

a. Current Tests

While never repudiating *Edwards's* reaffirmation of the cautionary principles stated in *Haskett* and earlier cases,[98] this Court has subsequently relied on tests which fail to effectuate those principles. And no case has given trial courts the kind of detailed guidance which other states' courts have found necessary. As just noted, in *People v. Taylor* the Court treated the question as whether the evidence was "so voluminous or inflammatory as to divert the jury's attention from its proper role or invite an irrational response." (26 Cal.4th at p. 1172; see also *People v. Stanley* (1995) 10 Cal.4th 764, 832 [whether argument "so inflammatory or emotional" as to divert the jury's attention, etc.]; accord, *People v. Smith* (2005) 35 Cal.4th 334, 365.) This approach adopted some of the early cases' language, but without the emphasis on the need for caution and limits.

A similar but different statement appears in other cases: "Under

---

[97]Appellant Romero moved for the Court to take judicial notice of the appellant's brief in a motion filed shortly after the filing of this brief.

[98]See page 175, above.

California law, victim-impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180; accord, *People v. Dickey* (2005) 35 Cal.4th 884, 917.) That formulation seems to connote that such evidence is presumptively admissible, completing a shift to a perspective where only a case far beyond what is now considered an ordinary victim-impact presentation in California would raise even a cautionary flag. And this Court has since explicitly stated that "[t]he references in *Payne* and [*People v.*] *Stanley*[, *supra*, 35 Cal.4th at p. 365] to the exclusion of unduly inflammatory victim-impact evidence contemplate an extreme case . . . ." (*People v. Smith*, *supra*, 35 Cal.4th 334, 365; but see *People v. Robinson*, *supra*, 37 Cal. 4th 592, 644–652 [indicating that there are limits to the nature and extent of permissible victim-impact testimony].)

By the time it proclaimed that only "an extreme case" requires trial-court control of the evidence, the Court had moved far from the watershed case, which merely held—on minimal facts—that victim-impact evidence is not inherently irrelevant under the Penal Code after all, insisted, along with other cautionary language, that the Court was not yet exploring the outer reaches of such evidence and argument, and reaffirmed the need for trial courts "[i]n each case . . . [to] strike a careful balance between the probative and the prejudicial." (*Edwards*, *supra*, 54 Cal.3d 787, 836.) There is a gaping hiatus between these two positions, unfilled in any intervening case by even an acknowledgment of the shift, much less an articulated justification for it. Instead, there has been more of a "'domino method of . . . adjudication . . .[,] wherein every explanatory statement in a previous opinion is made the basis

for extension . . . .'" (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 246, second omission in original.) *Pollock*, for example, drew its formulation from *People v. Boyette* (2003) 29 Cal.4th 381. (*People v. Pollock*, *supra*, 32 Cal.4th 1153, 1180.) But the language in *Boyette* was merely this Court's paraphrase of the appellant's contention. (29 Cal.4th at p. 444.) And *People v. Smith*, *supra*, neither cites authority nor gives an explanation for its remark about "extreme case[s]." (35 Cal.4th at p. 365.)

b. Contrary U.S. Supreme Court Expectations and Responses of Other States

Smith's outlook is wholly at odds with the views of at least four members of the six-person *Payne* majority, who believed that dropping the prophylactic per se ban on victim-impact evidence was acceptable because trial and appellate courts could be counted on to exercise considerable care in excluding unduly inflammatory evidence, as they do routinely in other contexts. (*Payne*, *supra*, 501 U.S. 808, 831 (conc. opn. of O'Connor, J.), 836–837 (conc. opn. of Souter, J.).) That will not happen, however, in a jurisdiction where trial courts are told that only an "extreme case" can be problematic.

Many other states have a much more cautious orientation. Texas, not known as a jurisdiction which makes death verdicts difficult to obtain, insists on "heightened judicial supervision and careful selection of such evidence to maximize probative value and minimize the risk of unfair prejudice." (*Salazar v. State*, *supra*, 90 S.W.3d 330, 336.) This is partly because "victim impact and character evidence may become unfairly prejudicial through sheer volume." (*Ibid.*, emphasis omitted, quoted with approval in *People v. Robinson*, *supra*, 37 Cal. 4th 592, 652.) "Thus Courts must guard against the potential prejudice of 'sheer volume,' barely relevant evidence, and overly

emotional evidence. A 'glimpse'[99] into the victim's life and background is not an invitation to an instant replay." (*Salazar v. State*, *supra*, 90 S.W.3d at p. 336, citations omitted.)

The Supreme Court of Tennessee was the court whose criticism and defiance of *Booth v. Maryland* and *South Carolina v. Gathers* paved the way to their partial overruling in *Payne v. Tennessee*.[100] But it has set up several particular safeguards (*State v. Nesbit*, *supra*, 978 S.W.2d 872, 891), described below, and it instructs trial courts that "such evidence, and prosecutorial argument based on the evidence, should be closely scrutinized and restrained so as not to be unduly prejudicial or appeal to the emotions or sympathies of the jury." (*State v. McKinney* (Tenn. 2002) 74 S.W.3d 291, 309.) Moreover, the jury is prohibited from even considering the evidence on the issue of penalty unless it has independently found that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. (*State v. Nesbit*, *supra*, 978 S.W.2d at p. 892; see also *id.* at p. 894.) Similarly, in Georgia, "when [victim impact] evidence is to be introduced . . ., trial courts are to use great caution in ensuring that the rights of the defendant are secured." (*Lucas v. State* (Ga. 2001) 555 S.E.2d 440, 445.) The New Jersey Supreme Court, in imposing its own set of protective standards and procedures, also emphasized "the potential for prejudice and improper influence that is inherent in the presentation of victim impact evidence."

---

[99]The reference is to the *Payne* opinion, which held that the Constitution permits a state to offer "'a quick glimpse of the life' which a defendant 'chose to extinguish' . . . ." (501 U.S. 808, 822, citations omitted.)

[100]See *State v. Payne* (Tenn. 1990) 791 S.W.2d 10; *Payne v. Tennessee*, *supra*, 501 U.S. 808, 826; *id.* at p. 845 (dis. opn. of Marshall, J.).

(*State v. Muhammad*, *supra*, 678 A.2d 164, 180.) The Oklahoma Court of Criminal Appeals, in permitting some testimony of the emotional impact of a death on the family, cautioned trial courts, "The more a jury is exposed to the emotional aspects of a victim's death, the less likely their verdict will be a 'reasoned moral response' to the question whether a defendant deserves to die; and the greater the risk a defendant will be deprived of Due Process." (*Cargle v. State* (1995) 909 P.2d 806, 830, quoted with apparent approval in *People v. Robinson*, *supra*, 37 Cal. 4th 592, 651.)

Because of this enormous potential for misuse, many states' supreme courts have given concrete form to their precautionary orientations. Tennessee, Oklahoma, New Jersey, Georgia, and Louisiana all require the trial court to go over the proffered evidence in detail in an in limine hearing, and federal courts in Pennsylvania and Kansas have chosen to do the same. (*State v. Nesbit*, *supra*, 978 S.W.2d 872, 891; *Cargle v. State*, *supra*, 909 P.2d 806, 828; *State v. Muhammad*, *supra*, 678 A.2d 164, 180; *Turner v. State*, *supra*, 486 S.E.2d 839, 841; *State v. Bernard*, *supra*, 608 So.2d 966, 973; *United States v. Glover* (D.Kan. 1999) 43 F.Supp.2d 1217, 1235–1236; *United States v. O'Driscoll* (M.D.Pa. 2002) 203 F.Supp.2d 334, 341 & fn. 6; see also *United States v. Williams*, *supra*, 2004 U.S. Dist. Lexis 25644 *82, fn. 39.) In New Jersey and Georgia, this is accomplished through use of a written statement. After the court orders deletion of any inappropriate material, the witness testifies on direct only by reading the statement. (*State v. Muhammad*, *supra*, 678 A.2d at p. 180; *Turner v. State*, *supra*, 486 S.E.2d at p. 842; see also *United States v. Williams*, *supra*, 2004 U.S. Dist. Lexis 25644 *82, fn. 39). The high courts of Oklahoma and Missouri have cited such practices, with apparent approval, as well. (*Garrison v. State* (Okla.Crim. App. 2004) 103 P.3d 590, 609; *State v. Deck* (Mo. 2004) 136 S.W.3d 481, 487–488.) This

approach gives the trial court a measure of control over the testimony that is lacking when a witness gives, for example, a nearly page-long answer to a question about her experience. (Cf. RT 49: 7301.) It also reduces the likelihood that the witness will "lose control and inadvertently offer highly emotional and potentially prejudicial testimony." (*Turner v. State*, *supra*, 486 S.E.2d at p. 842; see also *State v. Deck*, *supra*, 136 S.W.3d at p. 487 [having witness read narrative statement "help[s] prevent him from breaking down emotionally"]; *State v. Muhammad*, *supra*, 678 A.2d at p. 180; cf. 11/12/02 RT 519 ["virtually all" the victim-impact witnesses at appellant's trial "cried at various points during their testimony"].) Some courts instruct the witnesses that they must control their emotions if they are to testify. (*State v. Muhammad*, *supra*, 678 A.2d at p. 180; *United States v. Glover*, *supra*, 43 F.Supp.2d at pp. 1235–1236; *United States v. O'Driscoll* , *supra*, 203 F.Supp.2d 334, 341; see also *United States v. Williams*, *supra*, 2004 U.S. Dist. Lexis 25644 *82, fn. 39.)

The New Mexico Supreme Court, cognizant of *Payne's* reminders that inflammatory evidence still must be excluded, requires victim-impact evidence to be "brief and narrowly presented." (*State v. Clark*, *supra*, 990 P.2d 793, 808, citing *Payne*, *supra*, 501 U.S. at p. 825 & *id.* at p. 831 (conc. opn. of O'Connor, J.).) As noted previously, Texas courts are similarly instructed to keep the testimony relatively brief. (*Salazar v. State*, *supra*, 90 S.W.3d 330, 336.) Louisiana's high court allows evidence "[i]nforming the jury that the victim had some identity or left some survivors," while cautioning against "introduction of detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors . . . ." (*State v. Bernard*, *supra*, 608 So.2d 966, 971, 972.) Such descriptions, "which go beyond the purpose of showing

the victim's individual identity and verifying the existence of survivors reasonably expected to grieve and suffer," risk reversal. (*Id.* at p. 972.) In contrast, witnesses may testify generally "that they missed [the victim] very much, and that they were deeply affected," without being questioned "about particular aspects of their grief" or giving "detailed responses to general questions." (*State v. Taylor*, *supra*, 669 So.2d 364, 372.)

Florida flatly excludes testimony about bereavement trauma, limiting evidence to "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." (*Windom v. State*, *supra*, 656 So.2d 432, 438.) Tennessee, while permitting some testimony about the survivors' loss, instructs trial courts that "evidence regarding the emotional impact of the murder on the victim's family should be most closely scrutinized because it poses the greatest threat to due process and risk of undue prejudice . . . ." (*Ibid.*; see also *State v. McKinney* (Tenn. 2002) 74 S.W.3d 291, 309; *Turner v. State*, *supra*, 486 S.E.2d at p. 842 [Georgia court approves statements that did not "provide[] a 'detailed narration of . . . emotional and economic sufferings of the victim's family'"].) The defendant's knowledge of the victim's family circumstances is pertinent in evaluating the probative value of the testimony. (*State v. Nesbit*, *supra*, 978 S.W.2d at pp. 892–893.) Similarly, the trial court must take care to prevent prosecutorial argument that invites an emotional response to the evidence. (*State v. Nesbit*, *supra*, 978 S.W.2d at pp. 891–892; see also *State v. McKinney* (Tenn. 2002) 74 S.W.3d 291, 309; *State v. Muhammad*, *supra*, 678 A.2d at p. 180 [argument should be "strictly limited" to contents of testimony].)

In New Jersey, too, "[t]he testimony can provide a general factual profile of the victim, including information about the victim's family, employment, education, and interests." (*State v. Muhammad*, *supra*, 678 A.2d

at p. 180.) While it "can describe *generally* the impact of the victim's death on his or her immediate family," it "should be factual, not emotional, and should be free of inflammatory comments or references." (*Ibid.*, emphasis added; accord, *United States v. Glover*, *supra*, 43 F.Supp.2d at pp. 1235–1236.) Finally, some jurisdictions seek to contain victim-impact testimony by limiting it to one witness per victim. (*State v. Muhammad*, *supra*, 678 A.2d at p. 180; 725 Ill. C.S.A. 120/3(a)(3), 120/4(a)(4).)

The degree to which fairness requires restrictions such as these—as opposed to a presumption of admissibility for all victim-impact evidence—is highlighted by the origins of the rules in New Jersey and Georgia. In both states, prosecutorial authorities initiated the establishment of the ground rules. (*State v. Muhammad*, *supra*, 678 A.2d 164, 179–180 [initiative taken "[t]o harmonize the victim impact statute with the due process clauses of the Federal and State Constitutions . . . [and] to reduce the possibility that victim impact evidence is admitted for improper purposes or is used inappropriately"]; *Turner v. State*, *supra*, 486 S.E.2d 839, 842, fn. 5.)

Such sensitivity should return to this Court's victim-impact jurisprudence. Under the Eighth-Amendment, "the severity of [a death] sentence mandates careful scrutiny in the [post-trial] review of any colorable claim of error." (*Zant v. Stephens*, *supra*, 462 U.S. 862, 885; see also *California v. Ramos*, *supra*, 463 U.S. 992, 998–999; *Payne*, *supra*, 501 U.S. 808, 837 (conc. opn. of Souter, J.) [when victim-impact evidence is introduced, "this Court and the other courts of the state and federal systems will perform the 'duty to search for constitutional error with painstaking care,' an obligation 'never more exacting than it is in a capital case'"].) This Court's recent statements suggesting hands-off review of victim-impact claims are entirely inconsistent with appellant's right to—and society's need for—such

scrutiny.

5. Appellant Is Entitled to Rely on This Court's More Cautious Capital Jurisprudence, in Part Because of the Federal Constitution

California's short history with victim-impact evidence reveals several things. First, taking the most recent authorities as the only word, a defendant can seemingly challenge the quantity and quality of victim-impact evidence only by claiming, e.g., that the evidence was "so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case" (*People v. Pollock*, *supra*, 32 Cal.4th at p. 1180), and there is a clear assumption that a great deal of emotionality that *is* "tethered to the facts" is now tolerable.

There are, however, firmly-rooted principles about carefully balancing probative value against prejudicial effect, keeping in mind the context—a capital penalty trial surrounded by critical constitutional protections—that have never been repudiated. (*Edwards*, *supra*, 54 Cal.3d 787, 835–836; *Haskett*, *supra*, 30 Cal.3d 841, 864; *People v. Love*, *supra*, 53 Cal.2d 843, 856–857; see also *People v. Panah*, *supra*, 35 Cal.4th 395, 495; *People v. Taylor*, *supra*, 26 Cal.4th 1155, 1172.) Given the Eighth Amendment and due process considerations summarized above, those principles should be reaffirmed—and fleshed out with specific standards which trial courts can follow— not tacitly dropped, for the reasons explained previously (pp. 166–170).

Further,

(1) serious competing considerations have historically caused majorities on this and other courts to differ on whether victim-impact evidence is admissible at all;

(2) the first cases to resolve those tensions in favor of allowing such evidence did so on the most uncontroversial facts imaginable

and did not hold that concerns about the emotional power of such evidence and the limits on what it shows about a defendant's relative culpability are groundless and can be dropped from the equation entirely; and

(3) while such considerations have disappeared from the Court's victim-impact analyses, and far more extensive evidence has been admitted than the foot-in-the-door cases involved, this has not been a movement based on reasoned, articulated choices.

Appellant will take, therefore, as a starting point, those principles which the Court has traditionally held applicable to evidence with both probative value and potential to elicit an emotional response, as applied in a constitutional context which limits the procedures that are acceptable in a capital case. (See *Cargle v. State*, *supra*, 909 P.2d 806, 826 [Oklahoma equivalent of Evid. Code § 352 "is not the ending place, but the starting point. The underlying principles in *Payne* seem to indicate more scrutiny is needed"].)

E. The Use of the Victim-Impact Testimony Permitted in this Case Violated the Eighth Amendment and the Due Process Clause, Analogous Provisions of the California Constitution, and this Court's Traditional Limits on the Use of Emotionally Inflammatory Testimony

In this section appellant shows that the probative value of the evidence admitted against him was extremely limited and the evidence was actually affirmatively misleading, that the testimony was highly inflammatory by standards applied in any other aspect of civil or criminal litigation, and that its use against him tended strongly to confuse the jury as to the questions before it. The gross imbalance between the testimony's legitimate value and its capacity to undermine the fairness of the penalty trial alone makes it error

under federal and state constitutional law, as well as Evidence Code section 352. Many of the reasons why this was true also raise doubts about whether *Payne's* result was correct, but appellant's case can be decided without resolving those doubts. Indeed, a later section of the argument argues alternatively for banning victim-impact evidence on either constitutional or statutory grounds, or adopting limits that were grossly violated in this case. But case-by-case adjudication, against the broad constitutional background, is also possible, and this section shows error, in this case, on that basis alone.

1. The Testimony Presented Here Had Little Probative Value and Affirmatively Misled the Jury

The heart of appellant's argument on the limited probative value of the victim-impact evidence relies on the failure of the testimony of the witnesses in his case to describe "specific harm" (*Edwards*, *supra*, 54 Cal.3d at p. 833) that distinguished his case from other homicides and thus made it aggravated. This is because the effects of the homicides on the survivors—intense, extreme, and appalling though they were—were also typical. In this section appellant documents that statement, and in addition shows three other reasons why the added probative value of any victim-impact evidence beyond the barest minimum is nil. First, the law confronts other situations—including normal criminal sentencing—in which punishments are selected, and in these the ripple effects of the crime on those other than direct victims are considered irrelevant. Second, victim-impact evidence is inherently unreliable. There are documented human tendencies to describe lost loved ones in overwhelmingly positive terms and also—under prosecutorial questioning—to fail to note when the survivors experience some relief from their suffering. The adversarial process cannot make the distorted pictures more accurate, because cross-examination would antagonize the jury. Third, the only rationale for admitting

victim-impact testimony is to remind jurors that any mitigation case is balanced by a grievous crime. In the real-world context of a penalty trial, any need for such a reminder is minimal and can be met by a far more limited victim-impact case.

a. Failure of the Survivors' Reactions to Show an Aggravated Death-Eligible Murder

i. Aggravation as Requiring Atypicality

The question at appellant's penalty trial was—for offenses which were so serious that they were punishable by either life without parole or by execution—which penalty he deserved. Central to that question was the relative weight of the aggravating and mitigating circumstances. (*People v. Marks* (2003) 31 Cal.4th 197, 237 & fn. 8; see CT 9: 2011–2012 [jury so instructed].) "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so. If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm." (*Arave v. Creech* (1993) 507 U.S. 463, 474, citations omitted.)

Thus appellant's jury was told, in language approved by this Court, that "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." (CT 9: 2011; see *People v. Brown* (2003) 31 Cal.4th 518, 565 & fn. 20; *People v. Davenport* (1985) 41 Cal.3d 247, 289.) This is in accordance with both familiar legal and common meanings of *aggravate*. The question was, within the class of homicides that are already death-eligible, what

circumstances may have made appellant's crimes "worse" or "more serious" than others[101] or "increase[d] the degree of . . . culpability."[102] For "the purpose of 'aggravating' and 'mitigating' factors is to assess the seriousness of a capital crime in relation to others of the same general character." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 788.)

By the time appellant's jury was hearing the penalty-phase evidence, it was well aware of the common-sense principle that it would not be allowed to hear evidence not considered relevant to the issue before it. (See, e.g., RT 32: 4997; 33: 5197; 39: 6024, 6035–6036; 40: 6113–6114; 42: 6405–6406; 50: 7442.) It could only conclude, therefore, that the day of testimony it heard, from six witnesses, about their own and 11 other peoples' grief, loss, and trauma tended to show aggravation. (See *Brown v. Payton* (2005) 544 U.S. 133, 144–148 [jury will understand that testimony constituting significant portion of penalty phase legitimately supports proponent's case]; *People v. Payton* (1992) 3 Cal.4th 1050, 1072 [same].) Indeed, showing aggravation is the basis under which this Court has held that victim-impact evidence can be relevant. (*People v. Boyette* (2003) 29 Cal.4th 381, 445.) And the prosecutor made it quite clear that it was aggravation, beginning during voir dire[103] and then, early in his summation, stating, "You are allowed to weigh and consider the harm done to the victims, to their families, to their friends . . . ." (RT 54: 8006.)

---

[101]Both definitions are in Black's Law Dictionary (7th ed. 1999) page 65 and Webster's 3d New Internat. Dict. (1976) page 41.

[102]Black's Law Dictionary, p. 236 (definition of *aggravating circumstance*, under "circumstance").

[103]E.g., RT 14: 2588; 15: 2664; 16: 2805, 2872; 17: 2954.

ii. Traumatic Grief in General

The problem is that the mass of victim-impact testimony did not show that the offenses in this case were, among instances of capital murder, aggravated ones. "Clinicians and criminal justice professionals are often staggered by the depth of emotional suffering experienced by survivors." (Amick-McMullen, et al., *Family Survivors of Homicide Victims: Theoretical Perspectives and an Exploratory Study* (1989) 2 J. of Traumatic Stress, #1, 21, 22.) Moreover, although the jury had no way of knowing it, nothing it heard was outside the range of common reactions to any death by trauma: not only murders punished by death, murders punished by life without parole, and murders without special circumstances, but also deaths from manslaughter, drunk driving and other accidents, disasters, and suicide. The particular questions that consume survivors vary with the circumstances, but when death is sudden and violent, the overall contours of the survivors' traumas are similar.[104] (See generally Doka, ed., Living With Grief After Sudden Loss: Suicide/Homicide/Accident/Heart Attack/Stroke (1996) (Living With Grief); see also Rando, Treatment of Complicated Mourning (1993) 5–11, 149–183, 503–552 (Complicated Mourning).) In fact, there is a significant likelihood that a survivor of any of these is suffering post-traumatic stress disorder. (Figley, *Traumatic Death: Treatment Implications*, in Living With Grief,

---

[104]In this section appellant cites the mental-health literature about traumatic grief. An appellate court may rely on published studies that provide facts about the background against which legal questions are decided (as opposed to facts about the particular case). (See, e.g., *Roper v. Simmons* (2005) 543 U.S. 551, 569–570, 573; *Brown v. Board of Education* (1954) 347 U.S. 483, 494, fn. 11; *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 25–62, 68; *Guevara v. Superior Court* (1998) 62 Cal.App.4th 864, 870, fn. 2; Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 Vand. L.Rev. 111 (1988).)

supra, p. 94–95; Rando, *Complications in Mourning Traumatic Death*, in Living With Grief, *supra*, p. 139; see also Lord, *America's Number One Killer: Vehicular Crashes*, in Living With Grief, *supra*, pp. 25–26.) This is not to deny that each mode of sudden death—including homicide—produces unique challenges for the survivors. (See Rando, Complicated Mourning, *supra*, pp. 503–552.) But, incredibly, the facts that helped convince appellant's jury that he should be executed could have been true, with minor variations, had Joe Mans, Timothy Jones, and Jose Aragon been killed by a drunk driver. The implication of evidence in aggravation, however, is supposed to be "that the crime is more serious than 'normal' [i.e., a "normal" death-eligible offense], and thus especially deserving of death." (*People v. Rodriguez*, *supra*, 42 Cal.3d 730, 788, emphasis, citation, and quotation marks omitted.)

Sudden losses of loved ones, which can be precipitated by "terrorist actions, . . . inner city violence, crime, drunken driving and other causes . . . [,] are events seared indelibly into the lives of all who survive them." (Doka, *Sudden Loss*, *supra*, p. 11.) Even natural deaths commonly produce "shock, denial, sadness, anger, guilt, loneliness and despair . . . ." (Cummock, *Journey of a Young Widow*, in Living With Grief, *supra*, p. 5.) It is much worse when death is sudden. As an oft-cited expert in the field puts it, "When death occurs from sudden, unexpected circumstances such as accidents, suicide or murder, bereavement reactions are more severe, exaggerated and complicated. The mourner's capacity to use adaptive coping mechanisms is overwhelmed." (Redmond, *Sudden Violent Death*, in Living With Grief, *supra*, p. 53.) "Grief is often intensified since there is little or no opportunity to prepare for the loss, say good-bye or finish unfinished business." (Doka, *Sudden Loss*, *supra*, p. 11.) "[W]hen the loss of a loved one is complicated by a sudden, violent and

intentional act, such as murder, the reactions of survivors are also sudden and violent in their own way—intense, severe and extremely profound." (Cummock, *Journey of a Young Widow*, *supra*, p. 5; accord, Carroll et al., *Complicated Grief in the Military*, in Living With Grief, *supra*, p. 79.) According to the leading text in the field of "complicated mourning," another name for what is being discussed here, the single risk factor[105] contributing most to such reactions is one common to the other causes of death mentioned above: a high degree of suddenness. (Rando, Complicated Mourning, *supra*, pp. 553–554; see also pp. 555–557, 568–569.) One author found few differences in the degree of trauma suffered by survivors of homicide victims and people killed by drunk drivers. (Lord, *Vehicular Crashes*, *supra*, p. 25.) Even "sudden loss of a loved one from heart attack or stroke can be as unexpected and devastating to the family and friends of the deceased as suicide, homicide and accident," with a decedent who is not elderly and appears healthy. As with survivors of other traumatic deaths, the loved ones "suffer a uniquely wrenching loss that starts with shock and may end in familial and personal dysfunction." (Hersh, *After Heart Attack and Stroke*, in Living With Grief, *supra*, p. 17; see also Rando, Complicated Mourning, *supra*, 504, 505–506.)[106]

Suddenness is not the only complicating factor in the bereavement

---

[105]Among those relating to the cause of death, rather than the survivor's pre-existing capacities.

[106]It can be difficult to understand the extreme intensity, breadth, and duration of these experiences, or the fact that death of a relatively young person by heart attack or in an accident produces reactions comparable to those of homicides. The literature referred to here does explain the reactions which it documents, although the explanations are not included here, and it is consistent and free of internal controversies.

process. The apparent preventability of a death can be huge. (Rando, Complicated Mourning, *supra*, 9; see also *id.* at p. 513–515.) Whether the loss seems caused by "[c]arelessness, negligence, or maliciousness," the results are "anger, feelings of victimization and unfairness, the need to assign blame and responsibility and mete out punishment, obsession and rumination, attempts to regain control, lack of closure, significant violations of the assumptive world,[107] and the search for reasons and meaning. All of these sequelae complicate mourning and interfere with coping." (*Id.* at pp. 9–10.)

Where, as here, the decedent is the survivor's child (young or grown), the parents' problems "are extreme," regardless of the cause of sudden death. (Rando, Complicated Mourning, *supra*, 9; see generally Rando, ed., Parental Loss of a Child (1986) (Parental Loss).)

Any death involving physical violence to, and mutilation of, the decedent, is significantly more difficult to process. (Rando, Complicated Mourning, *supra*, pp. 504–505, 511, 512.) This includes accidents. (*Id.* at p. 512.)

These are the general parameters. The prosecution's witnesses in this case testified to many specific aspects of their trauma. As the following pages show, none were atypical for those affected by any sudden loss of a loved one, and certainly not from any homicide, "death-worthy" or not.

iii. Prolongation of Intense Grief Reactions

One of the aspects of the bereavement testified to by all the victim-impact witnesses at appellant's trial was its seemingly unending quality, even three and one-half years after their losses. (RT 49: 7294, 7298–7299,

---

[107]This term refers to one's assumptions about how the world works, such as that it is a fundamentally safe place, or that bad things do not happen to good people. (Rando, Complicated Mourning, *supra*, pp. 50–51.)

7315–7317, 7325–7328, 7340–7342, 7350–7352, 7369–7371.) This is not surprising. "With traumatic loss comes a feeling that one will never feel better again." (Cable, *Grief Counseling for Survivors of Traumatic Loss*, in Living With Grief, *supra*, p. 123.) Even when the cause is an auto accident, the sudden, violent loss of a loved one requires a four- to seven-year recovery period, and in some sense "recovery is never complete." (Lord, *Vehicular Crashes*, *supra*, p. 36.) Survivors of drunk-driving victims were, "even after five years, . . . still significantly more stressed than [the general population] on measures of well-being, somatization, obsessive-compulsive disorders, depression, anxiety, hostility, self-esteem and post-traumatic stress disorder." And they had a significantly higher incidence of poor health. (*Ibid.*) Even long periods may not lead to recovery unless significant help is sought and received. (Cummock, *Journey of a Young Widow*, *supra*, at p. 4 [many families still stuck in various stages of the grief process seven years after airplane crash]; accord, Redmond, *Sudden Violent Death*, *supra*, at p. 71; Carroll et al., *Complicated Grief in the Military*, *supra*, at pp. 80, 83; Cable, *Grief Counseling for Survivors of Traumatic Loss*, *supra*, at p. 123.)

iv. Disbelief; Keeping Hope Alive; Avoiding Reminders

Another theme of the testimony at appellant's trial was terrible difficulty dealing with the reality of the deaths. When Leigh Hopkins and James Jones learned of their losses, they did not believe it. (RT 49: 7309, 7366–7367.) Stephanie Aragon had to see Jose's body for his death to be real. (RT 49: 7320, 7322.) Catherine Mans avoided her son's funeral, had not yet visited his grave, and still found herself not believing that he was gone. (RT 49: 7338–7339.) Three and one-half years after Aragon's death, Hopkins was sometimes still thinking of him as alive. She would then have to tell herself

that he was gone, and was never coming back. (RT 49: 7315–7316.) Describing these experiences added depth and poignancy to their stories, in a way that this summary cannot. But those descriptions contributed nothing to the jury's understanding of whether these were circumstances aggravating the murders. Experiencing such shock and pain that it leads to genuine disbelief is absolutely typical in these situations. (Cummock, *Journey of a Young Widow*, supra, at p. 2; Rando, Complicated Mourning, *supra*, 33.)

Aragon's five-year-old sister Laura finally asked, a year or two after his death, if Jose wasn't ever coming home again. (RT 49: 7298.) For her, this sad and touching event was not just denial. Children six and under typically think "death [is] a temporary state, like going to work, or traveling," and they ask when the person they miss will return. (Cummock, *Journey of a Young Widow*, supra, at p. 3.)

That did not prevent Laura from having problems. She lost her ability to concentrate in school and went from being a "sweetheart" to a serious behavioral problem. (RT 49: 7296–7297.) But even with heart-attack victims, "school-age survivors experience . . . poor school performance [and] increased oppositional and defiant behaviors," among other things. (Hersh, *After Heart Attack and Stroke*, *supra*, at p. 21.)

A touching detail in Roybal-Aragon's narrative was about her husband: every year, he continued a ritual that Jose used to do, carefully recording all the scores from the NCAA tournament on a form cut out from the paper. (RT 49: 7298.) There was nothing unusual about this, either. Often survivors of a sudden death will try to "further incorporate the deceased into life" by adopting a behavior associated with them. (Hersh, *After Heart Attack and Stroke*, *supra*, at p. 22.) They also tend to have a hard time moving beyond the pre-loss world; issues about what to do with the dead person's belongings or

whether to make changes in the house become difficult. (Cable, *Grief Counseling for Survivors of Traumatic Loss*, *supra*, at p. 122.) Thus, for two and one-half years, Aragon's family left his room unchanged. "I think," said Roybal-Aragon, "somewhere we thought that maybe if we didn't touch anything or move anything that he would come back." (RT 49: 7297.) Similarly, according to Angela Mans, her sister Charlotte was unwilling to move out of the area because "she can't leave Punken, Joey." (RT 49: 7354.)

At the same time, people also avoid things that trigger the memories of the trauma. (Carroll et al., *Complicated Grief in the Military*, *supra*, at p. 81.) Thus, Hopkins had not, since Aragon died, "been into" playing a board game that she used to play with him. (RT 49: 7316.) Steve Aragon used to "shoot hoops" with his son in the backyard, but now "[n]obody shoots hoops at our house anymore." (RT 49: 7285.)

v. Obsessive Thinking About the Death

"There can also be a . . . consuming obsession with the person who died." (Doka, *Sudden Loss*, *supra*, at p. 11; see also Rando, Complicated Mourning, *supra*, 152 ["Persistent obsessive thoughts and preoccupation with the deceased and elements of the loss"].) Thus, for Roybal-Aragon, "every day is a day without Jose." (RT 49: 7298.) Several months after his death, Stephanie Aragon was dreaming of her brother almost nightly. (RT 49: 7323.) Even at the time of trial, she said, "I think of my brother every day of my life and wonder why did this happen to my family." (RT 49: 7325.) Catherine Mans thought about her son daily, and she needed to keep herself busy constantly to keep thoughts of him at bay.[108] (RT 49: 7340.) Angela Mans

---

[108]"[T]he need always to be occupied, as if cessation of movement would permit the surfacing" of intolerable feelings, is itself a known symptom (continued...)

believed that she saw a lot of fear on her brother's face in the casket, and there was not a day that went by without her thinking of his expression. (RT 49: 7348–7349.) Her sister Charlotte, said Angela, talked about him "constantly," visited the cemetery "all the time," and cried "a lot." (RT 48: 7254.) Speaking of Timothy Jones, his father James said, "well, I have never really got him off my mind in the last three and a half years." (RT 49: 7369.)

In particular "imagined scenes of what transpired . . . can haunt the bereaved," including after the horrors of an accidental death. (Rando, Complicated Mourning, *supra*, 512, 513; accord, Figley, *Traumatic Death: Treatment Implications*, *supra*, at p. 92.) This can include beliefs about the deceased having suffered at the end of his or her life. (Lord, *Vehicular Crashes*, *supra*, p. 30.) Lydia Roybal-Aragon, Leighette Hopkins, Catherine Mans, Angela Mans, and James Jones all were invited to, and did, describe this aspect of their own torment. (RT 49: 7301, 7316, 7344, 7348–7349, 7370, 7371.)

One might think that the senselessness of a murder would heighten survivors' reactions over those of other traumatized mourners. Thus, here the prosecutor elicited that Angela Mans thought she could have accepted an accident more easily, interpreting it as meaning that God wanted her brother. Instead, she felt that it wasn't his time. (RT 49: 7353.) Lydia Roybal-Aragon, James Jones, and Stephanie Aragon expressed similar sentiments. (RT 49: 7289, 7371, 7324.) They were almost certainly wrong, although neither they nor the jury knew it. People typically suffer with comparable beliefs whenever there is an "untimely" death. Particularly with accidents, as well as

---

[108](...continued)
of complicated grief. (Rando, Complicated Mourning, *supra*, 152.)

any homicide (criminal, aggravated, or neither), moving through the grief process is complicated by beliefs that the death did not have to happen and was not right. For even accidents involve either unnecessary carelessness or some kind of freakishness. (See Carroll et al., *Complicated Grief in the Military*, *supra*, at p. 79; Rando, Complicated Mourning, *supra*, 9–10; Rando, *The Unique Issues and Impact of the Death of a Child*, in Rando, Parental Loss, *supra*, pp. 12, 19–20; Sanders, *Accidental Death of a Child*, in Parental Loss, *supra*, pp. 187–188.) People struggle, largely unsuccessfully, to understand why the event happened. (Redmond, *Sudden Violent Death*, *supra*, at pp. 54, 59; accord Carroll et al., *Complicated Grief in the Military*, *supra*, at p. 81 [irrationality of the loss makes it harder to process].) Roybal-Aragon, Stephanie Aragon, and James Jones described such struggles, but, again, as if they were specific to appellant's crimes. (RT 49: 7288–7289, 7322, 7324, 7325, 7371.)

vi. Anger and Rage

At least four more categories of "specific harm"[109] suffered by the victim-impact witnesses were decidedly universal. As to the first, Stephanie Aragon and Catherine, Charlotte, and Angela Mans still suffered from continual anger as of the time of trial. (RT 49: 7327, 7339, 7352–7353.) Lydia Roybal-Aragon and others in the family would experience rage in the presence of Laura, "[a]nd you would have this little five-year-old staring up at you" wondering what she did. (RT 49: 7294.) She and her husband would tell Laura and their 15-year-old that their anger was not about the children, but the latter responded, "I used to have parents that never fought. Now I have parents

---

[109]*Payne v. Tennessee*, *supra*, 501 U.S. 808, 825; *People v. Edwards*, *supra*, 54 Cal. 3d 787, 833.

who are irrational, who take out their pain on everybody." (RT 49: 7295.)

This, too, failed to distinguish the consequences of appellant's actions from any homicide, especially, but also even from non-criminal deaths. It is "difficult . . . to understand the intensity, duration and frequency of anger and rage" of those who survive homicide victims. (Redmond, *Sudden Violent Death*, *supra*, at p. 55; see also *id.* at pp. 71; Doka, *Sudden Loss*, *supra*, at p. 11.) Highly distressing levels of anger and rage also follow sudden death, by heart attack or stroke, of one who was relatively young. (Hersh, *After Heart Attack and Stroke*, *supra*, at p. 18.) Often, as with the Aragons and Charlotte Mans (see RT 49: 7353), anger is displaced onto family members. (Redmond, *Sudden Violent Death*, *supra*, at p. 57.)

vii. Fear

"Survivors [of homicide victims] express a pervasive sense of fearfulness and apprehension. . . ." (Redmond, *Sudden Violent Death*, *supra*, at p. 57.) "The world is no longer safe as was previously believed. Parents restrict remaining children. . . and restrict their own activity." (*Id.* at p. 58.) Survivors of any of the traumatic forms of loss "often experience a heightened sense of vulnerability and anxiety. Nothing appears safe anymore." (Doka, *Sudden Loss*, *supra*, at p. 11.) Even spouses of people who died in an airplane accident had a generalized experience of "paralyz[ing] fear." (Carroll et al., *Complicated Grief in the Military*, *supra*, at pp. 86–87; see also, Cable, *Grief Counseling for Survivors of Traumatic Loss*, *supra*, at p. 123 [traumatic loss produces terror]; Rando, Complicated Mourning, *supra*, 152 ["[u]nusually high death anxiety focusing on the self or loved ones"].)

Instances of this phenomenon, too, were put forward again and again as evidence aggravating appellant's crimes, despite their typicality. Carlos Aragon complained that every place he wanted to go, the answer was always,

"No," because of his parents' fear of his being hurt or killed. (RT 49: 7279, 7295; see also RT 49: 7295, 7275, 7277, 7279–7280 [staying up late to wait for 25-year-old Steven].) Leighette Hopkins, Stephanie Aragon, and Angela Mans all described appalling losses of their senses of personal safety, and Angela's father had both become "paranoid" about her safety and that of her sisters. (RT 49: 7315, 7325, 7351–7352.) Angela's sleep was impaired by nightly fears of a break-in. (RT 49: 7351–7352.)

Even the long-lasting sleep problem, which Steven Aragon shared (RT 49: 7295), was not unusual. "Sleep disruption is a common component of post-traumatic stress responses," including traumatic grief. (Rando, Complicated Mourning, *supra*, 598.)

viii. Health, Relational, and Substance-Abuse Problems

The "aggravating circumstances" introduced against appellant included other phenomena that the families of even sudden heart-attack victims experience. Unsuccessful adjustment to that loss can manifest in a wide variety of ways, including poor health, substance abuse, loss of pleasure in life and hopefulness about life experiences, and inability to maintain relationships. (Hersh, *After Heart Attack and Stroke*, *supra*, at p. 22; see also Doka, *Sudden Loss*, *supra*, at p. 11; Rando, Complicated Mourning, *supra*, 153, 238–240.) Often, there is spiritual crisis, with anger at—and questioning one's faith in—a God who would let even seemingly-senseless accidental deaths happen. (Lord, *Vehicular Crashes*, *supra*, at pp. 35–36; Carroll et al., *Complicated Grief in the Military*, *supra*, at p. 82.) "When unable to comprehend" a terrible death, "we feel powerless, frustrated and without hope." (Redmond, *Sudden Violent Death*, *supra*, at p. 59.)

The difficulty in maintaining relationships can manifest in withdrawing

from them. "Members of the family withdraw from one another, each nursing his or her own level of psychic pain and grief." (Redmond, *Sudden Violent Death*, *supra*, at p. 59.) "[F]ear of future loss" and various other dynamics may also cause "[r]elationships with others [to be] marked by fear of intimacy and other indices of avoidance." (Rando, Complicated Mourning, *supra*, 153; see also Redmond, *Sudden Violent Death*, *supra*, at pp. 54, 70–71.)

Appellant's jurors heard about substance abuse, loss of spiritual moorings, health issues, relationship problems, and depression. Again, however, these were all erroneously presented as if they made appellant's crimes more egregious than other homicides. Angela Mans mentioned more than once that her father drank more since Joey's death, and he had aged a lot. (RT 49: 7350, 7352.) Stephanie Aragon said that what happened made her question her religion, and justice. (RT 49: 7327.) Timothy Jones's mother's health, already poor, deteriorated quickly. She had a stroke, and she died two years later. (RT 49: 7367–7369.)

The Aragon household was a textbook example of withdrawal into private worlds, with Jose's father and his brothers Steven and Carlos all continuing to go off separately to watch television or play video games. (RT 49: 7294.) Angela and Joey Mans' father left town on Christmas every year, instead of celebrating it with the family. (RT 49: 7352–7353.)

As for depression, Steve, Aragon's father, wondered every single day why he was on earth and hated a job he used to love. (RT 49: 7298–7299.) Catherine Mans described herself as depressed at the time of trial. (RT 49: 7341.)

ix. Unbearable Grief

Detailed as this summary is, it far from exhausts the heart-wrenching details that appellant's jury learned about family members' experiences, nor the parallels between those experiences and what is described in the literature summarized here about traumatic loss in general. What it particularly leaves out is what most pervades the testimony: grief itself, the deepest grief imaginable. The witnesses described frequent tears, ongoing anguish, sadness, loneliness, and deep pain. And they did so in the heart-wrenching way that only first-person narratives can convey. (RT 49: 7291–7295, 7298–7299, 7301, 7309–7311, 7314–7317, 7320–7322, 7327–7328, 7338–7342, 7344, 7348–7352, 7367–7371.) This, too, is described throughout the traumatic bereavement literature. (Leviton, Horrendous Death and Health: Toward Action (1991), p. 3 [survivors "often experience interminable grief"]; see also Rando, Complicated Mourning, pp. 64–77, 132–133; Rando, *Parental Bereavement*, in Rando, Parental Loss, *supra*, pp. 55–56; Doka, *Sudden Loss*, *supra*, at p. 11; Hersh, *After Heart Attack and Stroke*, *supra*, at p. 18; Lord, *Vehicular Crashes*, *supra*, at pp. 30, 36; Carroll et al., *Complicated Grief in the Military*, *supra*, at p. 86.)

x. Cultural Ignorance About Traumatic Grief

Appellant's jurors had no way of knowing that the extreme effects about which they were hearing were typical circumstances, not aggravating ones, nor that they were typical of more than just murders. Justices Souter and Kennedy rejected claims that it was unfair to hold perpetrators responsible for unforeseen consequences because everyone knows that survivors "will suffer harms and deprivations from the victim's death." (*Payne*, *supra*, 501 U.S. 808, 838 (conc. opn. of Souter, J.).) Surely this extreme understatement of

what victims' survivors suffer accurately reflects the jurors' ignorance. For the subtext of all the literature cited here—which was written for mental health professionals and others dealing with survivors on a regular basis—is that even they need to be sensitized to what survivors of homicides and accidental and other traumatic deaths actually go through. (See e.g., Rando, Complicated Mourning, *supra*, 4–5, 12–16 [discussing mental health practitioners' limited understanding].) Much of it emphasizes the therapeutic need to teach survivors that their extreme experiences are normal. (E.g., Cable, *Grief Counseling for Survivors of Traumatic Loss*, *supra*, at pp. 119, 123, 125; Redmond, Surviving When Someone You Love Was Murdered: A Professional's Guide to Group Grief Therapy for Families and Friends of Murder Victims (1989) pp. 68, 70.) The jurors were undoubtedly no better informed than the mental health professionals or untreated survivors. Thus they had no way of knowing that they should reject the presentation of the consequences of appellant's crimes as aggravation. Instead, they were faced with the inexorable logic of victim-impact evidence, which is its tendency "to persuade a fair-minded juror in any capital case to resolve that the perpetrator of such sorrow be sentenced to death." (*Com. v. Rice* (Pa. 2002) 795 A.2d 340, 360 (conc. & dis. opn. of Zappala, C.J.).)

b. Constitutional Consequences of Misleading Appellant's Jury

In contrast, it may be that little of the information presented here about murder victims' survivors is news to this Court, since terrible stories like those told by Lydia Roybal-Aragon, Stephanie Aragon, Leighette Hopkins, Catherine Mans, Angela Mans, and James Jones have begun to appear in other

cases which the Court has reviewed.[110] What the Court has not yet been asked to face are the implications of the typicality of these seemingly extreme sequelae of traumatic loss.

At this point in the brief, appellant is in the midst of showing the low probative value of the vast majority of the victim-impact testimony, as part of a probative/prejudicial balancing analysis. But it is necessary to pause and point out how the information already presented shows that there were constitutional violations in the presentation of the evidence, wholly apart from its prejudicial impact.

i. Failure to Rationally Determine Death-Worthiness

The most obvious problem is the violation of the principle that a state must administer its death penalty "in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." (*Spaziano v. Florida* (1984) 468 U.S. 447, 460.) This requires "a valid penological reason for choosing from among the many criminal defendants the few who are sentenced to death." (*Id.* at p. 460, fn. 7.) Evidence of the *commonalities* between appellant's crimes and those of non-death-worthy and non-death-eligible defendants can hardly fulfil that function.

ii. Irrationality Via Misleading the Jury with Inaccurate Information

Worse, the very act of presenting the mass of victim-impact testimony in appellant's case as aggravation, i.e., presenting the commonalities without acknowledging their status as such, actively misled appellant's jury. In one

---

[110]See *People v. Robinson, supra,* 37 Cal. 4th 592, 644 et seq.; *People v. Panah* (2005) 35 Cal.4th 395, 494–495; *People v. Benavides* (2005) 35 Cal.4th 69, 105; *People v. Boyette, supra,* 29 Cal.4th 381, 440–441; see also *Roper v. Simmons, supra,* 543 U.S. 551, 558.

sense, the testimony admittedly provided information about the "specific harm" which he and his comrades caused. (*Payne*, *supra*, 501 U.S. 808, 825.) But it did not tend to show that, among death-eligible murders, this was an aggravated one. Yet it gave the jurors exactly that impression. Indeed, they knew that they would not be hearing it unless it was legally determined to be aggravating. In reality, it was simply powerful anecdotal evidence of unfortunately broad—indeed typical—phenomena.

Appellant's jury began to learn a hidden truth about the vulnerability of the human spirit to trauma. Such information should become known, but the place to reveal it first is not before a sentencer who must decide whether a murder is at the extreme of culpability among murders. It belongs in policy debates about whether society gives sufficient support to survivors of victims of crime and accidents. And victim-impact panels, which show juvenile offenders how much worse losing a loved one to violence is than most people imagine, are powerful rehabilitative tools.[111] But "[t]he 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 . . . ." (*Monge v. California* (1998) 524 U.S. 721, 731–732.) Putting traumatic grief information before appellant's jurors as if it suggests how atypically egregious were the consequences of his actions is to turn truth into fiction.

Misleading the sentencer in this fashion is intolerable. Even in non-capital cases, sentences based on bad information are invalid under the state

---

[111]Abstract of Scott et al., *Turning Point: Rethinking Violence—Evaluation of Program Efficacy in Reducing Adolescent Violent Crime Recidivism* (2002) 53 J. Trauma, #1, 21, at <http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=pubmed&dopt=Abstract&list_uids=12131384&query_hl=1&itool=pubmed_docsum> (viewed April 14, 2006).

and federal due process clauses. "A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process." (*United States v. Weston* (9th Cir. 1971) 448 F.2d 626, 634; see also *United States v. Tucker* (1972) 404 U.S. 443, 447; *Townsend v. Burke* (1948) 334 U.S. 736, 741; *People v. Arbuckle* (1978) 22 Cal.3d 749, 754–755; *People v. Chi Ko Wong* (1976) 18 Cal.3d 698, 719, overruled on another point in *People v. Green* (1980) 27 Cal.3d 1.) As any system that values human life would require, the accuracy of the information before the sentencer is even more important in a death penalty case, under the Eighth Amendment.

> If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

(*Gregg v. Georgia* (1976) 428 U.S. 153, 190 (plurality opn.); see also *Johnson v. Mississippi* (1988) 486 U.S. 578, 590.) Misleading appellant's jury about what constituted aggravation invalidates its decision.

iii. Use of Aggravator Vague Enough to Include Non-Aggravated Facts

Moreover, the Eighth Amendment does not permit use of a procedure which "creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance," thereby creating "bias in favor of the death penalty." (*Stringer v. Black, supra*, 503 U.S. 222, 235–236; see also *People v. Bacigalupo, supra*, 6 Cal.4th 457, 473–474, 477 [seriously misleading aggravating factor may not be used in sentence selection].) A sentence-selection factor that can be applied in such a manner is unconstitutionally

vague. (*Ibid.*) Encouraging the jury to treat compelling, but not aggravating, circumstances as aggravation violates this principle as well, rendering factor (a) infirm for vagueness.

iv. Lack of Individualized Sentence

For evidence to be relevant to a penalty choice, it must pertain "to the proper inquiry, which is to tailor the defendant's punishment 'to his personal responsibility and moral guilt.'" (*People v. Beeler* (1995) 9 Cal.4th 953, 991, quoting *Enmund v. Florida* (1982) 458 U.S. 782, 801; see also *Tison v. Arizona* (1987) 481 U.S. 137, 156.) There is no tailoring when the jury is inundated with the non-unique aspects of homicide, especially when it is presented as if it were unique. What looked like a predicate for individualized sentencing actually relied on phenomena common to all homicides.[112]

---

[112]The traumatic grief evidence was presented to the jury in the particulars of how it manifested after appellant's conduct. But supplying such particulars did not make the sentence individualized. Individualized sentencing is required so that the sentencer looks not just at the abstract crime of murder, but "consider[s,] on the basis of all relevant evidence," both "why a death sentence should be imposed" and "why it should not be imposed." (*Jurek v. Texas* (1976) 428 U.S. 262, 271.) It must consider "both the offender and the offense in order to arrive at a just and appropriate sentence . . . ." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304 (plur. opn.).)

Here, it was as if a pathologist detailed a victim's death process at the molecular-biological level. The information would be particular to the crime, but it would not help the sentencer assess the culpability, background, and prospects of the individual before it. Indeed, the testimony would tend to defeat individualized sentencing, if the details were shocking and yet common to all similar deaths. The same was true of the traumatic-bereavement testimony. Though based on the facts of the particular case, it failed to give the sentencer a fuller view of what appellant actually did, in what manner and why and under what circumstances he did it, or anything about his character. Rather, it diverted the jury's attention to non-unique aspects of the crimes, while drawing on the emotive power of personalized accounts.

v. Use of Aggravator Vague Enough to Include Consequences Which Appellant Did not Choose to Cause

The "moral guilt" just referred to "depends on the degree of [the defendant's] culpability—what [his] intentions, expectations, and actions were." (*Enmund v. Florida*, *supra*, 458 U.S. 782, 800.) There is no basis for believing that appellant intended or expected to cause such appalling harm to the victims' survivors. Thus, applying factor (a) so that it permits significant detailing of traumatic bereavement reactions violates the vagueness ban outlined two paragraphs above. In this way, too, the jury was told to treat appellant as more deserving of death than he was by relying on a circumstance defined so that it could look aggravating when it was not. (*Stringer v. Black*, *supra*, 503 U.S. 222, 235–236; see also *People v. Bacigalupo*, *supra*, 6 Cal.4th 457, 473–474, 477.)

c. California's Conclusion That Similar Evidence is Irrelevant in All Comparable Contexts

Appellant here returns to the probative-value/prejudicial-effect analysis, with additional reasons why the probative value of the challenged testimony was poor.

A decision to impose the death penalty requires heightened rationality and reliability. And yet, in death penalty trials, we import considerations that do not have enough of a nexus to determining an appropriate penalty for the state to make it a factor in any other context where punishment is meted out in California courts.

The Judicial Council, when it adopted rules to promote determinate sentencing uniformity pursuant to a 1976 reform, possessed special expertise regarding sentencing practices. (*People v. Wright* (1982) 30 Cal.3d 705, 710, 713.) Its rules identified "circumstances in aggravation and mitigation relating

to the crime and to the defendant." (*Id.* at p. 709.) They have always focused strictly on culpability. The harm caused—in the limited, traditional sense of whether or not there was injury or death, or the amount of property taken or destroyed—may determine the permissible sentencing range by affecting the offense committed and applicable enhancements. But such "circumstances . . . relating to the crime" affect sentence *selection* only to the extent that the harm reflects on the defendant's intentions and behavior. (Cal. Rules of Ct., rules 4.421, 4.423, 4.425; see also *People v. Levitt* (1984) 156 Cal.App.3d 500, 516–517.) Moreover, the rules do not broaden harm beyond the direct victim, which would import a factor that generally lacks any nexus to what the defendant knew and was thinking about. The failure to do so is unsurprising. "Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished." (*Tison v. Arizona*, *supra*, 481 U.S. 137, 156.)

Similarly, in determining the propriety of punitive damage awards in the civil context, the primary factor is the reprehensibility of the defendant's conduct, along with the defendant's wealth. While lack of harm can play a limiting role, in that there can be no high punitive-damages award if the actual harm was slight, there is no increase in punitive damages because of great resulting harm. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928; see also *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 417–418 (conc. opn. of Mosk, J.))

Finally, civil penalties are fixed in an "arbitrary sum irrespective of actual damage suffered," as a means of seeking regulatory compliance by penalizing violations. (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1569, p. 1057 [quotation]; 34 Cal.Jur.3rd (Rev.) Forfeitures & Penalties, § 5,

p. 620.)

Of all the situations, therefore, where the state punishes misconduct, only in capital murder trials is specific harm, uncoupled from culpability, a determining factor. The fact that it has never occurred to decision-makers to use it beyond that sphere is eloquent testimony to its lack of genuine probative value on issues of legitimate concern.

d. Inevitable, Untestable Distortions in the Testimony

Any case there may be for admitting vast quantities of victim-impact evidence is further weakened by the inherent distortions of truth in the information presented. The information presented is inherently unreliable, further undermining any claim for its probative value.

People remembering loved ones after their deaths, particularly in a public forum, dwell on their good traits and what they miss about them, not their flaws, weaknesses, and what may have made being close to them a challenge. (See Lord, *Vehicular Crashes*, *supra*, at p. 30 [even normal grief includes "idealized attachment to the deceased"]; Rando, Complicated Mourning, *supra*, 152 [grieving complicated by traumatic loss can produce "[e]xcessive and persistent overidealization of the deceased and/or unrealistically positive recollections of the relationship"]; see also Redmond, Professional's Guide, *supra*, p. 95 [survivors in group therapy "are frequently shocked to realize their list of 'What I don't miss' [about the deceased] is longer, in more detail, and required more time to write" than the "What I miss most" list].) Cross-examination on these subjects would be in such poor taste and so devoid of tactical value that it rarely happens. (Johnson, *Speeding in Reverse: An Anecdotal View of why Victim Impact Testimony Should not be Driving Capital Prosecutions* (2003) 88 Cornell L.Rev. 555, 565 (*Speeding in*

Reverse); see also *Payne*, *supra*, 501 U.S. 808, 823 ["for tactical reasons it might not be prudent for the defense to rebut victim impact evidence"]; *State v. Humphries* (S.C. 1996) 479 S.E.2d 52, 55–56 [defense, though it possessed evidence of victim's temper and use of alcohol, did not cross-examine or present rebuttal]; Fahey, *Payne v. Tennessee: an Eye for an Eye and Then Some* (1992) 25 Conn. L.Rev. 205, 255.)

Thus, even with six victim-impact witnesses and two defendants in appellant's trial, there was not a single question in cross examination. No one asked, for example, if Aragon, who had a charming habit of keeping his things "all nicely lined up, all clean, always dusted" (RT 49: 7297), had an annoying obsessive-compulsive side. Appellant's counsel agreed in advance not to mention findings of methamphetamine in the blood of Jones and Mans, their possession of the drug, and an intoxicating level of alcohol in Jones's blood, presumably because the spectacle of the defense dragging the victims through the mud was not going to be helpful. (RT 10: 2014, 2045–2046; see also CT 5: 1040–1041.) In other ways, too, Jones and Mans were more like appellant than one would have thought from the trial testimony. They had been characterized outside of court by friends and relatives as "drifters who sometimes dabbled in drugs." (Ogul, *Relatives Fault Probe of Killings*, Riverside Press-Enterprise (Nov. 11, 1992), p. B1.[113]) Both men also "liked to drink." Mans worked "whenever he could find work," and Jones never worked at all. (*Ibid.*) Jones's father, who later was one of the victim-impact witnesses, was reported as saying that Jones had been homeless for a year. (Ogul, *Two Men Found Shot to Death Riverside Residents*, Riverside Press-

---

[113]Appellant moved the Court to take judicial notice of this article and the one cited later in this paragraph in a motion filed shortly after the filing of this brief.

Enterprise (Oct. 14, 1992), p. B3.) Mans was 26 years old (RT 49: 7346), and Jones was 23 or older (see RT 49: 7346, 7355, 7361), but there was no mention of a spouse, girlfriend, or other stable love relationship for either. As far as the jury knew, however, the victims had no flaws.

Similarly, the evidence regarding the witnesses's descriptions of their own and others' reactions was untested, and necessarily so. Leighette Hopkins testified, in black-and-white terms, "I fear getting killed. I fear somebody breaking into my car, my house. I don't feel safe anymore." (RT 49: 7315.) As a practical matter, no one could really ask her where these experiences actually were on the continuum of "occasional" to "constant." For the reluctance to cross-examine that exists with victim-character evidence, "given the high risk of offending jurors, . . . is understandably heightened with respect to witnesses' characterizations of the emotional harms they have suffered." (Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials* (2000) 33 U. Mich. J.L. Reform 1, 28.) The defense was, therefore, unable to effectively challenge such global statements as Lydia Roybal-Aragon's testimony that nobody was ever there for little Laura anymore, even though it was probably an exaggeration. (RT 49: 7294.) No one asked Catherine Mans for a more accurate portrayal of her varying states when she said she was still very upset and angry "all the time" (RT 49: 7339) or asked Angela Mans if her nighttime fears were slowly receding (RT 49: 7351–7352) or if it was possible that the fear she thought she saw on the face of her brother's embalmed body (RT 49: 7348–49) was in her own imagination. Moreover, among people who have survived tragedy, there are always some whose accounts include a story that begins, "I would never have asked to have gone through this, but it *has* brought me some unexpected gifts" by way of, e.g., a deepening of their appreciation for each moment of life or

of their capacity for compassion.[114] But no one could or did ask the witnesses against appellant if there were any silver linings in the clouds of their suffering. Again, a defendant has nothing to gain by trying to pin down a visibly grieving witness on exactly how global, intense, and exclusive her negative experiences are. But people do not ordinarily express themselves about such matters with precision and completeness spontaneously, which is why cross-examination is essential. With in-depth victim-impact testimony, however, the narrative is not subject to any meaningful reality-testing.

For similar reasons, a great deal of objectionable testimony came in at appellant's trial. This was especially true with Lydia Roybal-Aragon's testimony. With four defense attorneys present (RT 49: 7275), there was no objection while she continuously supplied hearsay or otherwise presented purported facts of which she could have no personal knowledge. (RT 49: 7284–7285,7290–7291, 7293–7294, 7298–7299, 7300–7301; see also 7316 [speculative answer from Hopkins].) No one dared object when she provided psychological analyses of the nature and origins of her children's problems—attributing them entirely to the death—without a foundation as to her expertise. (RT 49: 7295–7298.) Similarly, as shown below, there were many unobjected-to violations of *Booth v. Maryland's* still intact ban on testimony characterizing the crimes or their perpetrators. (RT 49: 7289, 7301, 7324, 7371.)

Absent the prepared statements used elsewhere, an extensive victim-

---

[114]See, e.g., The Gifts of Grief (Shining Light Productions 2005); White, *A Tiger by the Tail: The Mother of a Murder Victim Grapples with the Death Penalty*, in Acker & Karp, eds., Wounds that do not Bind: Victim-Based Perspectives on the Death Penalty (2006) pp. 55–56 & fn. 2; Coryell, Good Grief: Healing Through the Shadow of Loss (1998); Metzger, Tree (1997).

impact presentation practically requires open-ended questions, narrative answers, and great restraint in making objections. Witnesses cannot be interrupted in their stories of suffering by defense counsel trying to hold them to the niceties of the rules of evidence, without an intense juror backlash.[115] (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1034 [recognizing importance of avoiding alienating jury]; *People v. Johnson* (1993) 6 Cal.4th 1, 51 [same].) Moreover, in the instant case, none of the questions that elicited opinions about the crime and the perpetrators were objectionable as calling for such opinions. They were framed as questions about the witnesses' experiences. (RT 49: 7289, 7301, 7322, 7371.) So objections would have been in the form of truly obnoxious-seeming motions to strike the aggrieved family members' answers. Even if, somehow, the defense's role in eliciting a directive to disregard the offending remarks could be camouflaged, the directive would be ineffective. For all of these reasons, open-ended "victim impact evidence is inherently uncontrollable." (Mosteller, *Victim Impact Evidence: Hard to Find the Real Rules* (2003) 88 Cornell L.Rev. 543, 554.)

---

[115]It is no answer to the cross-examination dilemma to say that defendants must often choose between Scylla and Charybdis. (Cf. *South Dakota v. Neville* (1983) 459 U.S. 553, 564, 563 ["the criminal process often requires suspects and defendants to make difficult choices," upholding driver's compelled choice of submitting to a blood-alcohol test or having his refusal used against him].) If Scylla is unfair and Charybdis is unfair, then choosing either will make the trial unfair and its result unreliable. The criminal justice system then has its own choice to make: it must either establish a path that doesn't pass between Scylla and Charybdis or abandon its claim to providing fair procedures.

Here, where the structure of a procedure prevents either side from ensuring that the whole truth is presented, any evaluation of the procedure must account for its presenting distortions to the jury.

Thus, neither trial-court control nor—given the forfeiture rule[116]—appellate review of objectionable testimony is available, unless the trial court previews the testimony.

The inevitable tendency of drawn-out and detailed victim-impact testimony to provide idealized or sanitized portraits of the victims; somewhat stylized, black-and-white images of the unbroken bleakness of the survivors' lives; and various forms of incompetent and other objectionable testimony, is an additional reason to recognize the limited probative value of such evidence. (See *People v. Murtishaw* (1981) 29 Cal. 3d 733, 773–774 [unreliability of evidence detracts from its probative value].)

e. Minimal Testimony Required to Exhaust Probative Value

There is one more reason why extensive victim-impact testimony weighs but lightly on the probative side of the probative/prejudicial balance. It is relevant only to the extent that it tends to show a defendant's culpability. Its only specific claim to relevance is its capacity to remind a jury of the seriousness of the crime, in a context where a strong mitigation case might have rendered the murder and its victims mere abstractions. But the need for such a reminder is largely fictitious; to the extent that it is not, any testimony beyond a bare-bones victim-impact case is surplusage and adds nothing to its probative value.

i. The Culpability Link

Evaluating the actual probative value of victim-impact evidence requires revisiting a point mentioned above, the need for it to have something

---

[116]Error in the presentation of victim-impact testimony is deemed waived in the absence of an objection, even where objection would have alienated the jury. (*People v. Pollock*, *supra*, 32 Cal.4th 1153, 1181.)

to do with culpability. This need can be forgotten when *Edwards* and its progeny are cited, as they were by the trial court, for the simple proposition "that evidence of the specific harm caused by the defendant is admissible," as a circumstance of the offense. (RT 48: 7174.) It is easy to assume that *all* such evidence is relevant to penalty because all evidence tending to show circumstances of the offense is relevant to penalty.

The conclusion, however, is flawed because of an overbroad premise. Not all circumstances of the offense are relevant. Circumstances can be relevant because, and to the extent that, they pertain to culpability. "Under the 1978 death penalty law . . . , the determination of punishment turns on the personal moral culpability of the capital defendant. [Citations.] Culpability is assessed in accordance with specified factors of 'aggravation' and 'mitigation' . . . : (a) the circumstances of the crime; (b) prior violent criminal activity; [etc.] . . . ." (*People v. Gallego* (1990) 52 Cal.3d 115, 207 (conc. opn. of Mosk, J.).) "[F]actor[] (a) . . . direct[s] the sentencer's attention to . . . facts about the defendant and the capital crime that might bear on his moral culpability." (*People v. Tuilaepa* (1992) 4 Cal. 4th 569, 595; see also *Penry v. Lynaugh*, *supra*, 492 U.S. 302, 319 ["punishment should be directly related to the personal culpability of the criminal defendant," so sentence "should reflect a reasoned moral response to the defendant's background, character, and crime"]; *Enmund v. Florida*, *supra*, 458 U.S. 782, 801; *People v. Beeler*, *supra*, 9 Cal.4th 953, 991; *People v. Kaurish* (1990) 52 Cal.3d 648, 717 [evaluating circumstances of offense as they aggravated defendant's culpability].) Thus, evidence tending to show circumstances of the offense is relevant to penalty, but only to the extent that such circumstances show aggravated or mitigated culpability. Although the weather at the time and even the astrological planetary alignment are part of "[t]hat which surrounds" the

crime "materially,"[117] neither is normally relevant.

Since evidence of "specific harm" that flowed from the offense is claimed to be relevant as a circumstance of the offense, it is subject to the same limitation: such harm is relevant only to the extent that it shows aggravated or mitigated culpability.

This Court recently recognized this principle in *People v. Harris* (2005) 37 Cal.4th 310. The Court stated that the Eighth Amendment permits the introduction of victim-impact evidence "when admitted in order for the jury to assess meaningfully the defendant's moral culpability and blameworthiness." (*Id.* at p. 351.) Thus, evidence of the horrifying effect of the mistaken opening of the casket at a victim's funeral, though part of the specific harm that would not have happened but for the murder, "was too remote from any act by defendant to be relevant to his moral culpability," and its admission was objectionable. (*Id.* at p. 352.) So the issue in evaluating probative value is not simply whether evidence shows "specific harm" caused by the crime, but whether, in showing such harm, it shows something about the defendant's culpability.

ii. *Payne* on "Balancing the Scales"

With the foregoing in mind, the relevance of victim-impact testimony can be evaluated, as part of the probative-vs.-prejudicial weighing required in appellant's case. Its relevance is slim.

Until 1991, a majority of reasonable minds on both this Court and the United States Supreme Court believed that all victim-impact evidence was irrelevant to culpability. (*Booth v. Maryland*, *supra*, 482 U.S. 496; *People v. Gordon*, *supra*, 50 Cal.3d 1223, 1266–1267.) Abandonment of that position

---

[117] *People v. Edwards*, *supra*, 54 Cal.3d 787, 833.

meant not that all such evidence significantly adds to the jury's knowledge of the defendant's culpability, but only that it is not all *without* such probative value. In so holding, the majority in *Payne* was concerned that—in a situation where the Eighth Amendment virtually eliminates limits on a capital defendant's presentation of relevant mitigating evidence—"it unfairly weight[s] the scales" to bar the state "from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish' . . . or demonstrating the [resulting] loss to the victim's family and to society . . . ." (501 U.S. 808, 822; see also *id.* at p. 826; *id.* at p. 833 (conc. opn. of Scalia, J.).) Furthermore, the state has a legitimate interest in counteracting the mitigation "by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.' [Citation.]" (*Id.* at p. 825.) The victim should not be left as a "faceless stranger." (*Ibid.*) Presumably doing so would permit unfair and inaccurate minimization of the defendant's culpability.

So, in this manner, *Payne* provides a basis for its holding that the probative value of victim-impact evidence and argument, on the issue of the defendant's culpability, can be greater than zero. Given the minimal victim-impact evidence and argument in *Payne*, this was arguably enough to support its holding.[118] But when the prosecution's use of such evidence and argument

---

[118]The evidence was a six-sentence response to one question about the impact of the crimes on a little boy whom the defendant knew was witnessing the murders of his mother and sister. It was so minimal and so tied to the defendant's knowing conduct that the court below had held the *Booth* violation to be harmless beyond a reasonable doubt. (*Payne*, *supra*, 501 U.S. at pp. 811, 814–817, 826.) The prosecutor referred to the testimony in three sentences of argument and added a few more comments portraying further likely impacts on the child and other loved ones of the victims. (*Id.* at pp. 814–816.)

is qualitatively greater, the "balancing-the-scales" factor fails to justify the heavier use. As the succeeding parts of this argument show, after a very early point, more evidence, and more evocative evidence, is merely cumulative for this purpose.

iii. Jurors' Knowledge That Murder Is Serious

The legitimate added value of victim-impact testimony beyond a limited presentation is small because the penalty trial does not take place before jurors who were raised in a vacuum. They come to the courtroom knowing that murder is a terrible crime. Rather than reflecting the diversity of views of the general population, jurors are from the subset who are willing to personally order the death of one who kills. Often it takes the voir dire process to educate them out of a belief that everyone who intentionally kills receives, and should receive, the death penalty. (See *People v. Blair* (2005) 36 Cal.4th 686, 743 [three jurors who initially stated that they would vote for death in all cases of intentional murder, but backed off after an explanation of the law, were qualified to serve].) This was certainly true in appellant's case. (SCT 209 [Juror #9: if death is sought and defendant is guilty, the sentence should be death], 505 [Juror #11: death is appropriate in most cases of murder]; RT 15: 2651 [Juror #7: he would favor death penalty for any special-circumstance murder, unless defendant was not a shooter]; RT 17: 2976–2977 [Juror #2, the foreperson, would require "something very major to lean me towards not voting the death penalty" in a special-circumstances case, even for a non-shooter].)

These people do not sit on a murder jury and think they are dealing with a sympathetic defendant, an abstract offense, and a victim who is but a statistic. "A person of ordinary sensibility could fairly characterize almost

every murder as 'outrageously or wantonly vile, horrible and inhuman.'" (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428–429.) Moreover, if even "[m]urderers know their victims 'probably ha[ve] close associates, 'survivors,' who will suffer harms and deprivations from the victim's death" (*People v. Marks* (2003) 31 Cal.4th 197, 236, quoting *Payne*, *supra*, 501 U.S. 808, 838 (conc. opn. of Souter, J.)), then certainly the higher-functioning people who serve on their juries know the same. Similarly, this Court has recently stated, "As the People observe, although defendant may not have known the precise dimensions of the tragedy his actions would leave behind, the profound harm to surviving family members and friends was 'so foreseeable as to be virtually inevitable.' [Citation.]" (*People v. Robinson*, *supra*, 37 Cal. 4th 592, 652, fn. 33; see also *People v. Brown*, *supra*, 31 Cal.4th 518, 573 ["It is common sense that surviving families would suffer repercussions from a young woman's senseless and seemingly random murder long after the crime is over"]; *People v. Holloway* (2004) 33 Cal.4th 96, 110, 143–144 [defendant presumably could foresee that woman whom he beat severely would still experience emotional trauma 16 years later]; *People v. Douglas* (1990) 50 Cal.3d 468, 536–537 [no error in argument which "reiterated what the jury already knew—that murder is a crime against the victims, their families, and society"].)

The state cannot have it both ways. If, as the cited cases hold, defendants can be held accountable for the sequelae of their conduct because it is obvious to anyone what such sequelae will be, then there is no pressing need to prove the obvious to the jury.

iv. How the Scales Favor the Prosecution

Besides the fact that jurors enter the courtroom believing that murder is a horrifying crime that requires very serious punishment, it gets a more human, less abstract face in the guilt phase, where they learn the story of the

killing of a particular individual. "In many cases the evidence relating to the victim is already before the jury at least in part because of its relevance at the guilt phase of the trial." (*Payne, supra*, 501 U.S. 808, 823.) "Any capital trial will necessarily involve testimony and physical evidence pertaining to the victim." (*State v. Williams* (N.J. 1998) 550 A.2d 1172, 1203; see also *People v. Hardy* (1992) 2 Cal.4th 86, 200.) That certainly happened here. (See, e.g., RT 35: 5425–5426 [Ted Lehmann describes finding body of Aragon, whom he knew, and testifies to accuracy of photo of the scene]; 5433 [officer points out graduation tassel in interior photo of Aragon truck]; 5410–5411 & Ex. 234 [Steve Aragon, Jose's father, explains how Jose would leave notes if he went riding so that if he got hurt, Steve could go look for him, and authenticates the note Jose wrote the last day of his life]; 5411–5413, 5417–5418 [Steve Aragon describes looking for his son, learning of his death, and seeing the bloodstained truck]; 33: 5184–5189 [Charlotte Thornton, Mans's sister, describes the last time she saw him and recounts identifying his belongings]; 32: 4952–4960; 33: 5191–5211; 34: 5227–5244 [John Feltonberger, Ken Mills, and Paulita Williams describe being shot at, struggling to escape and/or survive, and lasting injuries].) Moreover, numerous post-mortem photographs of each victim were introduced. (See Exs. 1-B – 1-H, 1-I, 2-A – 2-Q, 2-S – 2-U, 3-A – 3-D, 3-L – 3-U, 3-X; RT 21: 3499 et seq.) Thus, the penalty phase did not take place on a blank slate, beginning with two "faceless strangers" and permitting the defense to portray one, the defendant, as a sympathetic human being.

Moreover, one of these individuals is a perpetrator, one a victim, and jurors' dispositions towards these people are not neutral. "When monstrous deeds are done, . . . there is a natural desire to avenge the outrage and to eliminate its perpetrator." (*Harris v. Vasquez* (9th Cir. 1990) 949 F.2d 1497,

1535 (conc. & dis. opn. of Noonan, J.).) The defense case, therefore, is an attempt to show that there may be some humanity in, and some way to understand the conduct of, one who up to that point appears to be a monster. "In many capital cases, a guilty verdict signifies that the prosecution has likely established a prima facie case for imposition of a death sentence." (Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases* (1983) 58 N.Y.U. L.Rev. 299, 335 (Goodpaster).) Thus, appellant went into his penalty trial as a convicted multiple murderer, under circumstances that did not in themselves suggest a shred of justification for the homicides. (See RT 54: 8004 [prosecutor argues appellant killed for sport]; 8041 [defense counsel concedes crimes were "heinous," "terrible," and "unspeakable"].) The necessary postponement of the mitigation case until the penalty phase "buil[t] on the preexisting media stereotypes about the inhumanity of persons convicted of murder by delaying opportunities to humanize the capital defendant until the very last phase of the trial itself." (Haney, Death by Design: Capital Punishment as a Social Psychological System (2005) p. 146 (Death by Design).) Until the defense penalty-phase presentation, "days, weeks, or even months into the trial—most capital defendants have sat mute in the courtroom, each one a kind of criminological Rorschach card onto which jurors are invited to project their deepest fears and anger." (*Ibid.*) As this Court has explained, the defense is under a tremendous burden by then:

> The prosecution will have selectively presented the judge or jury with evidence of defendant's criminal side, portraying him as evil and inhuman, perhaps monstrous. Defense counsel must make use of the fact that few people are thoroughly and one-sidedly evil. . . . Defense counsel must, therefore, by presenting positive evidence of the defendant's character and acts, attempt to convince the sentencer that the defendant has

redeeming qualities.

(*People v. Deere* (1985) 41 Cal.3d 353, 366, quoting Goodpaster, *supra*, 58 N.Y.U. L.Rev. 299, 335, disapproved on other grounds in *People v. Bloom* (1989) 48 Cal.3d 1194, 1228, fn. 9.) Moreover, to have a chance at a life verdict, the defense needs to somehow make incomprehensible behavior understandable:

> [T]he defense must attempt to show that the defendant's capital crimes are humanly understandable in light of his past history and the unique circumstances affecting his formative development, that he is not solely responsible for what he is. Many child abusers, for example, were abused as children. The knowledge that a particular abuser suffered abuse as a child does not, of course, excuse the conduct, yet it makes the crime, inconceivable to many people, more understandable and evokes at least partial forgiveness.

(*People v. Deere*, *supra*, 41 Cal.3d at pp. 366–367, quoting Goodpaster, *supra*, 58 N.Y.U. L.Rev. at pp. 335–336.) In doing so, appellant, like other defendants, faced an uphill battle, not only because of the length of time that the jurors sat with another view of him, but because "the typical juror's preexisting framework for understanding behavior is highly compatible with the basic terms of the typical prosecutorial narrative." (Haney, Death by Design, *supra*, p. 147.) That framework holds "that the defendant's crime stems entirely from his evil makeup and that he therefore deserves to be judged and punished exclusively on the basis of his presumably free, morally blameworthy choices . . . ." (*Ibid.*; see also RT 53: 7909–7910, 54: 8023–8024 [prosecutor: appellant made choices, different choices than his brothers and cousin made, and his upbringing had nothing to do with it])

v. What It Takes to Concretize an Abstract Murder

If, despite all these dynamics of a capital trial in front of a death-qualified jury, there truly is one where a victim comes off as a faceless cipher and where the jury might forget the damage likely done to families, it is enough that prosecutors are free to remind the jury otherwise in argument, as they long have been in California, even when *South Carolina v. Gathers*, *supra*, was good law. (E.g., *People v. Sanders* (1995) 11 Cal.4th 475, 550 [without victim-impact evidence, prosecutor may "refer[] generally to the predictable and obvious consequences to the victims' families and friends"]; see also *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1016–1017, and cases cited; *People v. Douglas*, *supra*, 50 Cal.3d 468, 536.) Or, as *Payne* put it in overruling *Gathers*, the defendant should not be able to argue his or her humanity without the prosecution being able "to similarly argue . . . the human cost of the crime . . . ." (*Payne*, *supra*, 501 U.S. 808, 827.)

Payne and *Edwards* give the prosecution even more, by permitting not only such argument, but actual evidence showing that "the victim is an individual whose death represents a unique loss to society and in particular to his family. [Citation.]" (*Payne*, *supra*, 501 U.S. at p. 825.) In a trial where there is somehow a danger of reducing both the victim and his or her murder to abstractions, limited testimony on these points can bring back into focus what murder is and does. But once facts capable of reminding the jury of this "common knowledge" (*id.* at pp. 838–839 (conc. opn. of Souter, J.) have been established—as, for example, by the six sentences of victim-impact testimony in *Payne* (*id.* at pp. 814–815)—the marginal probative value of additional testimony is minimal. Describing the consequences in the deep and extensive

way that it was done in appellant's trial adds only to its capacity to sway the jury emotionally, as the Louisiana Supreme Court has recognized:

> Informing the jury that the victim had some identity or left some survivors merely states what any person would reasonably expect and can hardly be viewed as injecting an arbitrary factor into a sentencing hearing. But the more detailed the evidence relating to the character of the victim or the harm to the survivors, the less relevant is such evidence to the circumstances of the crime or the character and propensities of the defendant. And the more marginal the relevance of the victim-impact evidence, the greater is the risk that an arbitrary factor will be injected into the jury's sentencing deliberations.

(*State v. Bernard, supra*, 608 So. 2d 966, 971, fn. omitted; see also *People v. Love, supra*, 53 Cal. 2d 843, 856 [in considering probative and inflammatory potential of penalty evidence, court should consider "the availability of less inflammatory methods of imparting to the jury the same or substantially the same information"]; *Adkins v. Brett* (1920) 184 Cal. 252, 258–259 [when a party has a legitimate purpose for introducing evidence which is also capable of misuse, court should take special care to exclude cumulative testimony].)

Prosecutors in many published cases have chosen, or been required, to present testimony that is quite abbreviated by California standards, and yet they succeeded in obtaining death verdicts.[119] Such testimony can still remind

---

[119]E.g., *United States v. Stitt* (4th Cir. 2001) 250 F.3d 878, 898 (3 victims, 19 transcript pages); *People v. Cornwell* (2005) 37 Cal. 4th 50, 64 (one witness, "brief testimony"); *Smith v. Gibson* (D.Okla. 2002) 2002 U.S. Dist. LEXIS 27527, *216 (9 pages). *State v. Irish* (La. 2002) 807 So. 2d 208, 215 (5 pages); *State v. Miller* (La. 2000) 776 So. 2d 396, 412 (4 witnesses, 15 pages); *Crawford v. State* (Miss. 1998) 716 So. 2d 1028, 1054 (conc. opn. of Banks, J.) (6 pages); *State v. Jacobs* (N.M. 2000) 10 P.3d 127, 152 (dis. opn. of Serna, J.) (2 witnesses, 17 pages); *State v. Green* (Ohio 2000) 738 N.E.2d 1208, 1235 (conc. opn. of Cook, J.) (15 pages); *Dodd v. State* (continued...)

the jury, in a very human way, of the harm done, the human costs of the defendant's actions. Indeed, this Court has characterized the testimony of one witness, which it summarized in two brief paragraphs and which clearly had less description of the victim and far less description of the bereavement experience than was presented here for any victim, as "powerful." (*People v. Roldan* (2005) 35 Cal. 4th 646, 722 [testimony], 725 [characterization].) If a parade of witnesses have praised and humanized the defendant, any chance that the person killed will be disregarded, as a faceless stranger, is eliminated with relatively brief testimony. "[A] quick glimpse" will do the trick. (*Payne*, *supra*, 501 U.S. at p. 822.) At the same time, the risk of flooding the jury with potent emotions and confusing them as to the issues is at least diminished.

vi. Other Courts' Implicit Doubts About Relevance

The balance-the-scales rationale identifies a need that is somewhere between fictitious and minimal, and it can be met with minimal testimony. The probative value of significant amounts of such evidence is so tenuous that courts in some states have given up trying to articulate it, though they bowed to the pressure to permit use of such testimony: "[M]any courts have found victim impact is neither an aggravating nor a mitigating circumstance, but simply relevant evidence that the jury may consider in determining an appropriate penalty." (*State v. Humphries* (S.C. 1996) 479 S.E.2d 52, 56; see, e.g., *Alston v. State* (Fla.1998) 723 So.2d 148, 160; see also *State v. Muhammad*, *supra*, 678 A.2d 164, 179 [victim-impact evidence is not aggravation; it assists the jury in deciding the weight to give to mitigation];

---

[119](...continued)
(Okla.Crim.App. 2004) 100 P.3d 1017, 1046, fn. 8 (2 victims, 26 pages; no witness testified for more than 5 pages).

Farina v. State (Fla. 2001) 801 So.2d 44, 53 [approving instruction that victim-impact evidence is not aggravation but may be considered only as it relates to victim's uniqueness].) Here is the Oklahoma Court of Criminal Appeals's version of the mental gymnastics required where a logical link to a truly disputed issue is so ephemeral: "Evidence supporting an aggravating circumstance is designed to provide guidance to the jury in determining whether the defendant is eligible for the death penalty; victim impact evidence informs the jury why the victim should have lived." (*Cargle v. State*, *supra*, 909 P.2d 806, 828, fn. 15.)

These awkward formulations are the reflection of an awkward reality: the justifications for admitting such evidence at all are extremely weak.

f. Conclusion Regarding Probative Value

To summarize, probative value relates to the extent to which evidence tends to prove a "disputed fact that is of consequence to the determination of the action." (Evid. Code § 210.) The rationale for admitting victim-impact evidence is to show a jury, which it is feared might get lost in the mitigation case, that murder is not a crime to be lightly penalized. In the usual case, this is not a disputed fact which requires extensive victim-impact evidence for its proof. There may be an exception in a case where the victim, too, triggered dehumanizing stereotypes, such as someone whose livelihood was prostitution or selling drugs, but that is not the usual death-penalty trial, and it was not this one. "[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant . . . ." (*California v. Brown* (1987) 479 U.S. 538, 545 (conc. opn. of O'Connor, J.).) *Payne* holds that victim-impact evidence is not per se irrelevant to that inquiry for the purposes of passing muster under the Eighth Amendment. This Court, however, is free to conclude that its probative value is slight, and it should so

conclude.

This Court has never analyzed in any depth what victim-impact evidence shows about a defendant's culpability because, as mentioned previously, the seminal case arrived in a posture where the Court could defer to *Payne's* handling of that question. (See *Edwards*, *supra*, 54 Cal. 3d 787, 833, 835; *People v. Boyette*, *supra*, 29 Cal.4th 381, 444.) Some of the reasons why *Payne* deserves the heavy criticism which it has received are reviewed below. (See section F.1, pp. 257 et seq.) And, as noted previously, *Payne* held only that victim-impact evidence is not so irrelevant as to make its use unconstitutional per se; that holding does not require this Court to accord such evidence any particular value. (See *Payne*, *supra*, 501 U.S. at p. 831 (conc. opn. of O'Connor, J.).)

In fact, if actions speak louder than words, this Court has proclaimed resoundingly that it sees little probative value in such evidence. The Court evaluates the strength of aggravation in some capital appeals, in the course of harmless-error analysis or proportionality review. When the Court marshals the evidence supporting the verdict, it tends not to include victim-impact testimony that was in the record. (See, e.g., *People v. Guerra* (2006) 37 Cal. 4th 1067, 1083, 1164; *People v. Cornwell*, *supra*, 37 Cal. 4th 50, 64, 104–105; *People v. Wilson* (2005) 36 Cal. 4th 309, 355–356, 361; *People v. Lenart* (2004) 32 Cal. 4th 1107, 1117, 1133–1134; see also *People v. Ochoa* (2001) 26 Cal. 4th 398, 420–421, 460 [approval of trial court's section 190.4, subd. (e), review]; but see *People v. Roldan*, *supra*, 35 Cal. 4th 646, 725.) To continue to endorse sentencing juries' heavy use of such evidence is to approve reliance on reasoning which evidently does not come naturally to this Court.

In sum, to the extent that the evidence admitted here seemed to show

that appellant's offenses were aggravated instances of special-circumstance murder, it was probative of a falsehood. Its peculiar capacity to produce idealized characterizations of the victims, combined with its general lack of susceptibility to cross-examination, rendered parts of it of dubious reliability. It proved facts not even deemed relevant at all in areas of law that are distinguishable only in that they have been less of a populist political football: sentencing in non-capital crimes, the assessment of punitive damages, and imposition of civil penalties. And, at best, it showed in concrete terms what the prosecutor could have effectively reminded the jury of in argument: that a real, unique human being suffered an undeserved death and left behind traumatized and bereaved loved ones.

Given, as shown in the next section, the tremendous degree to which the victim-impact evidence necessarily introduced emotionality rather than reason into appellant's penalty trial, its low probative value allowed it to undermine the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra*, 524 U.S. 721, 732), along with the other constitutional criteria for capital sentencing described earlier.

2. The Large Amount of Extremely Evocative Testimony Introduced Against Appellant Was Enormously Prejudicial

To introduce intense emotionality into the decision about whether the state will put a human being to death violates our society's deepest principles about life and liberty—and when they can be taken away by the government. If the state introduces victim-impact evidence, therefore, it "must not be so unduly prejudicial that its admission allows emotion to overwhelm reason." (*United States v. McVeigh* (10th Cir. 1998) 153 F.3d 1166, 1217; see also *Zant v. Stephens*, *supra*, 462 U.S. 862, 885; cf. *People v. Raley* (1992) 2 Cal.4th 870, 910, fn. 6.) To uphold the admission of the victim-impact evidence used

against appellant would require emptying the venerable principle underlying this rule of all content whatsoever. To understand this, it is necessary to begin with what this and other California courts have traditionally considered, and—in "normal" litigation still consider—to be inflammatory evidence. Absent its current status, which seems to place victim-impact evidence in a category of its own, the grossly inflammatory potential of the heavy doses of it given to appellant's jury would be instantly recognizable.

a. Traditional Views of Prejudice

In other contexts, this Court and the Courts of Appeal have recognized the dangerously prejudicial potential of far less powerful types of evidence than victim-impact testimony. For example, in *People v. Gurule* (2002) 28 Cal.4th 557, the prosecution had proposed to call a murder victim's mother during the guilt phase of a murder trial, to show the unlikelihood of his resisting a robbery attempt. As this Court recognized, "some of the evidence (e.g., that the victim was not carrying a weapon on the morning of his death) was to be introduced in a highly inflammatory manner (e.g., his mother knew this because she felt no weapon when she hugged him goodbye on the morning of his murder)." (*People v. Gurule, supra*, 28 Cal.4th 557, 622.) The evidence was eventually presented not through the mother's testimony, but through a stipulation, to reduce its emotional impact. The Court acknowledged, however, that, even presented in that manner, "[t]wo points—a brief description of the victim's religious background and the fact his mother hugged him the morning of his death—obviously carried the potential to inflame the passions of the jury against defendant." (*Id.* at p. 624.)

Similarly, in the same case, evidence was admitted regarding a victim's always carrying in her purse a prayer book in which she recorded information about significant family events. It was relevant to guilt, because of its

tendency to show that she would have resisted giving up the purse. This Court upheld the trial court's exercise of its discretion under Evidence Code section 352, but it also recognized the prejudicial potential of the evidence: "Certainly the trial court could have excluded the evidence due to its potential for prejudice." (*People v. Gurule*, *supra*, 28 Cal.4th 557, 654.)

"[E]vidence that a criminal defendant is a member of a juvenile gang may have a 'highly inflammatory impact' on the jury . . . ." (*People v. Williams* (1997) 16 Cal.4th 153, 250.) Trial courts are relied on to, and do, exclude gruesome photographs when their probative value is not great enough to justify their admission. (*People v. Weaver* (2001) 26 Cal.4th 876, 934.) Indeed, a number of photos to which appellant objected were excluded or partially covered on this basis at his trial. (RT 21: 3503–3529.) In *People v. Humiston* (1993) 20 C.A.4th 460, 480–481, it was error to admit evidence that a murder defendant previously used "187" to identify herself. This Court has found error in the admission of evidence of a co-perpetrator's violence on an occasion other than the offense being tried. (*People v. Bisogni* (1971) 4 C.3d 582, 588.) In another case, it was error to admit evidence of defendant's racism, although the victims of his offense were of the race towards which he had animosity. (*People v. La Vergne* (1966) 64 C.2d 265, 271.)

Relevant evidence is excludable for its prejudicial potential even though its impact would not discredit a party, and the prejudice would therefore be even more attenuated. (*People v. Phillips* (2000) 22 Cal.4th 226, 234 [court may exclude relevant evidence that a witness is a prostitute because of its possible inflammatory impact on the jury's evaluation of her credibility]; *People v. Peters* (1972) 23 C.A.3d 522, 532–533 [evidence of witness's homosexuality excludable as prejudicial, though it could establish bias]; *People v. Hillhouse* (2002) 27 Cal.4th 469, 496 [evidence of a crime victim's

drug use can be prejudicial]; *People v. Kelly* (1992) 1 Cal.4th 495, 523 [same].)

In civil cases, a plaintiff's being insured can be so prejudicial as to require exclusion of that fact even when it is relevant to some other issue. (*Helfend v. Southern Calif. Rapid Transit Dist.* (1970) 2 C.3d 1, 16–17 & fn. 23; 1 Witkin, Cal. Evid. (4th ed. 2000) Circum Evid, § 133, p. 482.) So can evidence of a decedent's moral character in a wrongful death case. (*Carr v. Pacific Tel. Co.* (1972) 26 C.A.3d 537, 545–546.) A wide range of other matters—none nearly as inflammatory as in-depth victim-impact testimony in a murder trial—are routinely excluded as too prejudicial, including "poverty of the plaintiff . . . [,] wealth of the defendant . . . [,] offer to settle or compromise . . . [,]other claims or litigation by the plaintiff . . . [,] subsequent precautions or repairs by the defendant . . . [,] gruesome or inflammatory real evidence . . . [,] offer of or withdrawn plea of guilty . . . [, and] degrading collateral matter offered to impeach . . . ." (1 Witkin, Cal. Evid., *supra*, Circum Evid, § 132, p. 482.) Courts have to operate in a different gear to be so solicitous of the need to exclude bias-evoking facts in these circumstances and yet effectively dismiss concerns about the inflammatory nature of victim-impact testimony.

b. The Impact of Victim Impact

If the same sensibility that this and other courts bring to each of the preceding situations is brought to the evaluation of detailed victim-impact testimony, the conclusion that its prejudicial impact dwarfs that sought to be avoided with the other kinds of evidence is inescapable. "The State recognizes the power of victim impact evidence. That is precisely why it fights so hard to introduce it. It is unquestionably powerful emotional evidence that appeals to the sympathies or emotions of the jurors." (*State v. Allen* (N.M. 1999) 994

P.2d 728, 769 (conc. & dis. opn. of Franchini, J.).)

In a Nevada case, *Hollaway v. State* (Nev. 2000) 6 P.3d 987, the prosecutor, in argument, included a sentence reminding the jurors that the family of the victim would spend no more holidays with her. (*Id.* at p. 993) This was error: "The statement encouraged the jury to impose a sentence under the influence of passion: 'holiday arguments' are meant only to appeal to jurors' emotions and arouse their passions. [Citation.]" (*Id.* at p. 994.)

The testimony here was not one photo, not a mention of a mother's hug or a victim's carrying a prayer book, or any other single impactful fact. As to the "holiday argument" outlawed in its briefest form in our neighboring state, the prosecutor asked five out of his six witnesses what holidays were like now, then reread several of the responses in his summation. (RT 49: 7298, 7315, 7341, 7352, 7370; 54: 8009, 8011, 8088.) As noted above, the victim-impact evidence as a whole produced, according to the trial judge "a very painful and agonizing [day] for everyone who was in the courtroom." (9/9/2002 RT 318.) Again, "I would say there wasn't a dry eye in the courtroom. Everybody was crying that day. It was a very emotional day for everyone." (*Ibid.*)

This, of course, included the witnesses, all six of whom "cried at various points during their testimony." (11/12/2002 RT 519.) This Court's need to rely on a written transcript—without hearing the witnesses' voices crack, seeing the pain on their faces, watching them cry, noticing how they handled the 28 photographs they showed the jury, and seeing how they left the witness stand after the draining experience of testifying—that need attenuates an appreciation for the impact that made the day that they appeared one that Judge Taylor said he "will always have with me." (9/9/2002 RT 318; Exs. 402–429.) Yet even reading the cold transcript is a very painful experience.

It is rare to get a trial judge's view of such testimony, but Judge Taylor is not alone. According to an Iowa federal judge, Mark Bennett,

> the "victim impact" testimony . . . was the most forceful, emotionally powerful, and emotionally draining evidence that I have heard in any kind of proceeding in any case, civil or criminal, in my entire career as a practicing trial attorney and federal judge spanning nearly 30 years. Indeed, I cannot help but wonder if *Payne v. Tennessee* . . . would have been decided the same way if the Supreme Court Justices in the majority had ever sat as trial court judges in a federal death penalty case and had observed . . . the unsurpassed emotional power of victim impact testimony on a jury. [After] four months . . . the jurors' sobbing during the victim impact testimony still rings in my ears.

(*United States v. Johnson* (D. Iowa 2005) 362 F. Supp. 2d 1043, 1107.) Judge Bennett added, "This is true even though the federal prosecutors . . . used admirable restraint in terms of the scope, amount, and length of victim impact testimony . . ." (*ibid.*), a restraint missing from appellant's trial. Citing a number of law review articles, he further noted, "Nor are my observations idiosyncratic." (*Ibid.*)

As noted previously, the Indiana Supreme Court, which bars victim-impact evidence not relevant to a statutory aggravating factor, found 29 pages of testimony by three witnesses to not be harmless error, without even needing to consider the remaining evidence, because of its inherent power. "While the victim's widow was giving some of the most compelling, emotional testimony imaginable, the prosecutor was affirmatively inducing [her] to continue relating heartbreaking narratives concerning the victim and his sons. We cannot say with any degree of confidence that the jury remained uninfluenced . . . ." (*Lambert v. State*, *supra*, 675 N.E.2d 1060, 1065, fn. omitted.) And, in another Riverside, California, case, less testimony than was

admitted here provoked Judge Edward Webster, while adamantly defending its admission, to add,

> This is some of the most dramatic testimony I ever had . . . . I suspect that there was not a dry eye among the jurors. I had to start thinking about other things, because I was almost to the point of where my eyes were moist. I dare say as you [defense counsel] were sitting here now, you were emotionally upset. The court reporter had a hard time with her composure. All that is—that is human in us had to be touched.[120]

(RT 15: 2333–2334 in *People v. Bridges*, No. S025355.)

It is well-recognized that most jurors lack the opportunities judges have had for learning to separate their feelings about emotionally evocative events from their decision-making. (*Gregg v. Georgia, supra*, 428 U.S. 153, 192 (plurality opn.); *People v. Sewell* (1989) 210 Cal.App.3d 1447, 1449; accord, *People v. Mockel* (1990) 226 Cal.App.3d 581, 587.) Thus, when it was illegal for juries to hear victim-impact testimony, the same was not true for sentencing judges: "The dangerous uses to which a lay jury may put a victim impact statement are not present when the statement is submitted to a dispassionate judge trained in the law and experienced in sentencing." (*People v. Sewell, supra*, 210 Cal.App.3d at p. 1450.) Conversely, jurors "will not be capable of disregarding victim-impact evidence's extreme prejudicial effects or avoiding its distorting and devastating impact." (*State v. Muhammad, supra*, 678 A.2d 164, 187 (dis. opn. of Handler, J.).)

If, therefore, Judges Taylor, Bennett, and Webster were so profoundly affected, the impact on the jurors is unimaginable. More specifically, if Judge Taylor could not, six years after appellant's trial, leave behind the emotions

---

[120]Appellant moved for the Court to take judicial notice of the comments in a motion filed shortly after the filing of the opening brief.

which the survivors' testimony evoked in him, there is no basis for hoping that the jurors could put them aside a few court days later, when they were deciding appellant's fate. Speaking to them just before that moment, the prosecutor acknowledged that "the pain, the heartache, the fear" that his witnesses had described "is so overwhelming that it's hard even to listen to it . . . ." (RT 54: 8003.) And it was no doubt the truth when, still addressing the jurors, he described the day that the victims' survivors testified as "one of the hardest days of your life." (RT 54: 8087.)

Moreover, no one instructed the jurors to put aside the feelings that made that day so hard. While refusal of a limiting instruction is complained of separately in Argument III, below, putting aside those feelings was probably a psychological impossibility in any event. Apart from the obvious reasons—that there was simply too much to put aside[121]—there is also the effect of the subjective nature of the sentencing decision. In determining what facts were proven, a disciplined person with some experience in doing so can largely set aside emotions and use reason to weigh the evidence. In contrast, at the penalty phase of a capital trial, since "the sentencing function is inherently moral and normative . . ." (*People v. Rodriguez*, *supra*, 42 Cal.3d 730, 779), "the sentencer is *expected* to subjectively weigh the evidence . . . ." (*People v. Box* (2000) 23 Cal.4th 1153, 1201.) Thus, for one who might turn away from emotions, there is no other direction to turn *to*. A juror must ultimately cast a vote based on what he or she feels is appropriate, after

---

[121]Cf. *Bruton v. United States* (1968) 391 U.S. 123, 135–136 (the shaky assumption that jurors' are able to follow a limiting instruction regarding a codefendant's extrajudicial inculpatory statement poses too great a risk to a defendant's substantial rights); *People v. Aranda* (1965) 63 Cal. 2d 518, 529–530 (same).

considering the relevant factors, and the emotions connected to the issue are a primary component of how one feels about it. There is no way around the conclusion that testimony like that admitted here poses enormous risks to the fairness of the jurors' decision-making processes.

c. Empirical Studies

The obvious inflammatory impact of the testimony; its use in a context where the jurors are performing a subjective evaluation, not an objective one; and, as shown below, its potential to erroneously convince them that the issue is a balancing of sympathies between the defendant and the victim's family, all demonstrate the likely prejudicial impact of introducing victim-impact information, in the manner and to the degree in which it was presented here. The limited empirical evidence available tends to show that the effect is not only likely, but real.

Mock jurors have been asked about the weight that various prosecutorial arguments carried with them. Both a brief statement about the victim being a pretty, young, unmarried lady of high morals, and a simple reminder that her family would celebrate all its Thanksgivings without her, had more influence than statements that crime was increasing in the absence of executions, that the prosecutor's office rarely sought death sentences, that we are in a losing war against a criminal element that must be eradicated like the enemy in any other war, and that we must remove cancers like the defendant from the body of our civilization to save it. These statements, each less effective than the victim-impact references, had all been held by an appellate court to be prosecutorial misconduct, banned because of their prejudicial

effect.[122]

In another study, half of the mock jurors were given a written victim-impact statement modeled after that in *Booth*. "[F]ifty-one percent of the students exposed to the victim impact statement voted for death, while only twenty percent of those not exposed voted for death."[123] A similar study, with live testimony, produced a 67%–30% differential.[124]

Interviews with actual jurors in South Carolina showed post-*Payne* increases in the role in deliberations of six of seven victim-related issues. Increases in attention to the victim's likely suffering and the family's grief were particularly marked.[125] There was also indirect evidence that victim-impact evidence increased the likelihood of a death verdict.[126] Many studies have shown that the greater the harm known to have been caused, the more the perpetrator is blamed, regardless of whether he or she foresaw or intended the

---

[122]Platania & Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials* (1999) 23 Law & Hum. Behavior 471, 476, 478–479, 481.

[123]Eisenberg, et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases* (2003) 88 Cornell L.Rev. 306, 317 (*Victim Characteristics*), summarizing Luginbuhl & Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death* (1995) 20 Am. J. Crim. Just. 1.

[124]Myers & Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy* (2004) 10 Psych., Pub. Policy & L. 492, 498 (Myers & Greene), citing Myers & Arbuthnot, *The Effects of Victim Impact Evidence on the Verdicts and Sentencing Judgments of Mock Jurors* (1999) 29 J. of Offender Rehab. 95.

[125]Eisenberg, et al., *Victim Characteristics*, *supra*, 88 Cornell L.Rev. at pp. 314–316.

[126]*Id.* at pp. 323, 325–328, 332, 334.

outcome.[127] Moreover, per another study, the greater the harm, the harsher the sentence recommendation.[128] These results must be considered while keeping in mind with what has been demonstrated above: that the probative value of victim-impact testimony may be greater than zero, but not by much. (See summary at p. 228.) What they show is that juries are unable to recognize the low level of helpfulness of the evidence. What is having an impact is its inflammatory nature.

d. Conclusion Regarding Prejudicial Effect

Courts have always believed that evidence with unusual emotional potency must be handled with care. They hold that, even when the issue is a strictly factual one like guilt or civil liability, some relevant evidence—almost always far less inflammatory than what was admitted here—can be so prejudicial as to require its exclusion rather than risk inflaming a jury against a party. The available empirical evidence on the effects of victim-impact evidence and argument—along with the eloquent remarks of some of the trial judges who have heard it—verifies what seems obvious in any event: such evidence and argument, even when it does not even approach the proportions reached in appellant's case, has an alarmingly powerful effect on juries.

This is unacceptable, and it would be even if the evidence had more substantial probative value. "Every care must be taken so that objective, meaningful distinctions are drawn between who lives and who dies." (*State v. Allen*, *supra*, 994 P.2d 728, 769 (conc. & dis. opn. of Franchini, J.).) "[V]ictim impact evidence . . . is . . . highly passionate and emotional. . . .

---

[127]Myers & Greene, *supra*, 10 Psych., Pub. Policy & L. 492, 497–498.

[128]*Id.* at p. 498, citing Myers et al., *Victim Impact Statements and Juror Judgments: The Effects of Harm Information and Witness Demeanor* (2002) 32 J. of Applied Soc. Psych. 2393.

Passion does not meaningfully distinguish between cases." (*Ibid.*)

The capital sentencing jury is supposed to "assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment," (*Monge v. California*, *supra*, 524 U.S. 721, 731–732), taking into account whatever else it learns about who the defendant is and how that person came to reach the point where he or she could kill. "[T]he 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." (*Id.* at p. 733, citation and quotation marks omitted.) Procedural protections, standards of proof, and the like mean little, however, if the jury's capacity to evaluate the issue before it is overwhelmed by a large quantity of evidence which, by its nature, reaches the heart, rather than the mind.

3. Spending a Day on Victim Impact Wrongly Demonstrates to the Jury That the Issue Is Sympathy for the Defendant Versus Sympathy for the Victims and Their Survivors

The problem is not only that the inflammatory nature of such extensive victim-impact evidence as admitted in appellant's trial far outweighed its limited probative value, although this is certainly enough to doom it. Creating a major victim-impact sub-phase of the trial created the false impression that the jury was to weigh sympathy for the victims' family against sympathy for appellant. This was not the weighing that the law calls for, and it was a contest appellant had to lose.

a. An Object Lesson for the Jury

When testimony about survivors' grief, anguish, and other reactions became a major part of appellant's penalty phase, it was, as this Court observed of facts given emphasis in a different manner, "singled out as a factor

which the state identifies as having particular relevance to the penalty decision." (*People v. Williams*, *supra*, 44 Cal.3d 883, 950 [discussing effect of making a fact a special circumstance].) And what was emphasized for the jurors was not only the content of the testimony, but its source. The act of family members in "testifying for the prosecution on the impact of the murder is tantamount to expressing a preference for the death penalty." (Dubber, *supra*, 41 Buff. L.Rev. 85, 127.)

With the state's placing such emphasis on evidence about what kind of people the victims were, how their killings affected their survivors, and the latter's apparent unanimous desire for a death verdict,[129] attention shifted from the offense and the offender to who was more deserving of the jury's sympathy, appellant or those whom he harmed.[130] Regardless of the words used to describe the jury's task, the court's *actions* in presenting a penalty phase where one family presented mitigation evidence and the others presented aggravation produced that result. "The jury no longer determines the defendant's individualized moral desert; the jury now chooses between two contestants: the defendant and the victim . . . ." (Dubber, *supra*, 41 Buff. L.Rev. 85, 86–87.) Furthermore, as one researcher explains, "[A] case in mitigation . . . often heavily depends upon family testimony, and VIE [victim-

---

[129]The jurors had no way of knowing that defendants may not present survivors to express a preference for a life sentence. (See *People v. Smith*, *supra*, 30 Cal. 4th 581, 622–623.) Although the rule is formally the same for those who favor death (*id.* at p. 622), support for the prosecution's cause is evident from the act of aiding it.

[130]Catherine Mans testified that she could feel the spirits of her son and Jones in the courtroom. (RT 49: 7340.) For those jurors whose spiritual beliefs permitted them to credit her perception, even the souls of the victims themselves were apparently weighing in on the prosecution's side.

impact evidence] may diminish a juror's receptivity to the power of such mitigating evidence." (Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims* (2003) 88 Cornell L.Rev. 343, 372 (*The Capital Jury*); see also *State v. Muhammad, supra*, 678 A.2d 164, 196 (dis. opn. of Handler, J.) ["An inescapable consequence [of allowing testimony demonstrating the value of the victim] is that jurors will compare the two sets of character testimony"].) Thus, in an actual case where a juror described a "battle between the two mothers," the juror felt sorry for the defendant's mother but ultimately disregarded her testimony. (Sundby, *The Capital Jury, supra*, 88 Cornell L.Rev. at pp. 372–373.)

This is unsurprising. As students of the emotional distancing required to sentence a person to death have pointed out, victim-impact testimony evokes tremendous sympathy for the suffering of those like ourselves. The cause of the pain was, in contrast, a person unlike us. Such sympathy can "thwart[] the jurors' effort to understand the person who has caused the suffering" and even relieve them from trying to do so. (Haney, Death by Design, *supra*, p. 156, citing Nusbaum, Upheavals of Thought: The Intelligence of Emotions (2001), p. 447, and Bandes, *Empathy, Narrative, and Victim Impact Statements* (1997) 63 U.Chi. L.Rev. 361; cf. *People v. Smallwood* (1986) 42 Cal.3d 415, 428 [other-crimes evidence is generally inadmissible on guilt in part because "'the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor' [citation]"].) The Utah Supreme Court has voiced a similar concern: "[A] judge or jury considering victim impact evidence is more likely to empathize with the family's tragedy, perhaps asking, 'What if I, or a member of my family, were the murder victim?' Such empathy dangerously increases the possibility of improper passion or prejudice." (*State v. Carter* (Utah 1994) 888 P.2d 629, 652.) Or,

as a New Mexico Supreme Court Justice put it:

> Just reading the emotional testimony of [a witness who described a mother's learning of her daughter's murder] is painful. The effect on the jury, who was present in the room when she spoke, is incalculable. The jury was not just a passive observer, it was being asked to do something about the family's pain: to return a death verdict.

(*State v. Allen, supra*, 994 P.2d 728, 772 (conc. & dis. opn. of Franchini, J.).) This dynamic is powerful enough so that it can affect sentencing judges. Thus, in *State v. Smith* (Ohio App. 2005) 2005 Ohio 3836, the judge in a vehicular-homicide case heard a number of victim-impact witnesses and chose a sentence that would not "demean the seriousness of the offense," instead of one based on statutory criteria. (*Id.* at ¶ 9.) By "seriousness of the offense," the judge meant its consequent loss of a life, forgetting that it would be true of any vehicular homicide. (*Id.* at ¶ 17.) The judgment was reversed because "the sheer number of victim impact statements . . . engaged the court's sympathy and led the court to forget its duty." (*Id.* at ¶ 16.)

Appellant should not have had to face a jury that felt that its verdict would be a matter of choosing which side deserved its sympathy more or was concerned about whether its verdict would show the survivors how seriously it took appellant's conduct.

b. Further Confusion Through Inevitable *Booth* Violations

This tendency to see the issue as whether sympathy for the victims and their survivors outweighs sympathy and other considerations favoring the defendant, and the consequent urge to vindicate the survivors, is the de facto situation whenever victims' survivors testify for the prosecution. It is intolerably heightened when, as here, family members give their opinions of the crime and those responsible, in violation of the Eighth Amendment as

interpreted by the portion of *Booth v. Maryland*, *supra*, 482 U.S. 496, which is still good law.[131] The giving of such opinions is permitted in California if prosecutors use some care in eliciting them. Witnesses may characterize the crime and the criminal if such a characterization is part of an answer to a question about their reactions to the event. (*People v. Pollock*, *supra*, 32 Cal.4th 1153, 1182.)

This happened over and over in appellant's case, making it even clearer where the witnesses stood on the ultimate question facing the jury. Lydia Roybal-Aragon, when asked her reaction to learning of her stepson's killing, replied that she wondered why anyone would do something like that to a kind gentle soul who never hurt anyone. Accidents can happen, but "no one should do that to someone else." It was "senseless[,] . . . sadistic meanness" to intentionally go out and find someone vulnerable, pretend to be interested and friendly, shoot him, ask if it hurts or burns, to laugh, shoot him six more times, "try out your new shotgun on him. And to say, 'Oh, look at the big hole I left.' That hole was our son." (RT 49: 7289.)

Much later, she concluded her testimony with more comment on the crime:

> [j]ust imagine him lying there with a gunshot to the abdomen, and then six more bullets in the chest. And the one in the neck. And them laughing and leaving, leaving him there to die alone with no one to cradle him, hold him, and say that you love him and to say good-bye. And no one to comfort him. And then for him to just lay there by himself for God knows how long.

---

[131]In *Payne*, "[t]he high court overruled *Booth* in part, but it left intact its holding that 'the admission of a victim's family members characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment.'" (*People v. Smith* (2003) 30 Cal.4th 581, 622.)

> And to know that while he is laying there they are using his ATM card and stealing his money . . . .
>
> So he is all alone, and he dies alone. And we aren't there to do anything. Even if we were there, we couldn't have saved him, because they left him for dead. They made sure that he was dead.

(RT 49: 7301.)

Stephanie Aragon testified that she felt like someone had come up to her older brother and taken him away like they owned him. (RT 49: 7324.) James Jones, Timothy Jones's father, commented, "But I can't see that anyone would want to take a kind and generous kid like he was, and probably who would have hugged him and kissed him and told him that he loved him, how they could take his life." (RT 49: 7371.) (Cf. *United States v. Bernard* (5th Cir. 2002) 299 F.3d 467, 480 [plain error in mother's statement to defendants: "I'm sorry for you, for your heart to be so hard, you couldn't even see the innocence of the two you've killed"].)

These witnesses supplied compelling characterizations of the apparent cold-heartedness of their loved ones' murders, including, in Roybal-Aragon's case, inviting the jury to imagine what it was like for Jose. (See also RT 49: 7349, 7350 [Angela Mans: she saw fear on the face of Timothy's body]; 7344 [Catherine Mans: she still pictures him struggling for breath].) In California, unlike many other states, *the prosecutor* may urge the jury to consider the offense from the perspective of the victim. (See, e.g., *People v. Haskett* (1990) 52 Cal.3d 210, 247; cf. *People v. Spreitzer* (Ill. 1988) 525 N.E.2d 30, 45 [it was "highly improper . . . to invite the jurors to enter into some sort of empathetic identification with the victims"]; *Von Dohlen v. State* (S.C. 2004) 602 S.E.2d 738, 745 [listing numerous jurisdictions that ban such argument as inviting jurors to decide case from a biased perspective].) And he

could characterize the crime and the behavior and state of mind of its perpetrators. But under the Eighth Amendment, a person with the peculiar perspective and compelling appeal of a survivor of a homicide victim may not. (*Payne*, *supra*, 501 U.S. 808, 830, fn.2; *Booth v. Maryland*, *supra*, 482 U.S. 496, 508.)

Except in California, where prosecutors have an easy—albeit unconstitutional—way around *Booth's* constraints. In *People v. Pollock*, *supra*, 32 Cal.4th 1153, witnesses characterized the crimes as savage and brutal. Because, like the witnesses against appellant, they did so in the context of explaining their own reactions, this Court held that they were properly testifying about how the murders affected them. (*Id.* at p. 1182.) The Eighth Amendment must circumscribe how witnesses can explain their experiences (permitting, "I felt shock," or at the most, "I was shocked by the manner of the killing," instead of "the savagery of the killing shocked me"). But since California frames the issue as whether it is proper to let witnesses answer a question about their experiences, the rule that they can describe those experiences now supposedly trumps *Booth's* constitutional holding. (See *People v. Robinson*, *supra*, 37 Cal. 4th 592, 657 (conc. opn. of Moreno, J.) [characterization of imagined version of crime, though "couched in the language of victim impact testimony, i.e., in terms of a 'videotape' running in the mind of the victim's mother," still violates *Booth*].)

As explained previously, the victim-impact witnesses already played an implicit role as advocates for a death sentence for appellant, by their appearing on behalf of the party seeking it and their giving reasons to impose it. When they told the jury their opinions about the crimes and their perpetrators that role became more explicit. Consequently, the de facto framing of the question as "who is more deserving of consideration, the defendant or those he

harmed?" became more explicit and impactful as well.

c. Reinforcement in Argument

Allowing an extensive victim-impact case and leaving the jury unguided on how to use it—both of which were actions permitted by much of this Court's jurisprudence—enabled the prosecutor to directly urge the jury to see the balance-of-sympathies question as significant. He began in his penalty-phase opening statement:

> The penalty phase . . . will be basically a battle for your sympathy and compassion. [¶] The evidence and the testimony of the victims' families and friends will show that sympathy and compassion should be theirs. But just as the defendant stole their lives and their money, he will try to steal the sympathy and the compassion that is rightfully theirs.

(RT 48: 7271.) In his summation, he read at length the testimony of Lydia Roybal-Aragon. Then, apparently anticipating a defense plea for sympathy, he concluded, "You can weigh her pain. You can consider that. You can consider that when the defendant says: feel sorry for me." (RT 54: 8008–8010 [quotation at 8010].) He read heartrending parts of Leigh Hopkins's and Stephanie Aragon's testimony, then said, "And the defendant says: Feel sorry for me." (RT 54: 8010–8012 [quotation at 8012].) This motif was repeated again with Catherine Mans, then with Angela Mans. (RT 54: 8012–8016.) The approach was foreshadowed several times in voir dire. (RT 15: 2670–2671; 18: 3177; see also 18: 3127.)

According to the law and the Constitution, however, the question was supposed to be what was the appropriate way to punish Orlando Romero, given what he did, who he was, and how he got to be who he was. (See *Zant v. Stephens*, *supra*, 462 U.S. 862, 879; *People v. Musselwhite*, *supra*, 17 Cal.4th 1216, 1267–1268.) Bombarding his jurors with evidence—and thereby

supporting argument—that focused them on who was more deserving of their sympathies emphasized a question that was not only the wrong one, but one with an undebatable answer in every case. Doing so undermined any chance of reliability and an individualized sentence. It undermined appellant's right to have compassion and sympathy actually considered by his jurors. (*People v. Lanphear* (1984) 36 Cal. 3d 163, 165–166, citing *Eddings v. Oklahoma* (1982) 455 U.S. 104 and *Lockett v. Ohio* (1978) 438 U.S. 586.) Worse, framing the issue in this tilted way conflicted with the principle that "sentencing factors should not inject into the individualized sentencing determination the possibility of . . . 'bias in favor of the death penalty.'" (*People v. Bacigalupo*, *supra*, 6 Cal.4th 457, 477, quoting *Stringer v. Black*, *supra*, 503 U.S. 222, 236; see also *Starling v. State* (Del. 2005) 882 A.2d 747, 758–759 [instructing "the jury that sympathy for the victims and their families should not influence their sentencing decision" was appropriate]; cf. *Hall v. Catoe* (S.C. 2004) 601 S.E.2d 335, cert. den. sub. nom. *Ozmint v. Hall* (2005) 544 U.S. 992 [argument comparing worth of victims' lives to that of defendant's was prejudicial error].)

d. Focus on Least Serious Crime, Most Appealing Victim and Witnesses

The way the victim-impact sub-phase threw the penalty trial off track was demonstrated vividly by its focus on the homicide for which appellant was least culpable but which permitted the most compelling victim-impact case. In the worst version (from appellant's perspective) of the facts that a juror could have believed, appellant initiated the shootings at Lake Mathews, killing Joe Mans before any other shots were fired. That act precipitated Timothy Jones's bolting, and his pursuit and killing by Self, in which appellant—per Munoz—was also involved. (RT 39: 5911–5919, 5922–5924.)

In the crimes against Jose Aragon, which came near the end of the string of offenses, appellant played a strange but much less culpable role. He came across in both Munoz's testimony and his own statement as someone who was drawn to Aragon and expressed opposition to hurting him, but who was passive and almost seemed blind to the intent of Self (or Munoz). Appellant, chatting with Aragon, was surprised when a shot from a .22 felled him. He helped him move to a place of comfort and expressed either concern or a very simple curiosity about how the wound felt. When Munoz and Self moved in to interrogate Aragon about his ATM card—and, ultimately, kill him—appellant moved away from what was happening, taking the tool boxes that were of interest to him back to the Colt a considerable distance away. (3SCT 2: 299–304, 320–321; RT 39: 5979–5995, 6258–6260, 6262.) That, as he told interrogators, what happened to Aragon was "[n]ot my thing. . . . Didn't want to have nothing to do with it" (3SCT 2: 320–321), was further corroborated by his committing no more crimes with the others after that shooting.[132] It was also corroborated by his prior behavior, at least after Lake Mathews. In every crime in the two-month period in which victims testified as to who played what role, appellant was portrayed as not aggressive and even—to the extent that one can be while committing a robbery—considerate. (See pp. 114–115, above.) Given the subtext of drug use that filtered through the story of these crimes,[133] jurors who were focused on questions of culpability might have wondered if appellant was not in some kind of a haze

---

[132]Self and Munoz together shot and robbed Feltenberger afterwards, but appellant shifted to solo robberies, where no injury resulted. (See RT 32: 4944 et seq. [Feltenberger]; 39: 6012–6020 [same]; 36: 5525–5542 [Greer]; 37: 5559– 5571[Beliveau].)

[133]See the portions of the record cited at p. 9, above.

when the others killed Aragon. Moreover, even if he was entirely lucid, while he did not prevent the Aragon killing, he surely was not fully part of it.

However, because Jose Aragon was the most "worthwhile" victim, i.e., a promising engineering student, the person lovingly involved with younger siblings, the one whose funeral was standing-room only, the one who was shot during preparations for Thanksgiving, and the one with the most articulate (and college-educated) survivors, well over half of the victim-impact sub-phase was devoted to him, not to the young men as to whom far less could be said about their backgrounds, careers, prospects, and relationships.[134] (Compare RT 49: 7275–7329 with 7330–7372.) Similarly, when the prosecutor read extensively from the victim-impact testimony in argument, twice as much came from the Aragon witnesses as from those from either the

---

[134]This aspect of the prosecution's case also validates a related concern of many courts and commentators. Where portrayals of some victims as particularly upstanding members of the community are possible, such portrayals can either encourage invidious comparisons between the relative worth of the lives of the defendant and of the victim or encourage more frequent imposition of death sentences where the victim is of greater social status, exacerbating the class and racial biases that are already inherent in use of the death penalty. (See, e.g., *State v. Carter*, *supra*, 888 P.2d 629, 652; *Turner v. State*, *supra*, 486 S.E.2d 839, 842; Nadler & Rose, *Victim Impact Testimony and the Psychology of Punishment* (2003) 88 Cornell L.Rev. 419, 421–422; Note, *Thou Shalt Not Kill Any Nice People: the Problem of Victim Impact Statements in Capital Sentencing* (Fall, 1997) 35 Am. Crim. L.Rev. 93, 105–110.)

Such concerns were among the reasons for the *Booth* court's ban on victim-impact evidence. (482 U.S. at p. 506 & fn. 8.) The *Payne* majority responded, too simplistically, as appellant's case shows, "[V]ictim impact evidence is not offered to encourage comparative judgments of this kind." (501 U.S. 808, 823.) The sentence may be true, but it misses the point. Permitting the use of extensive victim-character testimony permits its more effective exploitation when victims, and/or their survivors, are more appealing.

Jones or Mans families. (RT 54: 8008–8018.) Tremendous attention, therefore, went to the enormity of survivors' losses, as opposed to the crucial question of the enormity of what appellant did.

e. Conclusion Regarding Confusing the Jury

In sum, not only was the prejudicial effect of the victim-impact evidence enormous, but the very act of introducing such a large quantity of it confused the jury. The focus shifted to who was more deserving of sympathy, the victims and their families or the defendant and his. The evidentiary picture supplied a basis for the prosecutor to argue that, indeed, this was a major question for the jury. The effects were accentuated by the witnesses' becoming more direct advocates for death through the inevitable, but unconstitutional, introduction of their personal characterizations of the offenses and the offenders. Finally, confusion of the issues was both confirmed and heightened by the prosecution's disproportionate focus on the homicide in which appellant had the least involvement, but which permitted the most appealing victim-impact presentation, causing a serious problem, as to which *Payne's* only difference from *Booth* was a belief that it would not happen. (See p. 251, fn. 134, above.)

4. Admission of the Testimony Violated Appellant's Eighth-Amendment and Due-Process Rights

Appellant's trial was a failed experiment in broad application of this Court's sometimes-unqualified statements that evidence of specific harm caused by a murder is admissible. (E.g., *People v. Pride* (1992) 3 Cal. 4th 195, 262; *People v. Fierro, supra*, 1 Cal.4th 173, 235; see also *People v. Huggins* (2006) 38 Cal. 4th 175, 238; RT 48: 7174–7175.) The result was a multifaceted violation of rights that should have protected appellant when a jury was deciding whether the state will execute him.

Appellant showed previously (under heading E.1) that the victim-impact testimony had little probative value and actively misled the jury, because

- it failed to provide evidence that appellant's crimes differed, in their effects, from a wide range of intentional and accidental homicides, while creating the powerful illusion that the offenses were aggravated;
- the state recognizes in non-death cases that harm caused indirectly to those who were not the targets of misconduct bears no rational relationship to punishment;
- the evidence tended to idealize the victims and oversimplify the survivors' experiences, in a manner subject to no reality-testing, while the absence of adversarial controls permitted incompetent lay opinion evidence and testimony about others' experiences; and
- the vast majority of the evidence was cumulative to the small amount that would exhaust the only possible probative value: the purported need of reminding the jurors that murder is a serious crime that harms real people.

Section E.2 then showed that, by traditional standards of prejudice—those applied to every other type of evidence—the capacity of the testimony to evoke strong emotions was extreme, i.e., of a different order of magnitude than that of evidence that normally causes courts serious concern in probative-vs.-prejudicial balancing. The painful experience of reading even a summary of the testimony (Section B) confirms the prosecutor's label of "overwhelming" and the judge's comments about its profound effects. Such testimony was admitted in a realm—the "subjective" penalty-selection choice (*People v. Box*, *supra*, 23 Cal.4th 1153, 1201)—where feelings predominate over fact-finding and the effect of arousing the emotions is therefore unbounded. If this were

not enough, the victim-impact case strongly, and wrongly, suggested that a major determinant of penalty was which "side" was more deserving of the jurors' sympathies. It strengthened that effect with *Booth* violations and the shift of focus to the crime where appellant was least culpable but where the most powerful presentation could be made. And, in doing so, it validated longstanding policy concerns that victim worth will be a yardstick by which juries determine penalty.

Once these facts are acknowledged, it would require gross distortions of both federal constitutional law and this Court's own traditional standards of fairness in death-penalty and all other cases to find that the victim-impact case did not infuse appellant's trial with serious error. The sentencer's reliance on information that was unreliable in its black-and-white portraits of the victims and of the experiences of the survivors, unreliable for its inclusion of speculative and hearsay testimony about people not present, and—most especially—misleading in its appearance of showing an aggravated homicide, all meant that the sentencer lacked the accurate information required by both due process in any sentencing proceeding[135] and the Eighth Amendment in a capital one.[136] By "creat[ing] the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance," the misleading and unreliable testimony further violated the Eighth Amendment by creating "bias in favor

---

[135]*Townsend v. Burke*, *supra*, 334 U.S. 736, 741; *People v. Chi Ko Wong*, *supra*, 18 Cal.3d 698, 719.

[136]*Gregg v. Georgia*, *supra*, 428 U.S. 153, 190 (plurality opn.); *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 590; *People v. Bacigalupo*, *supra*, 6 Cal.4th 457, 477.

of the death penalty."[137] Thus, factor (a)—rather than appropriately guiding the jury as to what sentence to impose—became impermissibly vague, in the sense of seeming to support imposition of a death sentence in circumstances that might not justify such support.[138] Even apart from the poor-quality information, the excessive testimony violated the Eighth Amendment's requirement of reliable capital decision-making[139] by overwhelming the jury with prejudicially emotional material, the vast majority of which had no non-cumulative probative value on the central issue of appellant's culpability. The infusion of such emotionality also violated the due-process requirement of a fundamentally fair proceeding.[140] All of these dynamics permitted arbitrary and capricious imposition of the death penalty, further rendering the proceedings at odds with the Eighth Amendment.[141] The rationality in sentencing that the Eighth Amendment requires[142] was thus absent, a fact thrown into relief by the state's disinterest in using the ripple effects of any other kind of misconduct in assessing appropriate penalties. The Eighth

---

[137]*Stringer v. Black*, *supra*, 503 U.S. 222, 235–236; *People v. Bacigalupo*, *supra*, 6 Cal.4th 457, 474.

[138]*Stringer v. Black*, *supra*, 503 U.S. 222, 235–236; *People v. Bacigalupo*, *supra*, 6 Cal.4th 457, 473–474.

[139]*Monge v. California*, *supra*, 524 U.S. 721, 732; *People v. Horton*, *supra*, 11 Cal.4th 1068, 1134.

[140]*Payne*, *supra*, 501 U.S. 808, 825; *Edwards*, *supra*, 54 Cal. 3d 787, 835.

[141]*Pulley v. Harris*, *supra*, (1984) 465 U.S. 37, 53; *People v. Williams*, *supra*, 44 Cal.3d 883, 950.

[142]*Beck v. Alabama*, *supra*, 447 U.S. 625, 637–638; *People v. DeSantis* (1992) 2 Cal.4th 1198,1231.

Amendment's further requirement of an individualized sentencing determination based "upon the circumstances surrounding both the offense and the offender"[143] was violated, again because of the misleading use and inaccurate nature of the evidence placed before the body that was to make that individualized determination—especially the way in which that evidence masqueraded as being individualized to the particulars of how bad appellant's crimes were, while it was but the instantiation of generic phenomena common to sudden, violent deaths. The imperative of an accurately individualized sentencing choice was also violated by the way the rational inputs to the jury's process were overborne by emotionality.

All this is apart from the diversion of the decision-makers' attention to the bogus question of whether victims' survivors or appellant most deserved their sympathies. The de facto framing of the issues in this manner was a further assault on the reliability, rationality and non-arbitrariness, individualized consideration, and fairness required by the Eighth and Fourteenth Amendments.

No more need be said to show that there was serious error here. However, the trial court fell into error in part because of lack of concrete guidance from this Court. The next section of this argument, therefore, provides several options for providing such guidance.

F. This Court Should Ban or Severely Restrict the Use of Victim-Impact Evidence

In this section, appellant first shows that *Payne v. Tennessee* poorly justifies its own limited holding and argues that California should end its experiment with permitting victim-impact evidence. When this Court first

---

[143] *People v. Musselwhite*, *supra*, 17 Cal.4th 1216, 1267–1268; see also *Zant v. Stephens*, *supra*, 462 U.S. 862, 879.

reversed itself and decided to allow such evidence, the litigants before it treated *Payne* as settling all fundamental questions about the use of victim-impact evidence, except for whether it is a statutory aggravator in California. (*Edwards*, *supra*, 54 Cal. 3d 787, 833; see also *People v. Boyette*, *supra*, 29 Cal.4th 381, 444 [in *Edwards* this Court "followed the high court's lead"].) It is now important, therefore, to understand the limitations of the *Payne* opinion and why commentators' condemnation of its logic has been nearly unanimous.[144] Given the new information presented above and the weaknesses of *Payne*, there is a strong basis for abandoning entirely the victim-impact experiment. Alternatively, if victim-impact evidence is still to be received, the Court can choose between a case-by-case approach to adjudicating its propriety and one that cabins such evidence with the ameliorative constraints adopted in other jurisdictions, rather than leaving trial courts largely unguided.

1. *Payne v. Tennesee* Authorizes Only the Use of Victim-Impact Material Which Is So Limited That It Can Neither Divert Nor Inflame the Jury, and the Foundations for That Authorization Are Weak

While several differences separated the factions of the high court that split in *Booth*, *Gathers*, and *Payne*, the primary one was about whether the contested evidence is entirely "irrelevant to a capital sentencing decision." (*Booth v. Maryland*, *supra*, 482 U.S. at p. 503.) The *Payne* majority noted that *Booth's* conclusion was "based on two premises: that evidence relating to a particular victim or to the harm that a capital defendant causes a victim's family do [*sic*] not in general reflect on the defendant's 'blameworthiness,' and that only evidence relating to 'blameworthiness' is relevant to the capital sentencing decision." (501 U.S. at p. 819.) The opinion moved on to reject

---

[144]See surveys of such comment quoted on page 134, above.

Booth's conclusion, without explicitly challenging either premise. Its reasoning, however, may have been intended to question the first, for it marshaled purported evidence of historical and contemporary practices treating harm caused by a defendant as pertinent to sentencing.

The court noted that differential harms caused by equally culpable acts have traditionally distinguished some offenses from each other (e.g., murder versus attempt) and thus determined the available range of punishment. (*Payne*, *supra*, 501 U.S. at pp. 819–820.) The Court failed to acknowledge, however, that this has already happened in a capital murder case before the sentence-selection stage.

The majority opinion also asserted that the harm caused has been an important factor in a judge's *selection* of sentence from among those available for a particular offense, independent of the defendant's culpability. (*Id.* at pp. 819–820.) The authorities relied on for that proposition failed to support it. The *Payne* majority cited the Federal Sentencing Guidelines. (*Payne*, *supra*, 501 U.S. at p. 820.) But the Guidelines—none of which was specifically cited in *Payne*—do not create qualitative differences in punishment unrelated to a defendant's mens rea.[145]

---

[145]Few of the Guidelines address harm. U.S.S.G. §§ 5K2.2 and 5K2.3 do permit upward departures for physical or extreme psychological injury to a victim, based in part on the degree of the injury, but they caution that departures should be less substantial for unintentional injury. Similarly, if an offense causes death, an upward departure may be permissible, but its propriety also depends on factors related to culpability. (§ 5K2.1.) For economic crimes, a larger taking is subject to greater punishment, but the factor is inseparable from a defendant's culpable choices. (§§ 2B1.1 et seq.) The only example of a harm-only departure is an increase in punishment for attempted murder if the victim sustained permanent or life-threatening injury. (§ 2A2.1.) None of the guidelines extends the concept of "harm" beyond the (continued...)

Payne's only other source was S. Wheeler, K. Mann, & A. Sarat, Sitting in Judgment: The Sentencing of White-Collar Criminals (1988) (Wheeler). The opinion quoted the academic monograph about white-collar crime to the effect that, to sentencing judges, harm "is a measure of the seriousness of the offense and therefore . . . a standard for determining the severity of the sentence that will be meted out." (*Id.* at p. 56, quoted in *Payne*, *supra*, 501 U.S. at p. 820.) The quotation, however, was removed from its context in a way that totally distorted its meaning. "Harm" was the "social harm" caused by a crime, its "gravity." (Wheeler, *supra*, at pp. 54–55.) Every factor given that label by the study's authors related to the defendant's culpable choices, like the vulnerability of the victim.[146] None pertained to people not targeted by the offender. Contrary to *Payne's* claims, until it was decided, "[t]he criminal law [took] account of the general injury to society as a whole that arises from crime, not the peculiar hurt suffered by any of its particular members." (*People v. Mickle* (1991) 54 Cal.3d 140, 200 (conc. opn. of Mosk, J.).)

Payne is questionable in other respects, further undermining its fitness as a foundation for California law. Its casual leap from use of more limited, traditional forms of harm to the long-term ripple effects of the offense on non-

---

[145](...continued)
direct victim of the crime.

[146]The other factors: whether there were individual (versus institutional) victims, whether there was violence, the amount of property taken (in theft offenses), whether there was a scheme that lasted over time, and whether it involved an abuse of trust. (Wheeler, *supra*, at pp. 62–80.)

victims is dubious.[147] The further leap from considering harm in defining offenses and—supposedly—in deciding whether to imprison for a longer or shorter term, to the qualitatively different choice of life versus death is problematic.[148] So is the *Payne* majority's failure to address the logic which *Booth* quoted from *People v. Levitt, supra*, 156 Cal.App.3d 500, 516–517:

> We think it obvious that a defendant's level of culpability depends . . . on circumstances over which he has control. A defendant may choose, or decline, to premeditate, to act callously, to attack a vulnerable victim, to commit a crime while on probation, or to amass a record of offenses . . . . In contrast, the fact that a victim's family is irredeemably bereaved can be attributable to no act of will of the defendant other than his commission of homicide in the first place.

(*Booth v. Maryland, supra*, 482 U.S. 496, 504, fn. 7.) Finally, a key premise underlying the assent of at least two members of the six-person majority was the belief that those who kill are psychically equipped with enough empathy to fully recognize the harm they will be causing to survivors. Thus, it is fair to measure punishment by such foreseeable outcomes. "Just as defendants know that they are not faceless human ciphers, they know that their victims are

---

[147]See, e.g., Vitiello, Payne v. Tennessee: *A "Stunning Ipse Dixit," supra*, 8 Notre Dame J.L. Ethics & Pub. Pol'y 165, 211–223; see also *Jones v. United States* (1999) 526 U.S. 227, 257– 258 (dis. opn. of Kennedy, J.) (marshaling examples of consideration of harm in sentencing, all of which are objective categorical determinations, like whether a direct victim received serious bodily injury).

[148]"As many commentators, among them H.L.A. Hart and John Rawls, have pointed out, there exists an important distinction between justifying a death penalty statute and justifying a particular death sentence." (Dubber, *supra*, 41 Buff.L.Rev. 85, 140, fns. omitted; see also, e.g., *Payne, supra*, 501 U.S. 808, 861–862 (dis. opn. of Stevens, J.); *State v. Muhammad, supra*, 678 A.2d 164, 195 (dis. opn. of Handler, J.); Dubber, *supra*, 41 Buff. L.Rev. 85, 133–137.)

not valueless fungibles; and just as defendants appreciate the web of relationships and dependencies in which they live, they know that their victims are not human islands . . . ." (*Payne*, *supra*, 501 U.S. 808, 838 (conc. opn. of Souter, J., joined by Kennedy, J.).) Surely this Court, with an institutional familiarity with capital murder which the high court lacks, knows that this is an unjustifiably sanguine view. Rather, given the psychological deficits of those who commit special-circumstances murder, "it seems doubtful that death-eligible murderers are so reflective before committing a heinous crime," (Greenberg, Is *Payne* Defensible, *supra*, 75 Ind. L.J. 1349, 1374; see also *Mosley v. State* (Tex.Crim.App. 1998) 983 S.W.2d 249, 261, fn. 16 [presupposing that in general the defendant is "unaware, at the time of the crime, of the victims' character or of the impact that the victims' deaths will have on others"].)

Apart from the grave weaknesses in *Payne's* reasoning, its legal effect was, as noted above, limited to its disapproval of *Booth's* conclusion that all such evidence is irrelevant and therefore—given its potential for mischief—can never be admitted. This point bears emphasis, for, in *People v. Brown* (2004) 33 Cal.4th 382, this Court's rejection of a proposal for restricting victim-impact evidence was based, in part, on its inconsistency with *Payne's* rationale that the harm caused by a defendant has been an important concern of the criminal law. (*Id.* at p. 398.) But the "rationale" referred to was one which the high court said a state could adopt without violating the federal Constitution, not a point of view required by the Constitution. (*Payne v. Tennessee*, *supra*, 501 U.S. 808, 825; see also *id.* at p. 831 (conc. opn. of O'Connor, J.).)

Inconsistency with that rationale is a virtue. This is so because, as explained above, *Payne's* theory is misleading, both in its suggestion that

harm—separate from culpable knowledge or intent—had previously played a significant role in sentence-selection, and also in using the abstract term *harm* to obscure the revolutionary nature of considering harm to those other than direct (and therefore intended or likely) victims.

Moreover, when *Payne* held that victim-impact evidence was not constitutionally required to be treated as irrelevant per se, there was no statement that such evidence is *highly* probative and no enthusiastic endorsement of its use. There was certainly no implication that, because victim-impact evidence is not per se inadmissible, it is all presumptively admissible. (Cf. *People v. Smith*, *supra*, 35 Cal.4th 334, 365.) And there was no denial that there are risks of inflaming or diverting a jury. Rather, there were repeated statements—seemingly not taken to heart by this Court—that courts must take care to keep that from happening, and that it was their capacity to do so that negated any need for a general prophylactic ban. (*Payne*, *supra*, 501 U.S. at p. 825; *id.* at pp. 831 (conc. opn. of O'Connor, J.), 836–837 (conc. opn. of Souter, J.).)

The limited nature of *Payne's* holding; the weaknesses in its logic; and the new information provided by appellant on the unique capacity of traumatic-bereavement evidence to seem to show tremendous aggravation when it shows none at all, other limits on the probative value of typical victim-impact evidence, its likelihood of confusing the jury as to the issues, and its pervasive prejudicial effect, all mean that *Payne* fails to justify California's practice of admitting victim-impact evidence that exceeds that permitted in *Payne* itself by several orders of magnitude. And yet to date it is the sole support for this Court's victim-impact jurisprudence.

2. This Court Should Ban Victim-Impact Evidence in California

a. Federal Constitution

Payne v. Tennessee was wrong. For all the reasons set forth above, this Court should no longer follow it.[149] This Court has "an independent constitutional obligation to interpret the federal Constitution . . . . (See Cal. Const., art. XX, § 3 [judicial officers swear an oath to support the Constitution of the United States].)" (*Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 346 (dis. opn. of Werdegar, J.).) Moreover, a state court operating in the Eighth Amendment area, which is dynamic because it is based on society's evolving standards of decency, is required to look at both those standards and the knowledge and experience existing today, not when the United States Supreme Court last spoke on the subject. (*State ex rel. Simmons v. Roper* (Mo. 2003) 112 S.W.3d 397, 406–407 [extending Eighth Amendment protections beyond those of 14-year old U.S. Supreme Court precedent]; see also *Roper v. Simmons* (2005) 543 U.S. 551 [accepting without comment Missouri court's anticipating overruling of high court precedent]; cf. *People v. Moon* (2005) 37 Cal.4th 1, 47–48.)

Even if the Court feels bound to follow *Payne*, it can certainly recognize that that case should not be extended significantly beyond its limited facts. "In the absence of a decision by the high court directly on point," wrote Chief Justice Lucas for this Court, "we must fulfill our independent constitutional obligation to interpret the federal constitutional guarantee . . .

---

[149]Appellant reiterates that he makes this contention in the context of the guidance which this Court should provide trial courts, as well as an alternative ground for reversal. Section E of this argument showed that reversal is required without questioning *Payne*.

(see Cal. Const., art. XX, § 3 [judicial officers swear an oath to support the Constitution]) . . . ." (*In re Tyrell J.* (1994) 8 Cal.4th 68, 79.) There has been no decision by the high court on the use of testimony qualitatively beyond the limited evidence in *Payne*. This Court's independent obligation applies, and it should hold that any significantly greater uses of victim-impact evidence are unconstitutional.

b. State Constitution

This Court independently examines whether a death verdict violates the California Constitution. (See, e.g., *People v. Berryman* (1993) 6 Cal.4th 1048, 1110 [disproportionality of sentence under art. I, § 17]; *People v. Anderson* (1972) 6 Cal.3d. 628 [cruel or unusual punishment in general under art. I, § 17].) And, while the Court has not explicitly held that article I, section 17, shares with its Eighth Amendment analog the requirement of reliability in a death verdict, it has considered claims of violations of such a requirement without questioning its existence. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1074, 1085; *People v. Pinholster* (1992) 1 Cal.4th 865, 914, 927–928.) Moreover, the Court has repeatedly referred to the state's own interest in the reliability of death verdicts, without locating them in a particular constitutional provision. (E.g., *People v. Massie* (1998) 19 Cal.4th 550, 570, and cases cited; *People v. Deere* (1985) 41 Cal.3d 353, 363–364, and cases cited.) Given the weaknesses of *Payne's* reasoning and subsequent experience with how powerful, misleading, and unreliable victim-impact testimony is likely to be, this Court should terminate its experiment with following *Payne* and exclude such testimony under the state prohibition on cruel or unusual punishment. (Cf. *People v. Ramos* (1984) 37 Cal.3d 136, 152 [California due-process clauses can offer capital defendant greater protection against unfairness in penalty determination than 14th Amendment]; see also *People*

v. Frazer (1999) 21 Cal.4th 737, 782 (dis. opn. of Kennard, J.) ["in matters of constitutional law and criminal procedure, we . . . [need not] always play Ginger Rogers to the high court's Fred Astaire"]; *Griset v. Fair Political Practices Com.* (1994) 8 Cal.4th 851, 866, fn. 5 [California free-speech clause is more protective than its federal counterpart].)

c. State Statute—*Edwards* Should Be Overruled or Limited to Its Facts

If the state and federal constitutions do not ban victim-impact evidence, California's death-penalty statute does.

In *People v. Edwards*, which held otherwise, the three photographs of the victims were not presented as victim-impact evidence, and their admission was upheld on a different ground before the Court addressed the victim-impact question. (54 Cal.3d 787, 832.) Thus, there was no need to reach the question of the scope of section 190.3. Nevertheless, the Court went on to overrule its recent, unanimous holding in *People v. Gordon*, *supra*, 50 Cal.3d 1223, 1266–1267, and state that victim-impact evidence was admissible as a circumstance of the crime under Penal Code section 190.3, factor (a). (54 Cal.3d at p. 835.)

Justice Arabian's opinion relied almost entirely on one of the available dictionary definitions of *circumstance* as "[t]hat which surrounds materially, morally, or logically," and asserted that "[t]he specific harm caused by the defendant does surround the crime 'materially, morally, or logically.'" (54 Cal.3d at p. 833.) Thus, the question of the legislative intent in using the phrase *circumstances of the crime* as a potential aggravating or mitigating factor was totally abstracted from the legal context, and *circumstances* was separated from the phrase of which it was a part. And then this extremely abstract question was answered by use of a dictionary. As Justice Mosk

pointed out, the majority had to rely on "the historically most primitive" definition in a dictionary not usually used by the Court.[150] (*Id.* at p. 852, fn. 3 (conc. & dis. opn. of Mosk, J.); see also *People v. Fierro*, *supra*, 1 Cal.4th 173, 262 (conc. & dis. opn. of Kennard, J.) [discussing other, narrower definitions].) Rather, as he observed, it can be convincingly demonstrated that the legislative selection of the phrase was informed by United States Supreme Court case law, in which it meant "such facts as are part of the crime itself." (*Edwards*, *supra*, 54 Cal.3d at p. 853 (conc. & dis. opn. of Mosk, J.), citing analysis in Note, *Victim Characteristics and Equal Protection for the Lives of All: An Alternative Analysis of* Booth v. Maryland *and* South Carolina v. Gathers *and a Proposed Standard for the Admission of Victim Characteristics in Sentencing* (1990) 56 Brooklyn L.Rev. 1045, 1073–1076.) Thus, the effects of a crime on the direct victims would be admissible under the statute, but not other kinds of victim-impact evidence. (*Edwards*, *supra*, 54 Cal.3d at p. 855 (conc. & dis. opn. of Mosk, J.).)

A short time later, Justice Kennard demonstrated that *Booth*, *Gathers*, and *Payne* all specifically spoke of "circumstances of the crime," and all used the phrase *in contrast* to the type of evidence and argument which *Booth* and *Gathers* banned and *Payne* permitted. (*People v. Fierro*, *supra*,1 Cal.4th 173, 259–261 (conc. & dis. opn. of Kennard, J.)

This Court had just relied on the same view. In *People v. Carrera* (1989) 49 Cal.3d 291, the defendant contended that penalty-phase testimony

---

[150]The majority opinion used the Oxford English Dictionary. A Westlaw search discloses that the work was cited 4 times in the 15 years preceding the *Edwards* decision, usually to show the historical meaning of a word or to survey a wide range of meanings. Webster's was cited 59 times during the same period.

about a victim by her mother was improper victim-impact evidence under *Booth v. Maryland*, *supra*. Because the testimony would have supported an inference that the victim did not resist a robbery, it "bore directly upon the manner in which defendant committed the murders and was plainly a 'circumstance of the crime,'" for which *Booth* made an exception. (*Id.* at pp. 336–337.) Thus, two years before *Edwards*, this Court, too, was *contrasting* victim-impact testimony with testimony about the circumstances of the crime. It did the same thing in handling the same issue a year later. (*People v. Stankewitz* (1990) 51 Cal. 3d 72, 111.)

Moreover, in *Payne*, the high court acknowledged that victim-impact evidence "is of recent origin." (*Payne*, *supra*, 501 U.S. 808, 821.) Shortly thereafter, in contrast, it held that "[t]he circumstances of the crime are a traditional subject for consideration by the sentencer . . . ." (*Tuilaepa v. California* (1994) 512 U.S. 967, 976.) Moreover, as *Tuilaepa* further observed, it was settled that the sentencer is "require[d]" to consider "the circumstances of the crime." (*Ibid.*) But *Payne* makes clear that considering victim-impact evidence is but an option that the state can provide, not a constitutional requirement. (501 U.S. at pp. 824, 827; see also *id.* at p. 831 (conc. opn. of O'Connor, J.) To a court that considered victim-impact evidence an optional innovation and circumstances of the crime to be a traditional and required consideration, victim-impact evidence could not have been understood to be a "circumstance of the crime."

Furthermore, as noted at page 209, above, at practically the same time as the 1977 and 1978 death-penalty statutes were being drafted, the Judicial Counsel was drafting determinate sentencing rules that required courts to consider "circumstances . . . relating to the crime." Every such "circumstance"

had something to do with how the defendant carried out the criminal act. (Cal. Rules of Ct., former rules 421, 423; *People v. Wright*, *supra*, 30 Cal.3d 705.)

Finally as Justice Kennard pointed out, the *Edwards* definition broadened factor (a) enough to render factors (b) through (k) superfluous, violating well-known principles of statutory construction. (*People v. Fierro*, *supra*, 1 Cal.4th 173, 262–264 (conc. & dis. opn. of Kennard, J.).)

The *Edwards* opinion next asserted, "The specific harm caused by the defendant does surround the crime 'materially, morally, or logically.'" (*Edwards*, *supra*, 54 Cal.3d 787, 833.) This is true to the extent that *specific harm* means causing the death of the victim, traumatizing those whom the defendant knew to be witnesses, etc. But it is manifestly not true of the harms described in appellant's trial, such as Stephanie Aragon's fear-driven need to sit at the back of a movie theater or the decline in health, and eventual death, of Timothy Jones's mother. "The crime" was appellant's actions. The later effects on relatives, though *consequences* of those actions, did not "surround" them in any sense of the word. *Surround*, like *circumstances*, connotes contemporaneity and physical or moral presence.[151] One thing cannot surround another without in some way being there.

In addition to traumatic bereavement, which does not "surround" the crime, victim-impact evidence can include "offering 'a quick glimpse of the life' which a defendant 'chose to extinguish' . . . ." (*Payne*, *supra*, 501 U.S. 808, 822.) Such evidence, limited to a reminder that the victim was a real person, could at least arguably be considered a circumstance of the crime. Yet this acknowledgment only highlights the point made here: both extensive,

---

[151]The dictionary that used the term in defining *circumstance* defines *surround* as "[t]o enclose, encompass, or beset on all sides; to stand, lie, or be situated around." (17 Oxford English Dict., *supra*, p. 307.)

evocative detail about the victim (as opposed to "a quick glimpse") and narratives of survivors' traumatic bereavement experiences fall well outside any linguistically reasonable understanding of *circumstances of the crime.*

Edwards's only other explanation for its conclusion was this: "We need not divorce the injury from the acts." (54 Cal.3d at p. 835.) The eloquence of the statement may obscure its straw-man logic. The "act" of a guilty capital defendant is the firing of a gun, otherwise wielding deadly force, engaging a robbery victim when a comrade is likely to shoot, etc. "The injury" is the victim's death or—if such was the case—the victim's horrible death. To "divorce the injury from the act" would be to keep the jury in the dark about those consequences. No one has ever asked for that. Moreover, to the extent that a murder also triggers serious injury to others, the legislated prescription of a sentence of life without parole or death was intended to and does reflect the full gravity of the crime, in all its consequences. As to those injuries as well, society's treatment of the person who caused them involves no injury/act divorce, even without victim-impact evidence.[152]

Edwards's reaching to decide a question not presented by the facts, its broad language about factor (a) now encompassing the "specific harm" triggered by a defendant's actions, and subsequent cases that vastly, and without acknowledgment, expanded its holding to later effects on survivors[153] all occurred at a time when this Court was under enormous political pressure

---

[152]A portion of the *Edwards* opinion criticized *People v. Gordon* on a basis unrelated to the question of statutory construction. (54 Cal.3d at pp. 834–835 [discussing precedents concerning proper argument on enormity of crimes].) Justice Mosk's separate opinion effectively addressed that reasoning as well. (*Id.* at p. 855.)

[153]See Section D.3, pages 176 et seq., above.

regarding death-penalty cases. Many commentators believe that it dramatically responded to that pressure.[154] It is otherwise difficult to understand the Court's reconstruction of *circumstances of the crime*, to make easily-understood language from the 1978 initiative into a term of art that includes results flowing from the crime, sometimes years later. This Court has tacitly acknowledged that there was a reconstruction. (See *People v. Roldan* (2005) 35 Cal.4th 646, 733 ["notice that the prosecution intends to rely, as an aggravating factor, on the circumstances of the offense . . . fails to give adequate notice that it also intends to present victim impact evidence"]; *People v. Brown* (2004) 33 Cal.4th 382, 394–395 [rejecting challenge to judicial enlargement of the statute after the crime was committed, but only because changes in evidentiary rules are not constitutionally prohibited].) The simplest and most direct way to deal with the can of worms which *Edwards* opened is to close it again, overruling *Edwards* or limiting it to its facts, thus restoring *circumstances of the offense* to its original and natural meaning.

3. Alternatively, California Courts Could, Like the Courts of Many Other Jurisdictions, Carefully Control Victim Impact Testimony

If this Court does not disallow victim-impact evidence on either constitutional or statutory grounds, it needs to give trial courts considerable guidance on how to keep it within narrow bounds.

---

[154]E.g., Kamin, *Harmless Error and the Rights/Remedies Split* (2002) 88 Va. L.Rev. 1, 62–70; Uelmen, *Review of Death Penalty Judgments by the Supreme Courts of California: A Tale of Two Courts*, 23 Loy. L.A. L.Rev. 237, 238, 295 (1989); Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique* (1991) 26 U.S.F. L.Rev. 41, 89–90.

a. Case-by-Case Adjudication

This Court could continue to rely on case-by-case adjudication,[155] within a framework that retracts the tolerance it has shown for extensive victim-impact presentations. Long before the high court developed its death-penalty jurisprudence, this Court found it axiomatic that "[t]he determination of penalty, . . . like the determination of guilt, must be a rational decision." (*People v. Love*, *supra*, 53 Cal.2d 843, 856.) For that reason, it held, "Evidence that serves primarily to inflame the passions of the jurors must therefore be excluded, and to insure that it is, the probative value and the inflammatory effect of proffered evidence must be carefully weighed." (*Ibid.*) It may be enough to explain the significant risks presented by victim-impact testimony, reverse cases like this one, and reaffirm the rule of *Love*, while emphasizing the Eighth Amendment and due-process demands of providing accurate, not misleading, information to the jury; avoiding biasing the proceedings towards death; providing an individualized sentencing determination based primarily on the character of the defendant and the circumstances of his or her actual crime; avoiding arbitrariness, caprice, and emotion, and instead ensuring reliability and rationality; and ensuring fundamental fairness. The alternative would be to adopt more specific prophylactic rules, but the advantage of just stating the applicable principles and acknowledging their violation here would be to encourage prosecutors and trial courts to err on the side of caution, which is appropriate when the fairness of a trial over a person's life is at stake.

This is basically the approach taken by the Louisiana Supreme Court,

---

[155]See *People v. Haskett*, *supra*, 30 Cal.3d 841, 864; *Edwards*, *supra*, 54 Cal.3d 787, 836.

which cautions trial courts to carefully limit victim-impact evidence but, beyond that, leaves determinations to be made on a case-by-case basis. (*State v. Bernard*, *supra*, 608 So.2d 966, 972.) Exercising the kind of oversight which the United States Supreme Court expects of state reviewing courts when it upholds death-penalty schemes in general[156] and the use of victim-impact evidence in particular,[157] the Louisiana court has explained,

> some evidence of the murder victim's character and of the impact of the murder on the victim's survivors is admissible as relevant to the circumstances of the offense or to the character and propensities of the offender. To the extent that such evidence reasonably shows that the murderer knew or should have known that the victim, like himself, was a unique person and that the victim had or probably had survivors, and the murderer nevertheless proceeded to commit the crime, the evidence bears on the murderer's character traits and moral culpability . . . .

(*State v. Bernard*, *supra*, 608 So.2d 966, 972.) In contrast,

> [I]ntroduction of detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors, which go beyond the purpose of showing the victim's individual identity and verifying the existence of survivors reasonably expected to grieve and suffer . . ., treads dangerously on the possibility of reversal . . . .

(*Ibid.*)

Texas similarly relies on case-by-case adjudication, emphasizes the need for careful trial-court control because of the various potential problems

---

[156]*Gregg v. Georgia*, *supra*, 428 U.S. 153, 195, 198 (plur. opn.); *Jurek v. Texas*, *supra*, 428 U.S. 262, 276 (plur. opn.)

[157]*Payne*, *supra*, 501 U.S. 808, 831 (conc. opn. of O'Connor, J.); 836–837 (conc. opn. of Souter, J.). As noted previously, these opinions expressed the views of four members of the six-person majority.

with victim-impact evidence, and, as noted previously, cautions that a "'glimpse . . .' is not an invitation to an instant replay." (*Salazar v. State*, *supra*, 90 S.W.3d 330, 336.)

b. Bright-Line Rules

Other appellants have proposed two bright-line rules, which this Court has rejected. Appellant believes that the rules were advanced previously based only on their own logical merits. Appellant urges the Court to reconsider its prior holdings in light of this brief's presentation of a serious need for strict limitations on victim-impact testimony.

One proposal is to limit victim-impact evidence to the testimony of any surviving direct victims, or of family members who discovered the crimes. Such a bright-line rule would be consistent with the facts of early cases upholding the use of victim-impact evidence[158] and this Court's longstanding recognition that remoteness of events from the criminal act diminishes its probative value.[159] It would avoid most of the constitutional problems that the current victim-impact regime invites. Texas for a time held victim-impact evidence to be irrelevant to any legitimate sentencing issue, while finding that it was not an abuse of discretion to admit such evidence where the victim-impact witnesses had been affected in one of the ways just described.[160] This

---

[158]*Payne*, *supra*, 501 U.S. 808, 814–815; *People v. Taylor*, *supra*, 26 Cal.4th 1155, 1164.

[159]*People v. Love*, *supra*, 53 Cal.2d 843, 856.

[160]Compare *Smith v. State* (Tex.Crim.App. 1996) 919 S.W.2d 96, 97, 102 (evidence not relevant) with *Ford v. State* (Tex.Crim.App. 1996) 919 S.W.2d 107, 109–110, 112–113, 115 (evidence from survivors of murderous assault and father who came upon the scene deemed relevant); but see *Mosley v. State* (Tex.Crim.App. 1998) 983 S.W.2d 249, 261–264 (partially overruling (continued...)

Court has rejected the limitation. (*People v. Brown*, *supra*, 33 Cal.4th 382, 398; *People v. Pollock*, *supra*, 32 Cal.4th 1153, 1183.)

Another possibility for a bright-line rule that would avoid the problems that rendered the verdict in this case invalid would be the one proposed by Justice Kennard, in her separate opinion in *People v. Fierro*, *supra*:

> As used in section 190.3, "circumstances of the crime" should be understood to mean those facts or circumstances either known to the defendant when he or she committed the capital crime or properly adduced in proof of the charges adjudicated at the guilt phase.

(*People v. Fierro*, *supra*, 1 Cal.4th 173, 264 (conc. & dis. opn. of Kennard, J.) Such facts would relate directly to the defendant's culpability, and they would be true circumstances of the offense, i.e., of the defendant's actual conduct. (Cf. *State v. Nesbit*, *supra*, 978 S.W.2d 872, 892–893 [defendant's knowledge of victim's family circumstances is pertinent in weighing probative value of testimony about effect on family].) In *Payne* and *Edwards*, the cases in which prosecutors got a foot in the victim-impact door, this limitation, too, would have been met. (See 501 U.S. 808, 811, 814–815; 54 Cal.3d 787, 832.)

This Court has summarily rejected this restriction as well, citing a case in which the use of evidence going beyond it had been upheld, albeit against a different challenge. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1183, citing *People v. Boyette*, supra, 29 Cal.4th 381, 440-441, 443-445.) Given the now-apparent need for controls on victim-impact testimony, the *Pollock* holding should not be a barrier to the Court's use of the knowledge limitation. It would normally eliminate an inflammatory and misleading outpouring of bereavement-trauma evidence, memorial-like biographies of the victims, and such an extensive presence of bereaved survivors that it appears that there is a question about who is most deserving of sympathetic consideration. Yet

facts that the defendant knew about would be admissible, as highly relevant circumstances illuminating the culpable state with which he or she decided to engage in criminal conduct.

c. Keeping Testimony Brief and Unemotional

If victim-impact evidence is still thought to be an appropriate and authorized part of a penalty trial,[161] and if this Court declines to adopt either of the bright-line rules for limiting it proposed above, then it should follow other jurisdictions in requiring preparation of written victim-impact statements; careful pretrial review of each point of such statements; permitting *mention* of, e.g., grief, rage, anguish, and dysfunction but requiring it to be brief and general; similarly requiring some brevity in the description of the deceased; having witnesses testify by reading the statements; using no more than one witness per victim; and respectfully admonishing the witnesses that they are expected to try to control their emotions when testifying.[162] (See *Salazar v. State*, *supra*, 90 S.W.3d 330, 336; *Turner v. State*, *supra*, 486 S.E.2d 839, 841–842 & fn. 5; *State v. Nesbit*, *supra*, 978 S.W.2d 872, 891–892; *State v. Bernard*, *supra*, 608 So. 2d 966, 971–972; *State v. Taylor*, *supra*, 669 So.2d 364, 372; *State v. Clark*, *supra*, 990 P.2d 793, 808; *Windom v. State*, *supra*, 656 So.2d 432, 438; *State v. Muhammad*, *supra*, 678 A.2d

---

[161]But see *Com. v. Rice*, *supra*, 795 A.2d 340, 360 ("The capital sentencing scheme was simply not crafted as a mechanism for an outpouring of victim's grief, no matter how redacted, rehearsed or restricted the manner of presentation may be") (conc. & dis. opn. of Zappala, C.J.).

[162]Not every jurisdiction represented by the citations that follow imposes all these restrictions, although some do. In particular, the explicit requirement of written statements is not widespread, although it may be subsumed under mandates for detailed pretrial review of the testimony. The particular holdings of the cited cases are described above, at pages 180–185.

164, 179–180; 725 Ill. C.S.A. 120/3(a)(3), 120/4(a)(4); *United States v. Williams*, *supra*, 2004 U.S. Dist. Lexis 25644 *82, fn. 39; *United States v. O'Driscoll*, *supra*, 203 F.Supp.2d 334, 341 & fn. 6; *United States v. Glover*, *supra*,43 F.Supp.2d 1217, 1235–1236.) The use of a written statement would clearly delineate the scope of the testimony, help witnesses control their emotions, and solve the problem of *Booth* violations and other inadmissible testimony not being controllable in the normal fashion, assuming that this Court stops countenancing end runs around *Booth*.

It appears that a subtext of the concern about balance expressed by *Payne* was the desire to give survivors the opportunity to describe their experience—publicly, in the solemnity of a courtroom, and where they can confront the person who caused their suffering.[163] To the extent that victim-impact testimony can fulfill such a need[164]—for the subset of those affected who are willing to support the case for death[165] and otherwise have the opportunity to appear—and to the extent that the opportunity to testify is more

---

[163]See the references to the victims' rights movement and its goals at 501 U.S. 808, 821; *id.* at p. 834 (conc. opn. of Scalia, J.); see also Mosteller, *Victim Impact Evidence: Hard to Find the Real Rules*, *supra*, 88 Cornell L.Rev. 543, 554, and commentaries cited at p. 172, fn. 93, above.)

[164]But see Berger, *Payne and Suffering: A Personal Reflection and a Victim-Centered Critique* (1992) 20 Fla. St. U.L. Rev. 21, 59; see also Davis & Smith, *Victim Impact Statements and Victim Satisfaction: An Unfulfilled Promise* (1994) 22 J. of Crim. Just. 1, cited in Myers & Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy* (2004) 10 Psych., Pub. Policy & L. 492, 493 (Myers & Greene).

[165]See *People v. Smith* (2003) 30 Cal. 4th 581, 622–623; Cushing & Sheffer, Dignity Denied: The Experience of Murder Victims' Family Members Who Oppose the Death Penalty (2002).

than a token response by a system that still tends not to meet victims' needs,[166] more circumscribed testimony can still fulfill that function. The other possibility, holding it off until after penalty is decided, to avoid unconstitutional interference with that decision, and then permitting *all* who wish to speak to do so without significant restraint, would in many ways do so even better. This has been institutionalized in some states[167] and was used in some California courts before *Payne* and *Edwards* opened the door to penalty-phase testimony. (See *People v. Medina* (1990) 51 Cal.3d 870, 911–912.)

In any event, under our system, the verdict is to be decided with reference to society's needs, not those of particular stakeholders. (See *Dix v. Superior Court* (1991) 53 Cal.3d 442, 450–454.) Every capital case arriving on this Court's doorstep involves a determination that a unique, living human being—who is more than the sum of the worst things he or she has done in this world—is to be killed. It protects our own humanity as much as it protects defendants for us to be anchored in the standpoint of promoting fair, reliable, non-arbitrary, and rational decision-making. From that standpoint, limiting or postponing victim-impact testimony would end the spectacle of developing careful Eighth Amendment jurisprudence regarding every detail of the penalty determination, and then—with one tweak of the system introduced at a time of enormous public pressure—exposing juries to the most emotionally gripping, and yet fundamentally misleading, evidence imaginable.

Under the Eighth Amendment, there is "an acute need for reliability in capital sentencing proceedings." (*Monge v. California*, *supra*, 524 U.S. 721,

---

[166]But see Acker & Karp, eds., Wounds that Do Not Bind, *supra*.

[167]See Hoffman, *Revenge or Mercy? Some Thoughts About Survivor Opinion Evidence in Death Penalty Cases* (2003) 88 Cornell L. Rev. 530, 535.

732.) That Amendment proscribes a procedure that "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (*Lockett v. Ohio* (1978) 438 U.S. 586, 605.) As noted previously (pp. 254–256), other constitutional restraints are pertinent as well. There may be risks of violating them in admitting victim-impact evidence even with the safeguards described above. But this Court should at least join those of other states that have sought means to lessen the impact of such testimony, instead of leaving an idiosyncratic, gaping hole in our attempts to provide fairness, reliability, rationality, and some modicum of consistency in deciding whether the state is to kill one of its citizens.

G. The Error Was Prejudicial

1. Respondent Bears a Heavy Burden of Showing Harmlessness

It would be a rare case in which this type of error—which *is* error because of the prejudicial nature of the testimony and the consequent denial of reliability, rationality, and fundamental fairness in the proceedings—could nonetheless be harmless. Appellant's constitutional rights were violated because there was an unacceptable risk of biasing the penalty verdict, so it would be difficult to then say that, despite the intolerable risks, the verdict could not have been affected. (See *Booth v. State* (Md. 1992) 608 A.2d 162, 165, fn. 1 [remand of *Booth v. Maryland*, *supra*, 482 U.S. 496, 509, which contained no harmlessness analysis, was treated by Maryland courts as requiring new sentencing hearing]; cf. *Holbrook v. Flynn* (1986) 475 U.S. 560, 570 [trial procedure will be deemed "inherently prejudicial" if it creates "'an unacceptable risk . . . of impermissible factors coming into play'"]; *In re Brown* (1998) 17 Cal.4th 873, 903 [no harmless error analysis for *Brady* violations because materiality standard (likelihood of affecting outcome)

subsumes prejudice determination].) A case where failure to agree on a death verdict would somehow be absolutely inconceivable would qualify, but, as appellant showed in Argument I, it is dangerous to hypothesize such a case, and this is not one in any event.

Specifically, the harmlessness analysis must be conducted with due regard for these factors: appellant's right to have his fate decided by a jury not influenced by error, not an appellate court hypothesizing such a jury;[168] the inability of a reviewer of the record to observe witnesses' demeanor[169] and the limited capacity of such a person to develop a "'feel' for the emotional environment of the courtroom";[170] the inherent unknowability of what goes into the subjective weighing with which jurors are charged,[171] their being permitted to rely on mercy or sympathy[172] and required to exercise their own normative judgment as to the significance of each fact they find,[173] and, as a

---

[168]*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Satterwhite v. Texas* (1988) 486 U.S. 249, 263 (conc. opn. of Marshall, J.)

[169]*People v. Stewart* (2004) 33 Cal.4th 425, 451.

[170]*People v. Keene* (Ill. 1995) 660 N.E.2d 901, 913; see also *Caldwell v. Mississippi, supra*, 472 U.S. 320, 330, 340, fn. 7; *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal.App.3d 1019, 1024–1025.

[171]*Deck v. Missouri* (2005) 544 U.S. 622, __, [61 L. Ed. 2d 953, 965; 125 S. Ct. 2007, 2014] [factors are "are often unquantifiable and elusive"]; *Satterwhite v. Texas, supra*, 486 U.S. 249, 258; *People v. Robertson* (1982) 33 Cal.3d 21, 54; *People v. Hamilton* (1963) 60 Cal.2d 105, 136–137; *People v. Hines* (1964) 61 Cal.2d 164, 169, disapproved on another ground in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40.

[172]*People v. Caro* (1988) 46 Cal.3d 1035, 1067; *People v. Easley* (1983) 34 Cal.3d 858, 875–880.

[173]*People v. Rodriguez, supra*, 42 Cal.3d 730, 779.

consequence, the surprise life verdicts that juries sometimes agree on in highly aggravated cases;[174] the principle that reversal is required if one juror might have decided differently if not influenced by error;[175] and the deep concern for reliability required in both the making[176] and the review[177] of a state's decision to execute one of its citizens. Under these circumstances, as appellant explained previously (pp. 82 et seq.), under both state and federal law, the harmlessness inquiry must depend not on this Court's analysis of the strength of the cases for aggravation and mitigation, but simply on whether the error resulted in the admission of evidence "which possibly influenced the jury adversely . . . ." (*People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *Chapman v. California, supra*, 386 U.S. 18, 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [in death cases, state-law test is equivalent to *Chapman*].) This means that it "might have contributed to" the result (*Chapman, supra*, 386 U.S. at p. 24) or "might have affected [the] capital sentencing jury." (*Satterwhite v. Texas, supra*, 486 U.S. 249, 258.) To determine whether error could have "influenced," "contributed to," or "affected" a juror's decision, a court first "asks whether the record contains evidence that could rationally lead to a contrary finding with respect to" the question at issue. (*Neder v. United States*

---

[174]*McCleskey v. Kemp* (1987) 481 U.S. 279, 311; McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should it Be?: An Assessment of United States and Louisiana Supreme Court Case Law* (1999) 59 La. L.Rev. 1105, 1142–1144 (McCord); see also California LWOP cases cited at page 91, footnote 55, above.

[175]*Wiggins v. Smith* (2003) 539 U.S. 510, 537; *In re Lucas* (2004) 33 Cal.4th 682, 734.

[176]*Caldwell v. Mississippi, supra*, 472 U.S. 320, 329, fn. 2.

[177]*California v. Ramos, supra*, 463 U.S. 992, 998–999; *Zant v. Stephens, supra*, 462 U.S. 862, 885.

(1999) 527 U.S. 1, 19.) In a death case, because of the room for sympathy, mercy, and other subjective factors, this is almost always a possibility. And it is respondent who bears the burden of showing otherwise, beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24.) Any substantial error, therefore, can affect the penalty-phase outcome, unless it only further proved a conclusively-established fact or was nullified by curative action. (*People v. Hamilton, supra*, 60 Cal.2d 105, 136–137 [substantial error must normally be held prejudicial]; *People v. Roldan* (2005) 35 Cal. 4th 646, 734, 739 [exception where other action nullified error]; Traynor, The Riddle of Harmless Error (1970) p. 73 [exception where error proved fact otherwise established].) Otherwise there is a "realistic . . . possibility" that it affected the outcome, i.e., one that does not require hypothesizing juror caprice to envision (*People v. Brown, supra*, 46 Cal.3d 432, 448), and reversal is required.

2. The Jurors Who Held Out for Lifetime Incarceration Had Good Grounds for Doing So

As also explained in Argument I, penalty-phase evidence showed that appellant was the product of a home in which he was abused and neglected, by a mother who was deeply incapacitated, after he first witnessed inter-parental violence and then suffered abandonment by his father.[178] "[E]vidence of [a] childhood of deprivation and abuse," even in the face of substantial aggravation, can "produce sympathy and compassion in members of the jury and lead one or more to a more merciful decision." (*In re Lucas, supra*, 33 Cal.4th 682, 735.) Despite his upbringing, appellant still managed to be both loving and loved. Substance abuse may have been involved in his criminal behavior. In the year prior to the crimes, he had been willing to enter drug

---

[178]The evidence supporting the statements in this paragraph is summarized in detail, and with citations to the record, at pp. 107–124, above.

rehabilitation, which tragically had a months-long waiting list, and he had tried to change himself and the direction of his life by moving for a time to the San Francisco Bay Area and finding work there. He had no prior record and was still a youth of 21 when he committed his crimes. He had a young son, towards whom he was loving before his arrest and with whom he continued to maintain a relationship. He neither hurt nor particularly frightened any of the robbery victims whom he confronted alone, and he may have protected some of the others. Jose Munoz's testimony was that of a severely biased witness, and it was full of internal indicia of unreliability. Nothing that he said concerning appellant's role in the crimes that varied from appellant's own account was independently corroborated. Indeed, while the prosecutor promoted the informant's version, he also made it clear that aiding and abetting principles settled appellant's guilt in any event. (E.g., RT 45: 6909–6913, 6942.)

Finally, all the jurors, knowing that appellant might be convicted of three murders, had promised that they were open to either sentence. (See p. 128, fn. 82, above.) They deliberated for two days on penalty. (CT 8: 1956–1957; 9: 2025.)

Thus, under the capital framework in general and the specifics of this case, there were very real possibilities of a juror favoring a life verdict, and one or more must have for quite some time.

3. The Possibility That the Error Contributed to the Outcome Cannot Be Excluded

The preceding summary of the information and issues facing appellant's jurors assumes that they thought that they were to focus on his personal culpability (*People v. Harris* (2005) 37 Cal. 4th 310, 351) and appropriate penalty (*People v. Moon* (2005) 37 Cal. 4th 1, 40), that they were able to do so,

and that in doing so they relied on the relevant information just summarized. None of these assumptions is appropriate. Why should they believe that their duty was to focus on appellant's blameworthiness and appropriate treatment, when nearly a quarter of the penalty-phase testimony was not about his conduct, nor how he became a person who could kill, nor his character—in both its dark and redeeming aspects—but about the exceedingly painful aftermath of what he and his comrades had done? How could jurors put aside the invitation to consider which "side" was more deserving of their sympathy, especially since they were given no directive to put it aside? How could they not validate the terrible losses of the survivors by imposing the most serious penalty at their disposal, given what an important factor the trial made of that suffering? How could they focus rationally on the appropriate questions, when they must have been, like the judge, immersed in the enormous pain that bathed the courtroom after the victims' loved ones testified? Why would they rely only on the evidence that showed to what extent these killings were aggravated, to what extent there was other aggravation, and to what extent there were mitigating circumstances, when they were misled into believing that the testimony of the aggrieved was providing further information about the relative enormity of appellant's crimes? A death verdict—though not inevitable in the abstract—became unavoidable with the presentation of the overblown victim-impact case.

Certainly the prosecutor did not consider his case complete without a lengthy and intense victim-impact segment. Not only did he devote a day to presenting it, but it was a cornerstone of his arguments to the jury. Nearly half of that part of the opening statement which dealt with evidence (as opposed to explaining the law) was devoted to victim impact. (See RT 48: 7259–7271.) In his penalty opening statement, the prosecutor stated that the victim-impact

evidence would show that the murders were more aggravated than they otherwise appeared: "You will hear that these crimes are even worse than what you have already heard," because of the consequences for the survivors. (RT 48: 7265.) As mentioned above, he also characterized the forthcoming penalty phase as "a battle for your sympathy and compassion" and urged the jurors not to be taken in by appellant's anticipated attempt "to steal the sympathy and the compassion that is rightfully" that "of the victims' families and friends." (RT 48: 7271.)

When all the evidence was presented and it was time to sum up the case for a death sentence, the prosecutor's very first words were about the bereavement trauma,

> These crimes are so huge, so monstrous, the harm, the pain, the heartache, the fear that this man has caused is so overwhelming that it's hard even to listen to it, let alone live through it or die from it.

(RT 54: 8003.)

After then claiming that appellant killed for sport, he read some instructions and otherwise explained the law regarding the penalty decision. (RT 54: 8004–8006.) Then he added, "You are allowed to weigh and consider the harm done to the victims, *to their families, to their friends,* the weight of their loss to our community." (RT 54: 8006, emphasis added.) In other words, he made explicit what was implicit in any event in the unfettered presentation of the bereavement-trauma evidence: that it showed that the crimes were aggravated and that appellant deserved death, even though, as shown above, the truth is that such trauma could have followed a non-capital or non-criminal homicide.

The power of the testimony erroneously admitted was such that the prosecutor could not simply refer to it or even summarize it. He read page

after page of testimony. (RT 54: 8008–8011, 8013–8015, 8017–8018.) Those readings occupied a third of his summation. (See RT 54: 8003–8030.) Clearly he recognized, as should this Court, that it would weigh heavily in favor of death, and he made sure that it did.

The United States Supreme Court has been unwilling to find harmlessness in circumstances where the prosecutor relied heavily on evidence erroneously admitted, finding that fact alone enough to demonstrate the fatal significance of the error in the context of the trial. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 753–754; *Johnson v. Mississippi* (1988) 486 U.S. 578, 586, 590 & fn. 8; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *People v. Roder* (1983) 33 Cal. 3d 491, 505; cf. *People v. Hinton* (2006) 37 Cal. 4th 839, 868.) The same principle applies here.

Appellant, has shown, in explaining why there was error, how evidence like that admitted here is far more prejudicial than anything else allowable since first this Court, then the United States Supreme Court, found the need to impose special limitations on death-penalty proceedings. "[I]mproper victim impact evidence seems to be one of the things that is most likely to affect jurors' decisions." (McCord, *supra*, 59 La. L.Rev. 1105, 1149.) The reasons that cause such quantity and quality of victim-impact evidence as was presented to appellant's jury to be Eighth Amendment and due process error were presented in Part E of this argument. The constitutional violations lie in the creation of an intolerable risk, indeed a probability, of confusing jurors about their task and affecting their emotions in a way that clouds their ability to appropriately carry out that task. In other words, the unacceptably strong abstract potential for generating error creates the need for limiting rules. Concretely, this was a trial without such rules, so all the prejudicial dynamics were applied to the determination of appellant's fate. This was not

insubstantial error.

Since rational jurors could have voted for life based on the evidence legitimately before them, respondent cannot demonstrate that appellant's sentence "was surely unattributable to the error" (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279), or that there was no "reasonable (i.e., realistic) possibility that the jury would have rendered a different verdict" without a full and intense victim-impact sub-phase to the trial. (*People v. Brown*, *supra*, 46 Cal.3d 432, 448.) Put differently, because this Court cannot say that the error "had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." (*Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 341.) The death judgment must be reversed.

//

//

III

THE TRIAL COURT'S FAILURE TO GIVE A REQUESTED INSTRUCTION LIMITING THE JURY'S USE OF VICTIM-IMPACT EVIDENCE TO ITS PROPER PURPOSE WAS PREJUDICIAL CONSTITUTIONAL ERROR

Co-appellant Self requested the following jury instruction:

> Evidence has been introduced for the purpose of showing the specific harm caused by the defendant's crime. Such evidence, if believed, was not received and may not be considered by you to divert your attention from your proper role of deciding whether defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, purely subjective response to emotional evidence and argument. On the other hand, evidence and argument on emotional though relevant subjects may provide legitimate reasons to sway the jury to show mercy.

(CT 8: 1942.) Appellant joined in this request, arguing that the victim-impact testimony had a powerful emotional impact that placed a nearly impossible burden on the side seeking a life verdict, and that it swayed the jury to make its decision based on sympathy to the families of the victims. (RT 53: 7977–7978.)

The trial court considered the instruction misleading. (RT 53: 7975–7976, 7978.) It denied the request on that basis, as well as for being duplicative of unspecified other instructions and argumentative. (RT 53: 7979.)

This was grave error. As the previous contention (Argument II) makes clear, the very nature of the victim-impact evidence was such as to overwhelm reason, as well as to suggest that a primary question facing the jurors was

which "side" most deserved their sympathy.[179] The request for a limiting instruction was the court's last clear chance to try to reconstruct the jurors' capacity to focus on the issues before them after a storm of emotional testimony destroyed it. Even if some of the phrasing choices in the requested instruction were argumentative, rather than an appropriate attempt to bring the jurors back to their senses, it would still have been error to not give an instruction. Even in ordinary litigation, if evidence admitted for a proper purpose is subject to misuse, a limiting instruction is recognized as being so important to a fair trial that, when an infirm version is requested, the trial judge is under a duty to craft a correct one. As to the trial court's other concerns, not a word of the instruction was legally misleading, and nothing in the instructions given met the need to refocus the jurors' attention on determining appellant's appropriate punishment based on who he was and what he did, and on applying their rational faculties to do so. The court's violation of a clear rule that benefits civil and criminal litigants alike, in the context where a life hung in the balance, violated not only state law, but also appellant's rights to both a reliable penalty determination and a fair penalty trial under the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, as well as his due-process and equal-protection rights to the protections of state law.

A. Limiting Instructions Are Mandatory, upon Request, When Evidence Received for One Purpose May Be Used by the Jury for Another

Appellant's request was governed by a simple black-letter rule:

> Some evidence may be relevant for one purpose and inadmissible for another purpose, either because it is irrelevant or because some rule excludes it for that other purpose. It may

---

[179]The testimony is recounted at pages 138 et seq., above.

> be admitted, but only for the proper purpose, and under instructions of the court so limiting it.

(1 Witkin, Cal. Evid. 4th (2000) Circum. Evid, § 30, p. 360; see also Use Note to CALJIC No. 2.09 (April., 2006, ed.) p. 40 ["Upon request, the court must instruct the jury of the limited scope of evidence admitted only for one purpose"]; accord, Use Note to CALJIC No. 2.09 (5th ed. 1988) p. 34 [version current during appellant's trial].) The Evidence Code codified the rule as follows:

> When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

(Evid. Code § 355.) The provision restated settled law. (Cal. Law Revision Com. com., 29B pt.1 West's Ann. Evid. Code (1995) foll. § 355, p. 337.) Thus, failure to give a limiting instruction upon request, when evidence is introduced for a limited purpose, is error. (*People v. Miranda* (1987) 44 Cal.3d 57, 83.)

This Court has characterized Evidence Code section 355 as "mandating [a] limiting instruction upon request." (*People v. Falsetta* (1999) 21 Cal.4th 903, 924.) Because of that mandate, it is even error to simply refuse an infirm proposed instruction, rather than modifying it to give the jury appropriate guidance. (*Ibid.*; see also *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1318.)[180]

---

[180]Refusal of an instruction like that requested here was upheld, on the ground that it was confusing, in *People v. Harris* (2005) 37 Cal. 4th 310, 358–359. However, this Court gave no indication that it was asked to or did consider the right to an instruction regardless of the correctness of the version requested. Hence *Harris* is not dispositive. (*People v. Braxton* (2004) 34 Cal.4th 798, 819.)

The rule is a complement to the trial court's power to exclude unduly prejudicial evidence, now codified in Evidence Code section 352. Both rules deal with the dilemma created when evidence is offered for a legitimate purpose but may be misused by the jury for another purpose. Exclusion is the more drastic remedy, and, within limits, it is discretionary. A limiting instruction is the fallback solution, but providing at least this more circumscribed protection is mandatory. (*Adkins v. Brett* (1920) 184 Cal. 252, 258–259; accord, *People v. Sweeney* (1960) 55 Cal.2d 27, 42–43; see also *Inyo Chemical Co. v. City of Los Angeles* (1936) 5 Cal.2d 525, 544.)

B. The Victim-impact Testimony Was Susceptible of Misuse, and a Limiting Instruction Was Therefore Mandatory Upon Request

Victim-impact testimony has, under current law, a legitimate use, as well as a universally recognized potential for tremendous misuse. It therefore triggers the rule mandating a limiting instruction.

Regarding the legitimate use, both this Court and the United States Supreme Court have held that the harm caused by a defendant's criminal acts can be relevant to the sentencing decision. Testimony regarding it may be presented as a reminder that murder is truly a grave crime against both a unique human being and his or her survivors, and it is admitted to counter a perceived risk of reducing the crime or its victim to an abstraction. (*Payne v. Tennessee* (1991) 501 U.S. 808, 820, 822, 825; *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

The trigger for any right to a limiting instruction is the potential for other, illegitimate uses of such testimony by the jury. With victim-impact testimony, such potential is manifest. That potential has been largely responsible for the holdings in which first this Court, then the United States Supreme Court, banned victim-impact evidence; for the divisions in those and

other courts when the bans were lifted; and for strong cautionary language in the opinions permitting admission of such testimony.[181] Put differently, the controversy over the admission of such testimony has been over its relevance, and whether any probative value outweighs its prejudicial effect. There has

---

[181]See, e.g., *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825 (overruling of *Booth* does not remove other safeguards to evidence "so unduly prejudicial that it renders the trial fundamentally unfair"); *id.* at p. 831 (conc. opn. of O'Connor, J.) (citing availability of other means to protect against "[t]he possibility that this evidence may in some cases be unduly inflammatory"); *id.* at p. 836 (conc. opn. of Souter, J.) (victim-impact evidence "can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation"); *id.* at p. 846 (dis. opn. of Marshall, J.) (reference to testimony's prejudicial effect stemming from "its inherent capacity to draw the jury's attention away from the character of the defendant and the circumstances of the crime"); *id.* at p. 856 (dis. opn. of Stevens, J.) (victim-impact testimony "encourage[s] jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason"); *Booth v. Maryland* (1987) 482 U.S. 496, 505 (victim-impact testimony "could divert the jury's attention away from the defendant's background and record, and the circumstances of the crime"), overruled in *Payne v. Tennessee*, *supra*, 501 U.S. 808; *id.* at p. 508 (information about "the grief and anger of the family" can only "inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant"); *People v. Love* (1960) 53 Cal.2d 843, 857 (evidence of victim's suffering "served primarily to inflame the passions of the jurors"); *People v. Haskett* (1982) 30 Cal.3d 841, 864 (in using victim-impact considerations raised in argument, "the jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason," nor should the jury be provided with "information . . . that diverts [it] from its proper role or invites an irrational, purely subjective response"); *People v. Edwards*, *supra*, 54 Cal.3d 787, 835–836 (acknowledging the need for "limits on emotional evidence and argument" and quoting both *Payne* and *Haskett*); *People v. Bacigalupo* (1991) 1 Cal.4th 103, 152–154 (conc. opn. of Mosk, J.) (need for clear instructions to minimize the harm caused by victim-impact evidence); *People v. Hovey* (1988) 44 Cal.3d 543, 586 (conc. opn. of Mosk, J.) (references to "devastating impact" of testimony and likelihood of inflaming and diverting jury).

not, however, been any disagreement that it has significant potential to divert the jury from the questions before it.

Certainly this Court has never questioned what it has referred to as victim-impact evidence's "potential to inflame the passions of the jury against defendant." (*People v. Gurule*, *supra*, 28 Cal.4th 557, 624 [describing effect of a brief instance of such testimony].) Here, the trial judge spoke eloquently to the emotional power of the testimony years after he heard it. (9/9/2002 RT 318.) Such evidence was likely to overwhelm the jurors' capacities—even their will—to approach the question before them soberly and rationally.

The specific ways in which such testimony was likely to have been misused by the jurors have been discussed in Argument II, above, on the need for drastically restricting such testimony. (See pp. 230–252, above.) In brief, the victim-impact evidence invited the weighing of the wrong factors, namely the agony of the survivors against the pain a death sentence would inflict on appellant and his family, as well as sympathy for the survivors against sympathy for appellant.[182] It evoked such an overpowering sense of the enormity of the crimes that the maximum punishment seemed the only reasonable alternative—even though homicides that were not even death-eligible would have had the same awful human consequences, and even though the testimony was disproportionately focused on the most appealing victim,

---

[182]This would have been implicit from the quantity and nature of the evidence, but the prosecutor made it explicit as well:

> The penalty phase . . . will be basically a battle for your sympathy and compassion. [¶] The evidence and the testimony of the victims' families and friends will show that sympathy and compassion should be theirs. But just as the defendant stole their lives and their money, he will try to steal the sympathy and the compassion that is rightfully theirs.

(RT 48: 7271.)

with the most articulate family, not the one for whose death appellant was most responsible. Thus—in another potential misuse of the evidence—it could make it look like the issue was the enormity of the survivors' losses, not the culpability of appellant's conduct. For most people, the evidence would also intensify their anger and strongly encourage crossing the vague line that may separate "making the punishment fit the crime" (see RT 54: 8026 [prosecutor's argument]) from outright vengeance.

These observations are not made to renew an attack on the propriety of the victim-impact testimony. They are provided to specify the factors that presumably underlay this Court's previous acknowledgments that such testimony has very serious inflammatory potential, which is another way of saying that it was capable of misuse and of diverting the jurors from their true tasks. Under a clear and time-honored rule required to give even civil litigants a fair trial in such a situation, if the prejudicial effect is not so great as to require exclusion, then it at least requires a limiting instruction. (*Adkins v. Brett, supra*, 184 Cal. 252, 258–259; Evid. Code § 355.)

There is a paucity of case law on this subject from other jurisdictions. The likely reason is that the entitlement to limiting instructions upon request is so uncontroversial that trial courts are not refusing them. "Allowing victim-impact information to be placed before the jury without proper limiting instructions has the clear capacity to taint the integrity of the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) A limiting instruction must be given sua sponte in Georgia,[183] New

---

[183] *Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842–843.

Jersey,[184] Oklahoma,[185] and Tennessee.[186] The use of one is encouraged in Pennsylvania,[187] and the Wyoming Supreme Court has gone out of its way in dictum to suggest the need for one.[188, 189] None of the opinions announcing these rules found the proposition controversial or encountered any counter-arguments to answer. Further, appellant's research has disclosed no non-California cases that have concluded that a capital defendant is not entitled to a limiting instruction regarding the appropriate use of victim-impact testimony.

The task before a capital sentencing jury should be quite clear. It is supposed to "assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment," (*Monge v. California* (1998) 524 U.S. 721, 731–732), taking into account whatever else it learns about who the defendant is and how he or she came to reach the point where he or she could kill (*Lockett v. Ohio* (1978) 438 U.S. 586, 604–605). "[T]he 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

---

[184]*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.

[185]*Cargle v. State* (Okla.Crim.App.1995) 909 P.2d 806, 828–829.

[186]*State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 892.

[187]*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 158–159; see also *Commonwealth v. Williams* (Pa. 2004) 854 A.2d 440, 447 (approving of instruction that "consideration must be limited to a rationale [*sic*] inquiry into the culpability of the defendant, not an emotional response to the evidence").

[188]*Harlow v. State* (Wyo. 2003) 70 P.3d 179, 198, fn. 4.

[189]See also *United States v. Stitt* (4th Cir. 2001) 250 F.3d 878, 899; *Bivins v. State* (Ind. 1994) 642 N.E.2d 928, 957; and *State v. Taylor* (La. 1996) 669 So.2d 364, 372, each of which mentions the trial court's having given a limiting instruction regarding victim-impact evidence, in the context of holding errors in admitting victim-impact testimony harmless.

an erroneous judgment." (*Monge* , *supra*, 524 U.S. at p. 732, citation and quotation marks omitted.) There can be no doubt that any protection afforded as a matter of course to all litigants—here, an instruction reminding the jury of the proper use of testimony capable of inviting gross misuse—must be included among the protections given a capital defendant.

Here, the prosecutor argued that a limiting instruction was unnecessarily duplicative of other instructions. (RT 53: 7976.) The trial court agreed. (RT 53: 7979.) Neither, however, specified what instructions they had in mind. None of the instructions given either told the jury the purpose for which the victim-impact evidence was introduced and to which it was, therefore, limited, or cautioned them not to reach their verdict out of an irrational response to emotion-evoking evidence. These were the topics which the requested instruction covered. (CT 8: 1942.) If general instructions about the jury's task—which is what this jury received—were sufficient, there would never be a need for limiting instructions in any situation.

In *People v. Ochoa* (2001) 26 Cal.4th 398, 454, this Court summarily held that there was no error in refusal to give the instruction requested here because "[t]he proposed instruction would not have provided the jury with any information it had not otherwise learned from CALJIC No. 8.84.1 . . . ." Refusal of the same instruction was upheld, on the ground that it was confusing, in *People v. Harris* (2005) 37 Cal. 4th 310, 358–359. However, in neither case did the Court gave any indication that it was asked to or did consider the contentions raised and principles brought to the Court's attention in the present appeal. "[A]n appellate court's opinion is not authority for propositions the court did not consider . . . ." (*People v. Braxton* (2004) 34 Cal.4th 798, 819.) In any event, the version of CALJIC No. 8.84.1 given to

appellant's jury[190] did not fulfil the functions of a limiting instruction. It did not draw attention to the victim-impact evidence or identify its proper and prohibited uses. Rather, it was a very general introduction to the penalty phase instructions. The only part of it that was even marginally relevant to appellant's request was a general admonition to be fair and follow the law. Such an admonition is, in one form or another, given in every trial. (See CALJIC No. 1.00; BAJI No. 1.00.) But "[w]hen evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly." (Evid. Code § 355.) That cannot be done without mentioning the evidence at issue.

C. Any Weaknesses in the Draft Instruction Proposed by Appellants Were Curable

Appellant and Self need not have proposed an absolutely correct instruction to have been entitled to the protection which an appropriate limiting instruction would have given them. (*People v. Falsetta*, *supra*, 21 Cal.4th 903, 924; *People v. Jennings*, *supra*, 81 Cal.App.4th 1301, 1318.) Almost every word of the version they presented was drawn from *People v. Edwards*, *supra*,

---

[190]"You will now be instructed as to all of the law that applies to the penalty phase of this trial.

"You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.

"You must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict." (CT 9: 1965; see also RT 54: 8053.)

54 Cal.3d 787.[191] It appropriately directed the jurors' attention to the purpose of the evidence, reminded them of the question on which they were to focus (the appropriate punishment for appellant), and told them not to let emotional evidence and argument interfere with their sober and rational exercise of judgment about that question. The trial court agreed with the prosecutor that the instruction was argumentative. (RT 53: 7976, 7979.) Perhaps one can quibble with some of the wording, although a strong argument can be made for its propriety exactly as it read.[192] It would have been a minor matter to change any offending drafting choices, and it was within the trial court's discretion to do so. But it was not within its discretion to refuse to give a limiting instruction at all because of its disagreement with some of the wording. (*People v. Falsetta*, *supra*, 21 Cal.4th 903, 924; U.S. Const., 8th & 14th Amends.)

---

[191]The draft instruction is quoted on page 287, above. *Edwards* held that victim-impact evidence showing "the specific harm caused by the defendant" is admissible. (54 Cal.3d at p. 833.) The trial court "should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*Id.* at p. 836, quoting *People v. Haskett*, *supra*, 30 Cal.3d 841, 864.)

[192]A prosecutor might not like the reference to the "[u]ltimate sanction," but it was drawn from this Court's opinions quoted in the previous footnote, and it would have refocused the jurors on the gravity of the issue before them. The final sentence was an appropriate reminder of where emotionality can fit into the process, after a strong statement about where it should not. But it failed to say that evidence and argument on emotional though relevant subjects may also provide legitimate reasons to sway the jury to vote for death. (See *People v. Edwards*, *supra*, 54 Cal.3d 787, 836.) The omission could have been cured easily.

The trial court also thought that referring to the jury's "proper role" only in terms of its sentencing decision incorrectly left out the component parts of that decision, such as fact-finding. (RT 53: 7975–7976.) This is a pedantic view of the text, and it fails to recognize that jurors have "intelligence and common sense . . .[,]virtues [which do not] abandon them when presented with a court's instructions." (*People v. Coddington* (2000) 23 Cal. 4th 529, 594.) Moreover, it is not clear that an instruction *could* refocus the jury on its appropriate task in a clear and direct way while also naming each component sub-task. In any event, here, too, the court was free to—and required to—try to meet its own objection.

The court felt that "[t]his instruction seems to me to mislead the jury into an instruction [*sic*] that they should not consider factors in aggravation, in particular, victim impact evidence." (RT 53: 7978.) The instruction says no such thing. It states the purpose for which the evidence was received (showing the specific harm caused), then cautions that the jury should not be diverted from its task of making a life-and-death decision, soberly and rationally, rather than responding subjectively to the emotionality of the material. But again, if there were something that needed fixing, it could be fixed. Leaving the jury to flounder, unguided by any explanation of how to use and not use the evidence, was neither a lawful nor a better option.

D. The Trial Court Had a Sua Sponte Duty to Give a Limiting Instruction

Apart from the Evidence Code, the Eighth and Fourteenth Amendment rights to a fair and reliable penalty trial and an individualized sentence created a duty on the part of the trial court to give an appropriate and effective limiting instruction sua sponte, given the lack of limits on the inflammatory and confusion-evoking testimony admitted. Most of the states noted on page 293, above, as requiring a limiting instruction do so as part of a package of

precautionary measures regarding such testimony. This Court should do the same. More to the point for this appeal, however, is that in a trial like appellant's, without any other precautionary measures, constitutional standards could not possibly be met without a strongly-worded instruction telling the jury how it could and could not use the evidence.

E. The Erroneous Refusal to Give the Requested Instruction or an Appropriate Substitute Violated Appellant's Federal Constitutional Rights and Was Prejudicial

As a state-law error in a capital trial, the failure to give the limiting instruction requires reversal because it is at least reasonably possible that the error affected the verdict. (See *People v. Brown* (1988) 46 Cal.3d 432, 448.) Moreover, the reason why a limiting instruction was required was to permit a fair trial and a reliable and individualized penalty determination. Refusing one thus violated the Fourteenth Amendment right to due process and the Eighth Amendment. It also violated appellant's due-process right to the protections of state law, and to equal protection of those laws. (U.S. Const., 14th Amend.; Evid. Code § 355; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Reversal is therefore required because the state cannot show that the error was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. 18, 24.)

The reasons why a limiting instruction was needed here are the same reasons why its absence could have affected the jury: the victim-impact evidence was likely to arouse the jurors' anger; make them think that only the maximum sentence could respond to crimes that cause such enormous suffering—regardless of mitigating factors or the fact that such suffering is the baseline consequence of committing homicide; invite them to see the question as whether the survivors or appellant were more deserving of their consideration; and generally distract them from focusing on the nature of the

offense itself and the offender. The error would be harmless if there were so little victim-impact testimony or it had so little emotional charge that there was no risk of its affecting any juror improperly, but this is manifestly not the case here.

Ironically, the error could also be harmless if—as may well be the case—the quantity and quality of the victim-impact testimony was so prejudicial that no limiting instruction could undo the damage. However, to so hold would be to concede the validity of the claim that the victim-impact testimony was grossly excessive. Normally, when a limiting instruction is given, this Court is willing to "presume the jury will follow the instruction and hence the testimony will work no prejudice." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1120.) Here following such an instruction would have meant putting aside any "irrational, purely subjective response" to the extremely inflammatory victim-impact evidence and remembering that the evidence was admitted only "for the purpose of showing the specific harm caused by the defendant's crime." (CT 8: 1942.)

The trial court's failure to tell the jury to do so was prejudicial under any standard, and the judgment of death must be reversed.

//

//

IV

THE TRIAL COURT ERRONEOUSLY AND UNCONSTITUTIONALLY PERMITTED THE PROSECUTION TO USE AN INNOCUOUS CHARGE OF RECEIVING STOLEN PROPERTY AS AN EXCUSE TO INFLAME APPELLANT'S JURY WITH A GRUESOME ACCOUNT OF HIS COMRADES' ATTEMPT TO MURDER A POLICE OFFICER

Count XX of the amended information charged appellant with receiving a stolen ammunition pouch, in violation of Penal Code section 496. (CT 4: 832.) Appellant's conviction on this charge added a mere eight months to his sentence of four consecutive life terms plus fifteen years, in addition to his death sentence. (4SCT 435–437.) Significantly, the prosecution did not go after every last potential month of a determinate sentence: there were three robberies or attempted robberies, in each of which there were two victims but only one offense charged;[193] there were no charges relating to use of Meredith's, Greer's, and Aragon's stolen ATM cards to withdraw cash;[194] and a charge of possession of a weapon in an institution (§ 4574, subd. (a)), based on one of the shank possessions used as aggravation, was ultimately dismissed.[195] The receiving charge, however, combined with an erroneous

---

[193]See CT 4: 826 (Jerry Mills and his son), 830 (Ken Mills and Vicky Ewy), and cf. CT 4: 824 (robbery of William Meredith) with 3SCT 2: 316 & RT 39: 5888 (appellant & Munoz describe attempted robbery of William Meredith's companion).

[194]See RT 36: 5537; 39: 5890–5891, 5997–6001.

[195]See RT 2: 55, 58, 62, 103; 10: 2041–2042; 31: 4859; 55: 8182, 8220–8255. See also RT 51: 7484–7495 and the superior court record in Riverside No. CR59750, of which appellant asked this Court to take judicial notice in a motion filed shortly after the filing of this brief. The docket is available at <http://158.61.133.2/OpenAccess/CRIMINAL/actionlist.asp?action1=C&action2=H&actioncount=2&courtcode=C&casenumber= (continued...)

evidentiary ruling, permitted the prosecution to open its case by laying before appellant's jury the blow-by-blow account of his brother's and Munoz's shotgunning of off-duty police officer John Feltenberger. The testimony also included Feltenberger's struggle to survive and get help, the pools of blood and bits of human tissue found where he collapsed, and his medical treatment and disability afterwards. (See Statement of Facts, above, at pp. 42–46.) This evidence was admitted on the erroneous basis that these facts tended to show that the ammunition pouch was stolen and that appellant knew that it was. (RT 32: 4944.)

The vast majority of this evidence had no tendency to prove that appellant knowingly received stolen property, a fact that was proven in an instant when the prosecution presented appellant's volunteered confession on the subject. What the evidence did do was set the tone of appellant's trial by opening it with a gruesome survivor's account of being shotgunned by appellant's brother and alleged partner in crime. Because of the prejudicial nature of this testimony, its admission violated appellant's rights under the Eighth and Fourteenth Amendments to the United States Constitution and corollary provisions of state law. It did so by depriving him both of the fair trial essential to due process of law and also of a fair, reliable, and non-arbitrary determination of penalty.

A. The Evidence Was Irrelevant and Inadmissible

1. Procedural Background

Prior to trial, appellant moved to exclude evidence of the Feltenberger attempted murder from the trial before his jury. He cited Evidence Code

---

[195](...continued)
CR59750&defnbr=14260&defseq=1&otnmseq=0&dsn=&submit=Display+Actions> (as of May 11, 2006)].

section 352 and argued that the facts of the robbery and Feltenberger's shooting had no probative value—i.e., were irrelevant—on the receiving charge, which the prosecutor brought only in the hope of introducing the inflammatory Feltenberger evidence against appellant. (RT 30: 4695–4696, 4700–4701, 4707, 4711–4712.) The trial court believed that a "352 analysis" was unnecessary because the evidence would help the prosecution meet its burden of proving two elements of the offense, the property's having been stolen and appellant's knowledge of that fact. (RT 30: 4705; see also RT 30: 4699.) It therefore denied the motion. (RT 30: 4716.)

After Officer Feltenberger testified, appellant renewed the motion, to the extent that the jury had not yet heard witnesses describe the Feltenberger crime scene, pointing out that the prosecution had now established that the property in question was stolen and arguing that further evidence would not be relevant. (RT 32: 4971–4973.) The trial court disagreed and denied the motion. (RT 32: 4973.)

2. Applicable Law

Section 496, the receiving statute, "is directed at those who knowingly deal with thieves and with their stolen goods after the theft has been committed." (*People v. Jaramillo* (1976) 16 Cal. 3d 752, 758.) Thus, in proving a violation of that section, the prosecution need show nothing about how the property received was stolen. The elements of the offense are simply that "(1) the property was stolen; (2) the defendant knew it was stolen; and (3) the defendant had possession of it. [Citations]." (*In re Anthony J.* (2004) 117 Cal. App. 4th 718, 728.)

Only relevant evidence is admissible. (Evid. Code § 350.) Evidence is relevant if it has a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210.)

Even if relevant, evidence is subject to discretionary exclusion if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice. (Evid. Code § 352.) Section 352 "looks to situations where evidence may be misused by the jury . . . [, i.e., where it] would 'arouse the emotions of the jurors' or 'be used in some manner unrelated to the issue on which it was admissible.' (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1016 . . . .)" (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1851, disapproved on another ground in *People v. Martinez* (1995) 11 Cal.4th 434, 452.) In applying section 352, "courts must focus on the actual degree of risk that the admission of relevant evidence may result in undue delay, prejudice, or confusion." (*People v. Hall* (1986) 41 Cal.3d 826, 834.) On appeal, a ruling regarding section 352 is reviewed for abuse of discretion. (*People v. Coffman* (2004) 34 Cal.4th 1, 75.) Failure to exercise that discretion is error in itself. (*People v. Castro* (1985) 38 Cal.3d 301, 317; *In re Eichorn* (1998) 69 Cal.App.4th 382, 391.)

Admission of inflammatory, irrelevant evidence is a due process violation if it renders a trial fundamentally unfair. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15; *Payne v. Tennessee* (1991) 501 U.S. 808, 825; *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6; *People v. Castro* , *supra*, 38 Cal.3d 301, 313; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.) Moreover, the Eighth Amendment imposes "a special need for reliability in the determination that death is the appropriate punishment'" in any capital case." (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584, internal quotation marks omitted; see also *Booth v. Maryland* (1987) 482 U.S. 496, 502 [Eighth Amendment constraints on state relevance determinations], overruled on

another point in *Payne v. Tennessee* (1991) 501 U.S. 808; U.S. Const., 8th & 14th Amends.; see also Cal. Const., art. I, § 17.)

3. Analysis

In a lengthy argument, the prosecutor offered several reasons for admitting the testimony. He stated that the evidence was needed to prove the receiving count, because he needed to show that the leather pouch was stolen and that appellant knew that it was stolen; that Munoz could be corroborated on some of what he said about the Feltenberger robbery and attempted murder, thus enhancing his credibility; and that the defense might falsely portray Munoz as the shooter of Feltenberger if the crime were not described. (RT 30: 4696–4698, 4701–4705.) The trial court did not rule on whether Munoz could testify on a collateral matter merely because corroboration that might support his credibility was available. It suggested that any false portrayal of Munoz should be dealt with in rebuttal. It acknowledged that a "352 analysis" would be necessary if it were to consider admitting the evidence on either basis.[196] (RT 30: 4705, 4709–4710.)

The trial court ruled, however, that section 352 simply did not apply, since the prosecution would use the evidence to prove the theft and knowledge elements of the crime of receiving: "In that the People will offer evidence on the elements of the charged 496 and Count 20, I don't believe a 352 analysis is necessary because those are the elements which the People must prove."

---

[196]The transcript is somewhat confusing because the trial court repeatedly misspoke, stating the question as whether appellant would be present during the testimony at issue, rather than whether his *jury* would be present. In other remarks, however, the court demonstrated its understanding that it was ruling on whether or how section 352 affected the proposal to use the evidence against appellant. (See RT 30: 4705–4706, 4708, 4709, 4712, 4716–4717.)

(RT 30: 4705; see also RT 30: 4699, 4706 ["it is part of the People's burden of proof"], 4708, 4711–4712, 4716.)

This was error. There is no authority for the court's belief that the protections of section 352 do not apply to evidence which the prosecution claims tends to prove the elements of its case. All relevant evidence falls into this capacity. The statutory provision's capacity to enable a judge to protect the fairness of a trial and control its length would be eviscerated if it applied only to collateral matters, and it is not so limited.[197] At most, the prosecutor's claim that it needed the evidence to prove that the property was stolen and that appellant knew that fact raised a question of the degree of its probative value, which needed to be assessed, then weighed against its prejudicial effect.

Further, the evidence had no probative value at all. Spending most of the opening day of appellant's trial on the details of a brutal attempted murder committed only by his codefendants, in the guise of showing that he knew that they stole something, not only deprived him of the benefit of section 352's restriction on unjustifiably arousing the emotions of the jurors[198] and defied any "sense of [the] fair play" which due process protects,[199] undermining any confidence in the reliability of the penalty determination.[200] It also violated the bottom-line rule that only relevant evidence is admissible. (Evid. Code §§

---

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

[198]*People v. Edelbacher*, *supra*, 47 Cal.3d 983, 1016.

[199]*Dowling v. United States* (1990) 493 U.S. 342, 353.

[200]U.S. Const, 8th Amend.

210, 350.) Whatever the trial court believed, it was a maneuver by the prosecutor which this Court should not countenance.

As appellant pointed out to the trial court (RT 30: 4711, 4712), there was a clear distinction between the evidence that could show that the property was stolen and that appellant knew that fact, on the one hand, and evidence about the attempted murder of the officer, on the other. What was relevant was testimony from Feltenberger that his ammunition pouch was taken from him by Self and another robber (see RT 32: 4946–4954, 4956, 4961–4962), along with appellant's admission to his interrogator that the pouch in which he kept the clips for his .45 came from Feltenberger[201] (see 3SCT 2: 324). These facts, which could have been established by brief testimony or stipulation, conclusively established the section 496 violation. The prosecution could surely have gotten its extra eight months by presenting only the relevant evidence.

The only other circumstances of the theft that even slightly tended to show appellant's guilty knowledge were Munoz's identity as the other perpetrator, and facts corroborating Feltenberger's identification of Self. Thus, perhaps it would have been within the court's discretion to also permit certain additional, albeit unnecessary, evidence, such as Munoz's testimony that he and Self were the robbers (see RT 39: 6012–6020) and the forensic evidence and a Self admission on Self's involvement (see RT 32: 5001–5002, 5006–5007; 38: 5729, 5732–5733, 5838–5839, 5850–5851 [shoe print]; 32: 5015; 42: 6497–6498 [fingerprints]; 32: 4985–4988 [admission]).

In contrast, Feltenberger's occupation as a police sergeant, the particulars of the robbery, the shooting, the narrative and pictures of the gory

---

[201]The trial court was familiar with appellant's statement when the attempted-murder issue was heard. (RT 12: 2142–2143.)

scene that resulted, and Feltenberger's struggle to survive and recover (see pp. 42–46, above) had absolutely no tendency to prove either that the pouch was stolen or that appellant knew that fact. At the same time, this irrelevant evidence, which made up the bulk of the testimony, was grossly prejudicial. Even Munoz's claim that appellant, watching a news report of the robbery, said that they had to go to the hospital and take out Feltenberger (RT 39: 6022–6023), showed only that appellant knew that the others had shot Feltenberger; the proposition that he knew what was taken would have depended on speculation, not inference. The testimony about the alleged statement was also of dubious reliability, and it was entirely cumulative and unnecessary in light of appellant's dispositive admission (3SCT 2: 324) that he carried a pouch that was stolen from Feltenberger. And it was grossly inflammatory, in front of a jury that would soon be deciding if appellant should live.

Since appellant was entitled to a determination of his individual culpability, based on his own crimes—not those of his brother—and a determination untainted by passion and prejudice, this entire prosecutorial ploy should have been disallowed. Enforcing the black-letter rule which required limiting the evidence on the receiving count to that which tended to prove his guilt would have disallowed it. The same result would have followed a balancing of the probative value of this evidence—which was zero for most of it and marginal for the rest—against its considerable prejudicial effect.

The trial court did not conclude otherwise. Rather, it held that section 352 did not apply because the evidence would help the prosecution meet its burden of proving two elements of the offense. (RT 30: 4705, 4716; see also RT 30: 4699.) But to say this was only to assert, erroneously and without explanation, that the challenged evidence had some probative value. It did not

absolve the court of its duty of determining the magnitude of that value and whether it was outweighed by the evidence's prejudicial effect and cumulative nature. The court failed to exercise its discretion under the statute, which is error in itself. (*People v. Castro*, *supra*, 38 Cal.3d 301, 317; *In re Eichorn*, *supra*, 69 Cal.App.4th 382, 391.) Any reasonable exercise of that discretion could have led only to exclusion of the evidence.

The error also deprived appellant of his federal constitutional rights to a fair trial and a reliable determination of penalty. This assertion is based on the likely effect of the evidence on the jury when it decided penalty, i.e., the same issue that underlies a harmlessness analysis, so appellant now turns to that question. (See *People v. Partida* (2005) 37 Cal. 4th 428, 436–437, 439 [constitutional claims based on likely effect of error depend, like prejudice inquiry, on analysis of potential to affect the outcome].)

B. The Error was Prejudicial With Respect to the Penalty Determination

Appellant's guilt of the uncontested receiving charge was clear without the attempted-murder testimony, so the error could not have affected that determination. However, it was the beginning of a series of guilt-phase errors that paved the way for the penalty judgment, as the prosecutor clearly intended them to.

In determining whether state-law error can be held harmless, the issue is "whether it is 'reasonably possible' that a given error or combination of errors affected a verdict . . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.) "[A] 'mere' or 'technical' possibility that an error might have affected a verdict will not trigger reversal," but a "realistic . . . possibility" will. (*Ibid.*) As appellant explained in Argument I, the penalty verdict was not a foregone conclusion. (See pp. 107–128, above.) As appellant has also explained (pp. 82 et seq., above), because of the unknowability of jurors' subjective weighing

processes and other limits of the appellate process, a finding that error could not have contributed to a juror's penalty decision generally requires the error to have been trivial or to have produced results that were either undeniably cumulative or, conversely, undeniably undone by some other action. (*People v. Brown*, *supra*, 46 Cal.3d at p. 448; *People v. Hamilton* (1963) 60 Cal.2d 105, 136–137; and other cases cited at pp. 82 et seq., above.)

The error here was substantial. Appellant's jurors were instructed, at the close of the penalty phase, to consider all the evidence admitted at both phases of the trial. (CT 9: 1965.) That trial began by associating appellant with a gruesome attack on a police officer. The evidence was extensive in quantity, and it was inflammatory, i.e., "[t]ending to cause strong feelings of anger, indignation, or other type of upset; tending to stir the passions." (Black's Law Dict. (7th ed. 1999) p. 782.) The incident, and detailed descriptions of it, would have been appalling regardless of the victim. And juries do not take kindly to attacks on law enforcement officers. (*Steverson v. State* (Fla. 1997) 695 So. 2d 687, 690; *United States v. Davidson* (D.N.Y. 1992) 1992 U.S. Dist. LEXIS 10013, *18.)

The recognition that decision-making can be affected by emotion is implicit in the acknowledgement that testimony can be inflammatory. This is especially true with a jury deciding penalty, since the jurors' task is a "subjective" one. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1027, fn. 12.) As noted previously, even in a non-capital case, where the questions are strictly factual ones relating to guilt or innocence, not moral ones where emotions and biases can have free play, "it is virtually impossible to determine what influenced a particular juror's vote . . . ." (*People v. Hill* (1992) 3 Cal.App.4th 16, 35–36.) Because of the wide scope for jury discretion in deciding penalty in a capital trial, these considerations are far stronger:

> If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed. What may affect one juror might not affect another.

(*People v. Hamilton*, *supra*, 60 Cal.2d 105, 137.)

The trial court did tell appellant's jury that the evidence regarding Feltenberger was being offered against appellant only on the issues of the property's having been stolen and appellant's knowledge of that fact, not to show that he was involved in the robbery and attempted murder. (RT 32: 4944, 7050.) This, however, only stated the obvious. The jurors knew that appellant was not charged with those crimes, and they could see that there was no evidence that he was involved in them. But the instruction assumes a cool rationality, under which all 12 jurors would pay careful attention when Feltenberger said he was robbed of his ammo pouch, then retreated into their own worlds as he described the shooting and his agony, and averted their gazes while other officers painstakingly showed his trail of blood to the stoop where he begged for help and the pool of blood he left there. Indeed, if limiting instructions could work in such extreme situations, there would be no need for Evidence Code section 352.[202] Reliance on the admonition further assumes that no juror had the claimed "you-have-to-take-him-out" statement (RT 39: 6022–6023) in mind when deciding penalty. There is far more than "a reasonable (i.e., realistic) possibility" (*People v. Brown*, *supra*, 46 Cal. 3d 432,

---

[202]On the limitations of jurors' capacities to follow such instructions, see *Bruton v. United States*, *supra*, 391 U.S. 123, 135–136; *Dunn v. United States* (5th Cir. 1962) 307 F.2d 883, 886; and *People v. Aranda* (1965) 63 Cal. 2d 518, 529–530. On the relationship between telling juries how to use evidence that is capable of misuse, and excluding it altogether, see *Adkins v. Brett* (1920) 184 Cal. 252, 258–259; *People v. Sweeney* (1960) 55 Cal.2d 27, 42–43; and *Inyo Chemical Co. v. City of Los Angeles* (1936) 5 Cal.2d 525, 544.

448) that one or more jurors failed to meet these challenges.[203] Moreover, they had no reason to believe that they should attempt to do so, since the court clearly considered the evidence relevant to their tasks.

Because of its likely impact, the evidentiary error also rendered the penalty determination fundamentally unfair and unreliable, in violation of appellant's due process and Eighth Amendment rights.[204]

As this Court noted in *People v. Gonzales* (1967) 66 Cal.2d 482, 493, "Any meaningful assessment of prejudice [from the erroneous admission of evidence] must proceed in light of the entire record." Therefore this Court must consider not only the direct inferences to be drawn from these items of evidence, "but also any indirect effect that they might have had because of the way in which they were used." (*Ibid.*) The prosecution presented the entire series of criminal incidents involved in this case chronologically. All, that is, but the shotgunning of Officer Feltenberger, which was the tenth of twelve incidents but which was presented first. (See RT 31: 4808–4839; 32: 4944; 37: 5572; see also CT 5: 959–972.) Making Feltenberger his lead-off witness, and following him by officers who described the trail of blood and tissue at the scene, removed any doubt that the prosecutor's true purpose was to horrify the

---

[203]Even the trial court, in enumerating appellant's crimes in ruling on his post-trial motion to modify the penalty verdict, included "the attempted murder of an off-duty Ontario police officer" until corrected by the prosecutor. (RT 55: 8223–8224.)

[204]Appellant's Evidence Code section 352 objection was sufficient to permit a contention on appeal that the error in overruling it deprived him of the fair trial and reliable penalty verdict to which he is entitled under the state and federal constitutions. (*People v. Partida, supra*, 37 Cal. 4th 428 [due process]; *id.* at p. 438 [citing *People v. Cole* (2004) 33 Cal.4th. 1158, 1195, fn. 6, regarding reliable penalty verdict]; see also RT 30: 4701, 4707–4708, 4710 [counsel's references to the capacity of the evidence to unfairly contribute to a death verdict].)

jury and set a tone regarding the collective brutality of the perpetrators of the crime spree that he had told the jurors[205] that they would hear about.

The prosecutor had argued hard and long for his right to do so, albeit on other grounds. (See RT 30: 4695–4717.) Clearly this was not about admitting evidence necessary to get the conviction and eight-month sentence on a receiving count; it was about getting a death verdict. It cannot be said that there is no "reasonable possibility" that the prosecutor's judgment was correct, i.e., no reasonable possibility that the tactic placed at least one juror in a frame of mind that facilitated the rendering of a death verdict. (*Chapman v. California, supra*, 386 U.S. 18, 23, quoting *Fahy v. Connecticut* (1963) 375 U.S. 85, 86–87; *People v. Brown, supra*, 46 Cal.3d 432, 447–448.) Recognizing the possibility of a prejudicial impact here does not "convert procedural fly specks into reversible errors." (*People v. Easley* (1983) 34 Cal.3d 858, 890 (dis. opn. of Richardson, J.) Nor would it be permitting appellant to exploit "the virtually inevitable presence of immaterial error." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.) Rather, it would be a simple reaffirmation of society's demand that, when the state goes after a death verdict, it not use irrelevant evidence to inflame the passions of the jury. Accordingly, the judgment of death must be reversed.

//

//

---

[205]RT 31: 4808.

V

THE TRIAL COURT SHOULD HAVE GRANTED AT LEAST PART OF THE MOTION TO SEVER COUNTS, AND ITS FAILURE TO DO SO PREJUDICED THE PENALTY DECISION

Prior to trial, counsel for Self filed a motion to sever the non-murder counts from the three murder charges, citing a defendant's rights to due process and a fair trial. (CT 6: 1216 et seq.) Counsel for appellant joined. (RT 29: 4683.) The trial court denied the motion as to all counts. (RT 29: 4692.)

Refusing to sever some of the counts was within the court's discretion. However, Counts XI and XII, charging the Magnolia Interiors burglary and vandalism, were unlawfully joined with the remainder of the charges, and severance was therefore required. Even if joinder had been statutorily permissible, refusal to sever these counts would have been an abuse of the court's discretionary severance power, because evidence pertaining to those charges provided powerful, but statutorily unauthorized, reasons to vote for death at the penalty phase.

Count XX, the charge of receiving Officer Feltenberger's leather pouch, was also joined unlawfully. If severance had not been mandated for that reason, then, under the trial court's view of what evidence was relevant to that count, a proper exercise of discretion would have also led to a grant of severance.

As noted in the preceding argument, with confessions to three felony-murders and other serious offenses in hand, the prosecution passed up several obvious opportunities to lengthen appellant's determinate sentence. These included additional robbery counts available because of the second victims in both the William Meredith and Jerry Mills incidents, and an aggravated-assault count against Ken Mills's passenger Vicky Ewy. Appellant had confessed

accessorial responsibility to each of these, and the prosecution evidence also showed his guilt of a number of less serious charges. (See p. 301, above.) The prosecution clearly, therefore, prosecuted the minor Magnolia Interiors counts and the more minor receiving count to render more probable its desired penalty verdict. It cannot be said that the evidence, the introduction of which was permitted only by joinder of those counts, failed to contribute to that verdict. Appellant's state law and state and federal rights to due process, a fair trial, and a fair and reliable penalty determination therefore compel reversal. (U.S. Const., 8th & 14th Amends.; *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073, 1084, and cases cited; *United States v. Tipton* (4th Cir. 1996) 90 F.3d 861, 892; Cal. Const., art. I, §§ 7, 15, 17.)

A. There Was No Legal Basis for Trying the Magnolia Interiors Burglary and Vandalism with the Other Offenses

1. Joinder of Counts Is Authorized Only Where the Offenses Are Connected Together in Their Commission or Are of the Same Class of Crimes

Section 954 permits joinder of counts where offenses are connected together in their commission or are of the same class of crimes. Offenses are connected together in their commission, even if committed at different times and against different victims, if they are linked together by a common element of substantial importance. (*People v. Mendoza* (2000) 24 Cal.4th 130, 160.) Such an element can be, for example, that the offenses are so closely linked in time and purpose that they constitute a continuing course of criminal conduct (*ibid.* [four robberies in 48 hours]), or that they involve common intent (*People v. Balderas* (1985) 41 Cal.3d 144, 170), the use of the same instrumentality (*ibid.*; *People v. Leney* (1989) 213 Cal.App.3d 265, 269) or modus operandi (*People v. Matson* (1974) 13 Cal.3d 35, 39), or the same victims or similar

types of victims (*People v. Duane* (1942) 21 Cal.2d 71, 75; *Leney, supra*, 213 Cal.App.3d at p. 269).

As to the other condition permitting joinder, offenses are of the same class if they possess common attributes. (*People v. Kemp* (1961) 55 Cal.2d 458, 476; *People v. Grant* (2003) 113 Cal.App.4th 579, 586.) Crimes are of the same class if, for example, they all involve homicides (*People v. Ochoa* (2001) 26 Cal.4th 398, 422–23), assaultive conduct (*People v. Poggi* (1988) 45 Cal.3d 306, 320), lewd conduct toward young female minors (*People v. Leney, supra*, 213 Cal.App.3d at p. 269), or the wrongful taking of another's property (*People v. Koontz* (2002) 27 Cal.4th 1041,1075).

"Whether offenses properly are joined pursuant to section 954 is a question of law and is subject to independent review on appeal . . . ." (*People v. Cunningham* (2001) 25 Cal.4th 926, 984.)

2. The Trial Court Correctly Rejected the Prosecution's Claim That the Burglary and Vandalism Were of the Same Class of Crimes As the Assaultive Crimes

Count XI of the amended information charged burglary (§ 459) of the premises of Magnolia Interiors, reciting that the crime was of the same class of crimes as Count X. (CT 4: 828.) Count XII alleged felony vandalism, i.e., the destruction of property exceeding $5000 (§ 594, subd. (b)(2)), alleging that it was connected in its commission with Count XI, which it clearly was, since the vandalism was of the property burglarized. (CT 4: 828; see also RT 31: 4822–4823.).) But Count X, as to which the burglary was supposedly the same class, was the attempted murder (§§ 664 and 187) of "Pint," later identified as Randolph Rankins. (CT 4: 827–828.) There is no basis in case law or logic for considering burglary, with a target felony of vandalism, to be of the same class of crimes as attempted murder.

The prosecution would have fared no better trying to argue that the offenses were of the same class as any of the other crimes charged in the information, all of which were crimes against persons, except for the charge of receiving the ammunition pouch. The breaking in and trashing of Magnolia Interiors sticks out like a sore thumb in the amended information, for it is nothing like the remainder of the charged crimes. Indeed, in denying severance of the other non-murder counts, the trial court acknowledged,

> with the exception of November 14, 1992, Counts 11 and 12, each of the incidences [*sic*] giving rise to the counts charged in the information: One, involved assaultive behavior towards a person or persons; two, was facilitated by the use of a firearm or firearms; three, involved a crime at least as serious as armed robbery; four, took place within the same two-month time period; and five, was linked by a common element of intent to feloniously obtain property.

(RT 32: 4690.) The court then expressly found that Counts XI and XII were not of the same class of crimes as the other charges. (RT 29: 4691.)

3. The Vandalism at Magnolia Interiors Was Not Connected in its Commission with the Assaultive Crimes

a. Lack of Connection

The trial court proceeded, however, to deny severance of the Magnolia Interiors counts based on the section 954 prong on which the prosecution did not rely, the one that permits joinder where offenses are connected together in their commission. As noted above, offenses are connected together in their commission, even if committed at different times and against different victims, if they are linked together by a common element of substantial importance. (*People v. Mendoza*, *supra*, 24 Cal.4th 130, 160.) The trial court first acknowledged that "Counts 11 and 12 . . . are not part of the assaultive crimes

against a person, and so therefore are unrelated to the other incidents . . . ." (RT 29: 4691.) Then the court added a non sequitur:

> [B]ut they involved a burglary and extensive vandalism, painted graffiti stating "666," "Now you die," and "All shall die and live forever in flame," and a sonogram of the owner's unborn son which had been removed from his desk, stabbed with scissors, and had written upon it "Now you die."

(RT 29: 4691–4692.) Thus it seemed to consider the prejudicial nature of the evidence to substitute for the failure of the crimes to be connected together in their commission. Then, further losing sight of the tests for whether the offenses were lawfully joined, the court also noted that evidence of the incident was as inflammatory as that pertaining to the other charges, and that the evidence of the defendants' involvement in the Magnolia Interiors offenses was not particularly stronger or weaker than that on other counts. (RT 29: 4692.) Then, in yet another non sequitur, it concluded,

> So I find a common thread running through all of the crimes[,] including Counts 11 and 12, and that's the felonious intent to obtain property.
>
> So therefore the motion to sever is hereby denied.

(RT 29: 4692.) Having rejected the same-class basis for joinder, and having used the "common thread" language that this Court has used where crimes were "connected together in their commission" (§ 954) by being "linked by 'a common element of substantial importance,'" the trial court was clearly relying on the connected-together basis. (See RT 29: 4690, citing *People v. Lucky* (1988) 45 Cal.3d 259, 276.)

This was error, and the court was correct when, instead, it described the burglary and vandalism as "unrelated to the other incidents." (RT 29: 4691.) Only one sentence of the court's analysis dealt with the legality of the offenses' consolidation—under the law the remainder related to discretionary

severance of offenses lawfully joined—and that was the remark about "the felonious intent to obtain property." But theft was so much an afterthought in this crime that the prosecution did not even charge it. In a shop filled with valuable and easily removed office equipment, tools, and fabrics, the proprietor complained of $18,000 damage but the disappearance of only a paperweight, a fake hand grenade, some keys, and some collectible coins, which, at the time of the motion, were described as petty cash. (RT 34: 5355, 5362, 5363, 5366–5375; see RT 29: 4691 [court relies on defense's incorporation of prosecution trial brief into motion to sever]; CT 5: 963–964 [trial brief].) The Magnolia Interiors offenses were clearly motivated by the vandalism that the prosecution focused on, not by the intent to obtain property that was involved in the robberies.

Here there is neither the close link in time and purpose—four robberies in 48 hours—of *Mendoza*, nor the common intent, instrumentality, modus operandi, the same victims, or similarity in types of victims, that otherwise characterize cases where joinder is permitted on the basis of crimes being connected together in their commission.

b. The Trial Court's Misinterpretation of Precedent

When the court below found "a common thread running through all the crimes[,] including Counts 11 and 12, and that's the felonious intent to obtain property" (RT 29: 4692), it was quoting from *People v. Lucky* (1988) 45 Cal.3d 259, 276, which in turn quoted *People v. Chessman* (1959) 52 Cal.2d 467, 492, and *People v. Conrad* (1973) 31 Cal.App.3d 308, 315. As noted above, the court's factual premise—that the destructive actions at the business premises were motivated by the same intent as the various robberies and assaultive crimes—was mistaken. It was also in error legally. In none of the cases using the "common thread" language was a felonious intent to obtain

property alone held to meet section 954's "connected-together-in-their-commission" requirement.

In *Chessman*, where the language originated, the crimes were found "connected together in their commission" in part because eleven charged offenses were committed in the same unusual manner, in five incidents, and the automobile stolen in another was used to carry out them out. Five other offenses were of the same class as most of the first eleven, all being robberies or kidnapings for robbery. After noting *all* these factors in its analysis, this Court added that "the element of intent to feloniously obtain property runs like a single thread through the various offenses . . . ." (*People v. Chessman*, *supra*, 52 Cal.2d at p. 492.)

Similarly, all of the offenses in *Conrad* arose because "the defendant robbed a series of female storekeepers at knife point to obtain money," and this amounted to a common element of substantial importance. (*People v. Conrad* (1973) 31 Cal.App.3d 308, 315.)

In *Lucky* all the charges arose from robberies of small retail shops, in each of which the defendant had shot the clerk or shopkeeper or at least brandished a weapon. (45 Cal.3d at pp. 270–272.) This Court cited *Chessman's* "common thread" language and added, "In addition, the facts underlying the joined offenses share certain characteristics—the armed robber, usually joined by an accomplice, victimized small businesses which were managed by few employees, sold specialized merchandise, and were located in the same geographical area." (*People v. Lucky*, *supra*, 45 Cal.3d at p. 276.)

The consolidated offenses in each of these cases involving the "common thread" of an "intent to feloniously obtain property," among other things, were akin to the offenses as to which appellant is not contesting the refusal to sever—the series of robberies, robbery-related assaults and murders,

and other assaults. Neither *Lucky*, *Chessman*, nor *Conrad* comes close to holding that offenses are connected together in their commission, within the meaning of section 954, when a defendant involved in armed robberies and shootings decides to vandalize a business, even if he or a co-perpetrator incidentally finds some trinkets attractive and walks off with them. (Cf. *Walker v. Superior Court* (1974) 37 Cal.App.3d 938, 942–943 [though using the identical weapon in different offenses creates a common element permitting joinder, using an unidentified pistol in them does not] (opn. by Kaus, J.).)

If the language used in *Lucky*, *Chessman*, and *Conrad* had been intended to spell out a test for compliance with section 954, this situation would not pass it: clearly the intent motivating the robberies in which appellant participated was not the same intent that motivated the burglary and vandalism of Magnolia Interiors, where valuable, portable, marketable property was destroyed, not taken. Moreover, the sentence on which the court below relied was used by this Court as *part* of detailed analyses of the actual crimes in the cases from which it came, not as a talismanic phrase which—if it could be stretched to apply to a set of facts—would substitute for the statutory test. Rather, under the statute, offenses must be "connected together in their commission." (§ 954.)

This Court has elaborated a genuine test for what that means: if they do not involve the same victims or do not take place at the same time, the offenses must be "linked together by a common element of substantial importance." (*People v. Mendoza, supra*, 24 Cal.4th 130, 160.) The Magnolia Interiors burglary and vandalism were not linked with the other offenses in any significant manner. The only common factors were that one or more of the perpetrators appeared to be the same and that the Magnolia Interiors break-in

took place during the two-month period over which the other crimes were spread.[206] If this were enough to make offenses "connected together in their commission," section 954 would not limit joinder at all. This is not the case. The trial court had no discretion to deny the severance motion as to Counts XI and XII, because their being charged together with the other offenses was statutorily unauthorized. (See *People v. Cunningham*, *supra*, 25 Cal.4th 926, 984 [abuse-of-discretion standard applies to whether proceedings should have been severed in interests of justice, but not to whether joinder was lawful under § 954].) The error reaches constitutional proportions because of its likely prejudicial impact on appellant's penalty phase, an impact which is examined below.

B. Had the Magnolia Interiors Offenses Been Properly Joined with the Assaultive Crimes, Refusing Discretionary Severance Would Have Been an Abuse of Discretion

1. Even Properly-Joined Offenses Must be Severed If Necessary to Protect a Defendant's Rights to a Fair Trial and Reliable Penalty Verdict, as Determined by Four Factors

Even where joinder is permissible, "the court . . . in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately . . . ." (Section 954.) Even if the vandalism of the Magnolia Interiors shop had been properly joined with the assaultive crimes, it would have been an abuse of discretion to deny severance. As the defense pointed out to the trial court (CT

---

[206]Unlike the four robberies in 48 hours of *Mendoza*, *supra*, 24 Cal.4th at page 160, the burglary/vandalism here was three weeks after the preceding occurrence and five days before the next. (RT 34: 5253 [Rankins/Williams attacks: night of October 25, 1992], 5362–5364 [Magnolia Interiors: night of November 13], 5308–5309 [Steenblock kidnap/robbery: November 18]; see also CT 5: 963–964.)

6: 1218), a defendant can establish that denial of discretionary severance was an abuse of discretion by making a clear showing of prejudice. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 447.) "Fundamental principles of due process compel such a conclusion." (*Id.* at p. 452.)

Joinder causing prejudice which denies a defendant a fair trial violates the federal constitutional right to due process. (*United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8; *Bean v. Calderon*, *supra*, 163 F.3d 1073, 1084; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243–1244.) Higher standards should apply in a capital case because of "the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment . . . .' [Citation.]" (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 323.)[207]

"The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever [for] trial." (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.)

> In determining whether there was an abuse of discretion, we examine the record before the trial court at the time of its ruling. The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total

---

[207]The Eighth Amendment need for reliability has been found to constrain trial courts' discretion in ruling on severance of co-defendants when joint trial is sought on capital charges. (*United States v. Tipton*, *supra*, 90 F.3d 861, 892; *United States v. Bernard* (5th Cir. 2002) 299 F.3d 467, 475.) This Court has recognized that cases on severance of counts "are instructive" in deciding issues of severance of defendants for trial (*People v. Keenan* (1988) 46 Cal.3d 478, 500), and there is no reason why the converse should not also be true (see *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322).

> evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case. [Citation.]

(*People v. Mendoza*, *supra*, 24 Cal.4th 130, 161.)

2. The Evidence Was Not Cross-admissible

If there is a common element of substantial importance in the commission of two offenses, "joinder prevents repetition of evidence and saves time and expense to the state as well as to the defendant." (*People v. Scott* (1944) 24 Cal.2d 774, 778–779.) However, "If there can be no repetition because the evidence is not admissible on both counts, this rationale does not come into play." (*Walker v. Superior Court* (1974) 37 Cal.App.3d 938, 941.) On the other hand, if the evidence on one count would be admissible even at a separate trial on the other count, cross-admissibility negates prejudice from joinder. (*Williams v. Superior Court*, *supra*, 36 Cal.3d 441, 448; *People v. Jenkins* (2000) 22 Cal.4th 900, 948.) For these reasons, the cross-admissibility factor can have greater weight than the others (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 948), although an absence of cross-admissibility does not in itself render joinder improper (§ 954.1; *People v. Sandoval* (1992) 4 Cal.4th 155, 173).

In appellant's trial, the evidence pertaining to the burglary and vandalism charges against appellant would not have been admissible to show guilt of any of the crimes against persons, nor to show that he should be put to death for the murders. The prosecutor did not argue, and the trial court did not hold, that the evidence was relevant for either purpose, and it was not. (See CT 6: 1207–1215; RT 29: 4691–4692.) Thus, this particularly important factor (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 948) weighed on the side of

severance: the judicial economy benefits of joinder were minimal, and cross-admissibility could not negate the potential for prejudice.

To the trial court, however, the cross-admissibility factor was irrelevant. (RT 29: 4688, 4690.) The court relied on *People v. Hill* (1995) 34 Cal.App.4th 727, 734–735, which, as it said, "discarded . . . entirely" the cross-admissibility factor. (RT 29: 4688–4689.) In a detailed explanation of its rulings, the trial court, therefore, did not consider cross-admissibility. (RT 29: 4685–4692.) *People v. Hill*, however, stands alone in interpreting the enactment of Penal Code section 954.1 as removing cross-admissibility from the analysis. By the time the motion was heard in this case, this Court had already noted that section 954.1 merely codified existing law about cross-admissibility not being a prerequisite for a severance denial, reaffirmed the traditional four criteria, and emphasized the importance of cross-admissibility to the analysis. (*People v. Memro* (1995) 11 Cal.4th 786, 849.) Had the trial court applied governing law, it would have recognized that lack of cross-admissibility negated both what is normally the main reason for joinder and the clearest means to negate prejudice.

3. There Was No Weak-Case/Strong-Case Problem, But the Trial Was a Capital One

Application of two other criteria is also straightforward. As the trial court noted (RT 29: 4692), there was no issue of joining a weak case on guilt with a strong one, where a "spillover effect" could have led to an unreliable guilty verdict. Thus, that potential reason for granting severance was not a factor here. Its absence, of course, does not militate against severance.

On the other hand, the case was a capital one; appellant's life hung in the balance. When "one of the charged crimes is a capital offense, carrying the gravest possible consequences, the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital

case." (*Williams v. Superior Court, supra*, 36 Cal.3d 441, 454; accord, *People v. Keenan, supra*, 46 Cal.3d 478, 500.) This scrutiny is compelled by the Eighth Amendment. (See *Caldwell v. Mississippi, supra*, 472 U.S. 320, 323; *United States v. Bernard, supra*, 299 F.3d 467, 475; *United States v. Tipton, supra*, 90 F.3d 861, 892.)

Here, as it turned to apply the law to the facts before it, the trial court's only nod to the effect of appellant's case being a capital one was to state, "Even in capital cases, however, consolidation may be upheld on appeal where the evidence on each charge is so strong that consolidation is unlikely to have affected the verdict." (RT 29: 4690.) The statement is identical to language in *People v. Lucky, supra*, 45 Cal.3d 259, 277, but *Lucky* was addressing an argument for a per se rule against consolidation in capital cases because of a perceived risk of the jury's "merely combining the bulk of the evidence and convicting the defendant on the basis of the numerous charged offenses" (*ibid.*), a claim not being made here. Citing *Williams v. Superior Court, supra*, 36 Cal.3d at p. 454, and *People v. Smallwood* (1986) 42 Cal.3d 415, 430–431, *Lucky* reiterated the need for trial courts to exercise particular care in considering the possibilities for prejudice caused by consolidation of charges in capital cases. (45 Cal.3d at p. 277.) Despite a lengthy recitation of the basis of its ruling, the trial court said nothing to suggest that it was exercising such care, nor even that it understood that the case's being a capital one was a factor to consider. Rather, it contented itself with the irrelevant observation that denial of severance in capital cases can sometimes withstand appellate review. (RT 29: 4690.)

To the extent that this implied a focus on what can be upheld when discretion is exercised, rather than straightforward use of the factors that must guide discretion, there was a failure to appropriately exercise discretion.

Finally, the trial court's failure to apply the capital-case factor caused it to look only at the impact of its decision on the guilt verdicts, while omitting its constitutional duty to consider the impact on the penalty decision. (Compare RT 29: 4691 ["the evidence [of guilt] is so strong that consolidation is unlikely to affect the verdict"] with *United States v. Tipton*, *supra*, 90 F.3d 861, 892 [trial court's discretion, and appellate review thereof, are constrained by the Eighth Amendment where there will be a capital sentencing phase].)

4. The Trial Court Correctly Found the Evidence "Extremely Inflammatory" but Erroneously Thought That This Was a Reason to Deny Severance

The remaining factor for assessing prejudice, when severance is committed to a trial court's discretion, is whether the evidence on any of the charges was particularly inflammatory. (*People v. Mendoza*, *supra*, 24 Cal.4th 130, 161.) The trial court fatally confused the mode of analysis under this factor with that under the weak-case/strong-case factor. It stated, "I don't think it can be argued that the incident is significantly less inflammatory than the others, in that the sonogram is extremely inflammatory . . . ." (RT 29: 4692.) The court had similarly noted that the "extensive vandalism" involved "painted graffiti stating '666,'[208] 'Now you die,' and 'All shall die and live forever in flame' . . . ." (RT 29: 4691.) As to the sonogram, it was "of the owner's unborn son which had been removed from his desk, stabbed with scissors, and had written upon it 'Now you die.'" (RT 29: 4691–4692.)

The issue, however, was not a comparison of the inflammatory nature of the evidence on one count versus the inflammatory nature of that on another, but whether the evidence on the joined count was inflammatory at all,

---

[208]"666" is commonly understood as a reference to the Devil. (See *People v. Michaels* (2002) 28 Cal.4th 486, 540; *Anthony v. County of Sacramento* (E.D.Cal. 1995) 898 F.Supp. 1435, 1442.)

i.e., "whether some of the charges are likely to unusually inflame the jury against the defendant."[209] (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 161; see also *People v. Marshall* (1997) 15 Cal.4th 1, 27–28 [whether charges "unusually likely to inflame the jury"]; *Frank v. Superior Court* (1989) 48 Cal.3d 632, 639 [same].) Relative inflammatory capacity is not the issue: "Prejudice may arise from consolidation where it allows the jury to hear inflammatory evidence of unrelated offenses which would not have been cross-admissible in separate trials." (*People v. Lucky*, *supra*, 45 Cal. 3d 259, 277.)

Had it properly kept in mind the fourth factor—that this was a capital case requiring unusual sensitivity to the possibility of biasing the penalty determination—the trial court would have realized that the "extremely inflammatory" nature of the evidence (RT 29: 4692) was a reason to keep it *out* of the murder/robbery trial by severing the charges, not a reason to bring it in via joinder. It is true that a comparatively weak guilt case can be prejudiced by being joined with a comparatively strong one. In contrast, because of the normative weighing of intangibles that goes into a capital penalty determination (*People v. Sanders* (1990) 51 Cal.3d 471, 529; see § 190.3), it is not disparities in inflammatory potential, but *cumulative* inflammatory and/or legitimately unfavorable testimony that helps produce a death verdict. (See, e.g., *People v. Roldan* (2005) 35 Cal. 4th 646, 725

---

[209]The trial court was again relying on *People v. Hill*, *supra*, 34 Cal.App.4th 727. (RT 29: 4689.) And here, as in its analysis of cross-admissibility, *Hill* failed to accurately paraphrase the precedents on which it relied. (*Id.* at p. 735, citing *People v. Sandoval*, *supra*, 4 Cal.4th 155, 172–173; *Williams v. Superior Court*, *supra*, 36 Cal.3d 441, 452–454; *Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1286–1287; but see *id.* at p. 1284.)

[surveying facts which, added together, likely led to death verdict].) Permitting the prosecutor to add more evidence inflaming the jurors against appellant was precisely the problem. The testimony could have been introduced only by joining the charges. It was not relevant to guilt or innocence on charges other than the Magnolia Interiors counts themselves, and it could not have been introduced in the penalty phase of the murder trial, since it pertained to none of the aggravating factors enumerated in section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 775.) What the trial court did, therefore, was give the prosecutor a golden opportunity to argue appellant's evil nature, an opportunity which the attorney seized repeatedly, as shown in detail below.[210] (RT 45: 6944–6945 ["This count is very instructive . . . about the . . . mental state of Mr. Romero"]; 46: 6961, 7039–7040; see also RT 31: 4812; 48: 7269.)

Neither the inflammatory Magnolia Interiors evidence, nor the theories about appellant's character which it permitted the prosecutor to elaborate, belonged in a trial in which the jury was to decide whether appellant lives or dies. Yet it was presented to appellant's jurors as powerful evidence of what kind of young man he was. It was, therefore, grossly prejudicial to his penalty defense. Or, to use the language of the severance cases, it was evidence (a) unusually likely to inflame a jury, introduced into (b) a capital case, (c) in a situation where only joinder, not cross-admissibility, could have been the vehicle for its admission, and where the judicial-economy benefits of joinder were minimal. Thus refusal to ensure the fairness of the capital proceeding through severance was an abuse of discretion. (*People v. Mendoza*, *supra*, 24

---

[210]The prosecutor began his first summation before the Self jury with a series of points about Self's depraved character, and he alluded to the vandalism then as well. (RT 45: 6702–6705.)

Cal.4th at p.161; *People v. Marshall, supra*, 15 Cal.4th at p. 27–28.) This is unsurprising, since the trial court thought that two of the four factors intended to guide that discretion could be ignored and misunderstood how to apply a third.

How the error was prejudicial and reached the level of a constitutional violation is dealt with below, after consideration of the trial court's other erroneous severance ruling.

C. The Trial Court Abused Its Discretion in Refusing to Sever the Count of Receiving an Ammunition Pouch Stolen from Officer Feltenberger

Appellant has contended that it was error to permit the introduction of evidence of the gruesome details of the attempted murder of Officer John Feltenberger, in support of Count XX, the charge of receiving an ammunition pouch stolen from Feltenberger. (Argument IV, pp. 301 et seq., above.) The contention was that no element of that offense was shown by permitting the prosecution to open its case with the blow-by-blow of Self's and Munoz's shotgunning of the officer, his struggle to survive and get help, the pools of blood and bits of human tissue found where he collapsed, his medical treatment and disability afterwards, and appellant's alleged statement that Self and Munoz needed to "take out" Feltenberger at the hospital. Here, respondent is in a double bind: if, somehow, this evidence were admissible on the receiving-stolen-property count, it would surely have been error to deny the motion to sever as it applied to that count.[211] (See CT 6: 1220 et seq.)

The analysis should have been straightforward, under the principles set forth previously.

---

[211]Before ruling on the severance motion, the trial court was notified that inclusion of the receiving count could permit evidence of the Feltenberger attempted murder to be placed before appellant's jury. (RT 29: 4654–4655.)

Had appellant and Self been tried before the same jury a (weak) argument for joinder being authorized could be made, because the receiving count would have been connected in its commission with a codefendant's other offenses. (See *People v. Spates* (1959) 53 Cal.3d 33, 36.) Here, however, that situation did not exist. Receiving Feltenberger's ammunition pouch was not connected to its commission with any other crime charged against appellant, i.e., with any crime which his jury would be hearing about. Nor was it of the same class of crimes as any of his offenses.[212] Joinder was unauthorized by statute, and the trial court lacked the discretion to refuse to sever. (See *People v. Cunningham*, *supra*, 25 Cal.4th 926, 984.)

If joinder had been statutorily authorized, severance would have been required in the interests of justice and a constitutionally fair and reliable penalty trial. The evidence involving Feltenberger was not otherwise admissible at appellant's guilt or penalty phase. It was highly inflammatory, given both Feltenberger's status as a police officer and the details of his survivor's-eye view of being shotgunned and left to die. Denial of severance permitted its introduction in a capital case, where particular caution to avoid prejudice needs to be exercised. The absence of the fourth factor—weak-case/strong-case "spillover"—does not make admission of the evidence through joinder any less prejudicial, particularly since the problem was prejudice to the penalty decision, not the guilt determinations.

The trial court's view was quite different. Although the court had recognized the differences between the assaultive offenses that made up the

---

[212]Robbery and receiving both involve another's property. But robbery is a taking. The conduct criminalized by the receiving statute is not a theft offense; the prohibition "is directed at those who knowingly deal with thieves and with their stolen goods after the theft has been committed." (*People v. Jaramillo* (1976) 16 Cal. 3d 752, 758.)

bulk of the charges and the Magnolia Interiors counts, it did not do the same with the receiving charge. Rather, to the trial court, the Magnolia Interiors offenses were in one group, and everything else was in another, in which each offense involved assaultive behavior, use of a firearm, and a crime at least as serious as armed robbery. (RT 29: 4690.) The confusion in even the trial judge's mind, so that the minor, non-violent offense of receiving stolen property was somehow lumped in with the remaining charges, speaks volumes about the inherent difficulty in mentally separating that count—as it was prosecuted—from the robbery and attempted murder committed by Munoz and Self, a difficulty sure to affect the jurors as much as it did the judge.

In terms of discretionary severance, the trial court made the same errors of omission and commission that it made in analyzing the four factors that should have applied to the Magnolia Interiors counts. With the receiving-property charge, the court mentioned only two, simply stating its belief that no incident was "significantly more inflammatory or weaker in evidentiary strength than the others." (RT 29: 4691.) While the point about evidentiary strength was true, the inflammatory nature of the Feltenberger evidence added to the cumulative case for death, which was the real point, not whether the likelihood of inflaming the jury varied among the different counts. (*People v. Marshall, supra*, 15 Cal.4th 1, 27–28 [question is whether evidence on charges sought to be severed is "unusually likely to inflame the jury"]; cf. *Williams v. Superior Court, supra*, 36 Cal.3d 441, 454–455 [even on strength-of-evidence factor, differential in strength is not the only issue; where acquittal was conceivable in on either count, risk of jury's cumulating evidence for guilt was determinative].)

As noted in the discussion of the other counts, the court mistakenly thought cross-admissibility no longer mattered. (RT 29: 4688, 4690; cf.

People v. Jenkins, *supra*, 22 Cal.4th 900, 948.) Perhaps this error is what permitted the court to find a savings in judicial economy, though such savings was virtually absent, given that—in two trials—the pertinent evidence would be presented in only one. (RT 29: 4691; cf. *People v. Smallwood*, *supra*, 42 Cal.3d 415, 430 ["As the two offenses were not cross-admissible, there simply was no significant judicial economy to be gained from joinder"].)

Finally, as also noted above, the trial court's only comment on the applicability of the fourth factor was to state, "Even in capital cases, however, consolidation may be upheld on appeal where the evidence on each charge is so strong that consolidation is unlikely to have affected the verdict." (RT 29: 4690.) Thus it did not acknowledge, much less apply, the principle that "[s]everance motions in capital cases should receive heightened scrutiny for potential prejudice." (*People v. Keenan*, *supra*, 46 Cal.3d 478, 500.)

By eliminating cross-admissibility and the capital-case factor from the equation, and by limiting the question of the inflammatory nature of the evidence to its *differential* tendency to inflame, the court ultimately engaged in a rote analysis. In other words, not only did it fail to properly consider and apply three of the four factors which this Court has stated should have guided its discretion, but its reasoning was abstracted from the fundamental question which the four factors are meant to help answer: whether there were judicial-economy benefits that could somehow outweigh the likely impact—on a real jury—of allowing the receiving charge to be prosecuted in the capital trial. There were not. If receiving had to be proved by dwelling on the brutal means by which the theft was committed by people closely associated with appellant in the minds of the jury, it was a serious and unconstitutional abuse of discretion to not sever the count for trial to keep the material out of the capital case. (U.S. Const., 8th Amend. & 14th Amend., due process clause; *United*

States v. Lane, *supra*, 474 U.S. 438, 446, fn. 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. 320, 323; *People v. Mendoza*, *supra*, 24 Cal.4th 130, 161; *People v. Marshall*, *supra*, 15 Cal.4th 1, 27–28; *People v. Keenan*, *supra*, 46 Cal.3d 478, 500.)

D. The Errors Were Prejudicial

1. Respondent's Burden Is Extremely High

The prejudice analysis draws on elements that have been set forth in earlier portions of this brief. Briefly, there was aggravating evidence consisting of the circumstances of the crimes in which appellant participated and his continuing to act out during the initial part of his pretrial confinement.

A death verdict was not, however, so inevitable, and the error was not so minor and technical, as to allow this Court to find the severance errors harmless without effectively substituting *its* death verdict for whatever result might have been reached by a jury uninfluenced by inflammatory evidence that did not belong in this capital trial. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 ["The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error"].) Penalty phase evidence portrayed appellant as the product of a home in which he was seriously abused and neglected, by a mother who had her own considerable deficits.[213] Such evidence, even in the face of substantial aggravation, can "produce sympathy and compassion in members of the jury and lead one or more to a more merciful decision." (*In re Lucas* (2004) 33 Cal.4th 682, 735.) Appellant still managed to be both loving and loved. He had tried—albeit unsuccessfully—to change himself and the direction of his

---

[213]The evidence supporting the statements in this paragraph is summarized above, at pp. 107–124.

life by moving for a time to the San Francisco Bay Area and finding work there. He had no prior record and was still a youth of 21 or 22 when he committed his crimes. He had a young son, with whom he maintained a relationship while facing trial. He neither hurt nor particularly frightened any of the robbery victims whom he confronted alone, and he may have protected some of the others. Nothing that Munoz said concerning his role in the crimes that varied from appellant's own account was independently corroborated

The jurors deliberated for two days on penalty (CT 8: 1956–1957; 9: 2025). The factors that go into each unique human being's vote on a question based so much on normative judgment and discretion cannot really be determined. (*People v. Hines* (1964) 61 Cal.2d 164, 169; *People v. Hill* (1992) 3 Cal.App.4th 16, 35–36.) The possibility of a difference in one juror's vote is enough to entitle appellant to reversal. (*In re Lucas*, *supra*, 33 Cal.4th 682, 734, quoting *Wiggins v. Smith* (2003) 539 U.S. 510, 537.) The plethora of automatic appeals with which this Court is deluged and the dry, abstract nature of the appellate review process should not obscure the fact that, Orlando Romero, too, is a unique human being, loved and cared for by many people, and entitled to the utmost caution in the determination of whether the proceedings that determined that the state should kill him were reliable enough to permit such a grave outcome. (See *Johnson v. Mississippi* (1988) 486 U.S. 578, 584 [special need for reliability in a death case].)

2. It Is Impossible To Demonstrate that the Errors Could Not have Affected the Outcome

As appellant demonstrated at length previously (pp. 82 et seq.), under both state and federal law, the harmlessness inquiry does not depend on this court's analysis of the strength of the cases for aggravation and mitigation, but simply on whether the error resulted in the admission of evidence "which possibly influenced the jury adversely . . . ." (*People v. Neal* (2003) 31 Cal.4th

63, 86, quoting *Chapman v. California, supra*, 386 U.S. 18, 24.) The ways in which the failures to sever could have influenced one or more jurors have been argued in detail in the course of explaining why they were errors at all. Briefly, evidence of an attack on an officer is always inflammatory, and Feltenberger set the tone for the trial by describing his unprovoked ordeal in chilling detail, backed up by the evidence of what was left at the scene of his blood and tissue. (See Exs. 39–42, 44.) Moreover, the prosecution's case on that count included Munoz's inflammatory testimony that appellant said they had to go to the hospital and "take out" Feltenberger. (RT 39: 6023.) The alleged statement was highlighted in the prosecutor's summation. (RT 46: 6967.)

As the trial court actually emphasized in its upside-down analysis, the Magnolia Interiors evidence was also "extremely" inflammatory—with the stabbing of the baby's sonogram and its "Now you die" inscription, the "666" allusion to Satanism, the other hostile graffiti, and the wanton destruction. (RT 29: 4691–4692.) Photographic exhibits dramatically illustrated the testimony and made it come alive. (Exs. 10–13, 186–199.)

Moreover, the prosecutor explicitly and deftly used the Magnolia Interiors evidence to enhance his negative portrayal of appellant's character. The United States Supreme Court has found emphasis in a prosecutor's argument alone enough to necessitate rejecting the possibility that penalty-phase error was harmless. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 753–754; *Johnson v. Mississippi* (1988) 486 U.S. 578, 586, 590 & fn. 8; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *People v. Roder* (1983) 33 Cal. 3d 491, 505; cf. *People v. Hinton* (2006) 37 Cal. 4th 839, 868.) Appellant's prosecutor did not directly bring up the burglary/vandalism during his penalty-phase summation, which would have been blatant misconduct,

since it did not relate to a statutory aggravating factor. However, as explained in the Introduction and Summary of Argument, both parties used the guilt phase primarily as a prelude to the penalty trial. So prosecutor the used the incident over and over, during guilt-phase arguments that transparently revealed why these two counts—each of which added a mere eight months to appellant's sentence (RT 55: 8250–8251)—were brought and tried with the others:

> Let's talk about Magnolia Interiors. You saw the photos of the destruction. . . . This count is very instructive to us because it teaches us a lot about the mental—mental state of Mr. Romero and Mr. Self at this time. Teaches us what they are about. Teaches us what Romero is about, which is just sheer destruction, destroying things, just for the fun of it. The spray glue in the computers and the Xerox machines. The spray paint, the weird sayings, "All shall die and live forever in the flame." "Sad day in hell, see you there." Just weird stuff. Furniture stabbed and ruined. Ironic little smiley faces there. "666." Another little smiley face, and a "666," on the toilet "Now you die." What are you thinking about when you write something like that? What are you thinking about when—what is Romero or his brother thinking about when they take a sonogram of an unborn baby out of the manager's desk, stab it with a pair of scissors and write, "Now you die"—or "You're gonna die."
>
> What are you thinking about? And then this is interesting, the couch, written on it, "Just when you thought," and then stabbed with a pair of scissors. That seems to be a recurring theme, again. People going about their business thinking everything is fine, and "Just when you thought," the defendant likes to spring a little surprise on you.
>
> Just when Joey Mans was starting to think everything was going to be okay, he is just shot in the back.
>
> Just when Jose Munoz— Aragon is thinking he is just talking to somebody interested in motorcycle riding, he is shot without warning.

(RT 45: 6944–6945.) None of this had anything to do with appellant's guilt

of the burglary and vandalism charges, as the prosecutor undoubtedly knew, but it constituted 33 of 41 lines of his argument on those counts. (See RT 45: 6944–6946.) And it did not start or end there. The prosecutor had just described the Mills/Ewy incident:

> Just when they thought they were off to themselves, kind of out in the country, *just when they thought everything was going to work out nice*, the guy is out with his girlfriend, just when they thought—they look over to turn, and blam.

(RT 45: 6940 [emphasis added].) The prosecutor returned to the theme a few minutes after the discussion of Magnolia Interiors, in his characterization of appellant's state of mind during the Aragon shooting: "All the while he is planning his death, because, you know, *just when you thought*—just when the victim is relaxed, won't it be a surprise for him to get shot? That seems to be the kind of thing Mr. Romero likes." (RT 46: 6961, emphasis added.) And he used Magnolia Interiors again at the very close of his argument:

> Finally, just when we're thinking about what people intended, and we go back to Magnolia Interiors, that little home interior shop, and the things that were written there and what is on the mind of people doing that kind of destruction, that kind of damage, writing those kind of things. Things like, "Now you die." And who is intending for people to die in these robberies? The defendant intended to kill at Aragon and at Lake Mathews.

(RT 46: 7039–7040.) The repetition of the "just when you thought" motif was a reprise of a theme that had been introduced during opening statement:

> Gene Romero is being very cool. Mr. Mans is probably thinking, this is going to work out. *Just when he thought he might come out of this alive, just when he thought this might just be a jack* [robbery], Gene Romero tells Danny, "Shoot him, shoot him."

(RT 31: 4812, emphasis added.)

Having so fully established the theme during the guilt phase, the

prosecutor recalled it subtly but effectively during his penalty-phase opening statement. Describing an assault on a jail inmate, he said, "Mr. Thibedeau wasn't used to people talking nicely to him, due to what he was in there for. *But just when he thought* someone was being nice to him," appellant thrust the paper spear at him. (RT 48: 7269, emphasis added.) Surely the jury had no reason to forget, when it retired to decide penalty, what it had learned from the "very instructive . . . mental state" evidence arising from the Magnolia Interiors counts. (RT 45: 6944.) On the contrary, before it began penalty deliberations, it was twice instructed that it should consider the evidence received during the entire trial. (RT 54: 8053, 8063.)

Were this Court to conclude that there was no reasonable possibility that the errors could have affected the death verdict (see *People v. Brown*, *supra*, 46 Cal.3d 432, 447–448), and that their impact on the fairness of the trial and the reliability of the penalty decision were harmless beyond a reasonable doubt (see *Chapman v. California*, *supra*, 386 U.S. 18, 24), it would be discarding not only appellant's claim, but respondent's own very practical judgment. The prosecutor fought to get this evidence in (see CT 6: 1207–1215 [extensive memo in opposition to motion to sever]) and expended time and resources in presenting it, in contrast to his giving up a number of similar opportunities to tack a few additional months onto appellant's term of imprisonment, each of which was based on evidence already being presented. (See p. 301, above.) Then he made John Feltenberger his lead-off witness, focused the Magnolia Interiors portion of its guilt-phase argument not on the proof of the elements of burglary and vandalism, but on what the specifics of the crimes showed about appellant's character and mentality, and used some of the Magnolia Interiors graffiti ("Just when you thought") as a primary theme in characterizing what he saw as appellant's attitude and motives in attacking

people, a theme he recalled during the penalty phase.

While one is hesitant to ascribe motives to the prosecution, they can be seen clearly by imagining that the motion to sever had been granted as to the Feltenberger and Magnolia Interiors charges. It is inconceivable that the prosecution would have followed through with trying those charges, just as it did not try the shank possession which it had separately charged, though trials on any of these counts would have taken less than a day. They were joined in the hope that they would affect the penalty verdict, i.e, because respondent's trial counsel thought that they could do so. He was correct, and there is a reasonable possibility that the erroneous refusals to sever did affect that verdict. The unfairness introduced into the penalty determination was a violation of the rights to due process and a reliable penalty determination guaranteed by the Fourteenth and Eighth Amendments, and it is not possible to demonstrate that the constitutional violations could have affected no juror. (See *Chapman v. California*, *supra*, 386 U.S. 18, 24.) On the contrary, they probably did. The purported "take him out" statement (Feltenberger) and the Satanism and baby-killing allusions (Magnolia Interiors) were each alone items that could clearly have pushed one or another juror over the line for death.

It is important to remember that joinder of these minor offenses was not even legally authorized, although analysis of the alternative abuse-of-discretion claims took up more space in this argument. Joining them in this trial was prosecutorial overreaching, in a successful attempt to ensure a death verdict. It should not be tolerated by this Court. The death judgment was rendered by a jury exposed to inflammatory evidence that should have been heard and seen—to the extent that it was admissible at all—only by a jury or juries having the limited tasks of deciding guilt or innocence of charges of

receiving stolen property, burglary, and vandalism. The penalty judgment must therefore be reversed.

//

//

VI

THE JURY WAS ERRONEOUSLY PERMITTED TO USE HIGHLY PREJUDICIAL EVIDENCE OF "ATTEMPTED ESCAPE" AS AGGRAVATION, EVEN THOUGH APPELLANT ONLY MADE PREPARATIONS TO ESCAPE WITHOUT ATTEMPTING TO DO SO

An excellent way to get a jury to return a death verdict is to encourage it to speculate that, if the defendant is permitted to live, he might escape, thereby being free to hurt more people, including, perhaps, the jurors who convicted him. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1232; *People v. Kaurish* (1990) 52 Cal. 3d 648, 710; *People v. Gallego* (1990) 52 Cal.3d 115, 196; Garvey, *The Emotional Economy of Capital Sentencing* (2000) 75 N.Y.U. L. Rev. 26, 66–67 ("*Capital Sentencing*"); Platania & Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials* (1999) 23 Law & Hum. Behavior 471, 476, 478–479, 481 ("*Prosecutorial Misconduct*").) Testimony introducing such a possibility is normally not permitted, because it is "inherently speculative, and may be highly prejudicial in undermining juror confidence in the sentence of life imprisonment without parole as an alternative to death." (*People v. Kaurish*, *supra*, 52 Cal. 3d at p. 710.) This Court has permitted circumvention of the ban, however, if the defendant escaped, or attempted or even prepared to do so, during pretrial confinement. Then the evidence can come in during the guilt phase to show "consciousness of guilt." (*People v. Williams* (1988) 44 Cal.3d 1127, 1143– 1144.) This is true, however, only if the evidence is more probative on guilt than prejudicial on guilt or penalty. (Evid. Code § 352; see *People v. Box* (2000) 23 Cal. 4th 1153, 1204–1205 [entertaining but rejecting on its merits a § 352 challenge].) And to permit use of the evidence at the penalty phase as well, the defendant's alleged actions would have to amount to an actual crime involving the use or a threat of use

of force. (*People v. Bacigalupo* (1991) 1 Cal. 4th 103, 148; Evid. Code § 355.)

Here the prosecutor was permitted to evade these restrictions and use evidence of escape preparations against appellant. This happened because neither the trial court nor appellant's attorney recognized the distinction between attempting a crime, which in itself is criminal and thus possibly admissible regarding penalty, and preparing to commit a crime, which is not. The result was three related errors. Each took place during a different part of the trial, but they are so interrelated that it is best to analyze them all here.

First, consistent with his general use of the guilt phase to set up the penalty phase, the prosecutor introduced the escape-preparation evidence during the proceedings on guilt. He did not charge attempted escape in the information, which would have subjected it to the jury's formal deliberative process, as well as a motion to sever. It was admitted to show "consciousness of guilt." Counsel could have defeated this ploy, since the evidence's minimal probative value on guilt was clearly outweighed by its tremendous potential for prejudice in the later penalty determination. Second, if admitted, its use should have been limited to proving whatever consciousness of guilt was supposedly in issue at the guilt phase. It was also, however, used as aggravation during the penalty phase, even though the escape preparations had not ripened into an attempt and therefore did not constitute an actual or attempted crime of violence under Penal Code section 190.3, factor (b). Third, jurors properly instructed on attempt would have recognized that there was no attempt. One would hope, therefore, that they would have followed instructions rendering the evidence unusable as aggravation because no factor (b) crime, only an offense involving property damage, had been shown. However, the attempt instructions fatally muddled the preparations/attempt distinction.

The three errors together permitted an invalid finding of a weighty circumstance in aggravation and tainted the penalty verdict, in violation of appellant's right to trial before a properly-instructed jury, right to a reliable and non-arbitrary penalty trial, and due-process right to a fair trial. (U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art I., §§ 7, 15, 16, 17.)

The first claim and, in part, the second, are presented under the rubric of ineffective assistance of counsel. (U.S. Const., 6th Amend.; *Strickland* v. *Washington* (1984) 466 U.S. 668.) Although trial counsel tried to exclude the evidence at the guilt stage, his efforts were hamstrung by his failure to recognize that the evidence had no legitimate use at penalty. Since there could be no tactical basis for objecting on a weak basis instead of a strong one, the issue can be decided on the appellate record.

After setting forth the procedural background, appellant explains the premises underlying all three claims, i.e., the preparations/attempt distinction and the failure of the prosecution's evidence to show an attempt. Then each claim is analyzed in turn.

A. The Defense and the Trial Court Were Apprised of the Proffered Testimony, and Defense Counsel Made Weak Attempts to Exclude It

Prior to trial, the prosecution filed a motion in limine seeking a ruling on what it characterized as evidence of attempted escape. The motion explained that, two years earlier, two bars on appellant's cell had been cut through and taped back in place; that a shank had been found in the cell to which appellant was moved after discovery of the cut bars; and that, according to a jailhouse informant, appellant and his cellmate had sawed through the bars using a smuggled hacksaw blade and planned to sneak out of the cell, hide in a shower area, attract a guard by causing a disturbance, and demand release while holding the shank to the guard's throat. (CT 5: 1035; see also RT

30: 4738–4739.) There was no mention of any action to try to implement the plan.

Appellant's counsel filed opposition papers describing a court's discretion under Evidence Code section 352 and making a conclusory assertion that the conditions for invoking that discretion had been met. (CT 6: 1225–1226.)

When the matter was heard, trial counsel alluded to his points and authorities and section 352, acknowledged authority permitting escape attempts to be introduced to show consciousness of guilt, and moved on to "another analysis that we need to consider," the only one which he actually argued and on which he sought a ruling. (RT 30: 4735–4736.) He asserted that the inmate informant, Arthur Dicken, suffered from delusions, and that therefore a hearing under Evidence Code section 402 to assess "the veracity or credibility" of the evidence should be held. (RT 30: 4736–4737.) The trial court expressed doubt that admissibility of the testimony was predicated upon its credibility but agreed to hold the hearing "out of an abundance of caution." (RT 30: 4739.)

When that hearing was held, counsel again changed tack. He noted that the witness, in his statement,

> gave a narrative of things unrelated to Mr. Romero, and they're also unrelated to the alleged escape attempt . . . .
>
> So that's really the basis for the 402 hearing. I need to have some idea of what Mr. Dickens [*sic*] is going to testify about, and also, I am going to ask that the Court caution him not to go into areas tangential or far afield from direct questions that he is being asked.

(RT 42: 6390–6391.) Counsel conceded that the issues raised earlier about the witness's credibility did not affect the admissibility of his testimony, only its weight. (RT 42: 6391–6392.) The trial court then established with counsel the

parameters of the witness's legitimately anticipated testimony and admonished him to testify only from personal knowledge and not to volunteer information beyond what he was asked. (RT 42: 6391–6397.) Counsel raised no other issues about the admissibility of Dicken's testimony or other evidence of the escape preparations. Nor did he seek a ruling on his initial objection under Evidence Code section 352.[214]

As set forth in more detail in the Statement of Facts, various deputies and Dicken then testified generally in accordance with the prosecution's original proffer regarding the state of appellant's cell door, the discovery of two possible shanks, and the activities of appellant and his cellmate in obtaining a hacksaw blade and sawing the bars. As to the cell door, two bars—which, when removed, left enough space for a person to exit—had been cut through, taped in place, and painted to conceal the damage. There was somewhat less detail (than in the proffer) on the plan to gain control of a guard as a hostage, and more on how the hacksaw blade was obtained. (RT 42: 6418–6483; see detailed summary at pp. 51–52, above; cf. CT 5: 1035.)

During the penalty phase, the prosecution, with defense acquiescence, was permitted to use the incident in aggravation.[215] (See RT 48: 7201, 7268; 54: 8026, 8030.) In instructing the jury, the trial court included it in the list of

---

[214]Later, after all the evidence had been put before the jury, the court considered Self's objection to testimony pertaining to a separate alleged escape attempt by him. At that point the prosecutor noted that there had been no ruling on appellant's objection. (RT 42: 6486.) After ruling adversely to Self, the court offered to apply the ruling to Romero as well, and appellant's counsel accepted the offer. (RT 42: 6488–6489.)

[215]Counsel did try to foreclose the prosecution from using the previously-admitted statement about overpowering a guard, but the effort was rebuffed because the statement was one of intent and plan that was integral to the uncontested escape-preparations evidence. (RT 48: 7201–7206.)

alleged acts that the jury could consider. (RT 54: 8065.)

B. The Offense of Attempted Escape Requires Beginning To Leave Custody, Not Just Making Preparations To Do So

An attempt to commit a crime requires a specific intent to commit the crime and a direct but ineffectual act done toward its commission. (*People v. Kipp* (1998) 18 Cal.4th 349, 376.) However, not every act is sufficient. California, like most states, does not criminalize "acts normally considered only preparatory." (*People v. Dillon* (1983) 34 Cal.3d 441, 453, fn. 1.) "The act must go beyond mere preparation, and it must show that the perpetrator is putting his or her plan into action, but the act need not be the last proximate or ultimate step toward commission of the substantive crime. (*People v. Kipp*, *supra*, 18 Cal.4th 349, 376; accord, *People v. Toledo* (2001) 26 Cal.4th 221, 230.)

> It is . . . well settled that there is a material difference between the preparation antecedent to an offense and the actual attempt to commit it. The preparation consists of devising or arranging the means or measures necessary for the commission of the offense, while the attempt is the direct movement toward its commission after the preparations are made. In other words, to constitute an attempt the acts of the defendant must go so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances.

(*People v. Memro* (1985) 38 Cal.3d 658, 698, quoting *People v. Werner* (1940) 16 Cal.2d 216, 221–222.) In another formulation, "preparation alone is not enough, and some appreciable fragment of the crime must have been accomplished. [Citations.]" (*People v. Gallardo* (1953) 41 Cal.2d 57, 66 [holding that "arranging for operations, filling out hospital cards, and accepting money" did not amount to an attempt to commit abortion, absent starting to administer medicine or use an instrument], quoted with approval in *People v. Memro*, *supra*, 38 Cal. 3d at p. 698.) In other words, "[T]he act must

reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. [Citation.]" (*People v. Miller* (1935) 2 Cal.2d 527, 530.)

The reason for these distinctions is that "'between preparation and execution there is a gap which criminal jurisprudence cannot fill up so as to make one continuous offense. There may be a change of purpose, or the preparation may be a vague precautionary measure, to which the law cannot append a positive criminal intent, ready to ripen into guilty act.'" (*People v. Miller*, *supra*, 2 Cal.2d at p. 530, quoting 1 Wharton's Criminal Law (12th Ed. 1932) 292.)

An early case further illustrates the difference between preparation and attempt. In *People v. Murray* (1859) 14 Cal. 159, the Court found the evidence insufficient to support a charge of an attempt to enter an incestuous marriage. "It only discloses declarations of his determination to contract the marriage, his elopement with the niece for that avowed purpose, and his request to one of the witnesses to go for a magistrate to perform the ceremony." (*Ibid.*) The intention was clear, but the acts were all preparatory. "[U]ntil the officer was engaged, and the parties stood before him, ready to take the vows appropriate to the contract of marriage, it cannot be said, in strictness, that the attempt was made." (*Id.* at p. 160.) For, as the modern authorities cited above still repeat, a criminal attempt "must be manifested by acts which would end in the consummation of the particular offence, but for the intervention of circumstances independent of the will of the party." (*Ibid.*) The Court illustrated the principle with a hypothetical: "[A] party may purchase and load a gun, with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim, there is only preparation and not an attempt." (*Id.* at pp.

159–160.) The rule is still the same. (*People v. Hernandez* (2003) 30 Cal. 4th 835, 868 ["attempted willful and premeditated murder . . . requires a direct, though ineffectual, premeditated murderous act"].)

C. Appellant Did Not Attempt to Escape

Applying these principles to the present case, the evidence presented was not evidence of an attempted escape. The prosecution evidence tended to show that appellant and a cellmate surreptitiously sawed two bars of their cell door in a manner that would permit them to squeeze out, hid the damage, obtained something of a shank or material for creating one,[216] and told Arthur Dicken of a plan to leave by taking a deputy hostage. (RT 42: 6418–6483; see pp. 51–52, above.)

Appellant and his cellmate—with bars loose, a piece of metal with a blunt 1¼-inch prong, and boasts of a plan to Arthur Dicken—were like the man who bought and loaded a gun and made threats, the one who made the arrangements for abortions without beginning one, and the would-be groom who gathered with his niece and witnesses and sent for a magistrate. (*People v. Murray*, *supra*, 14 Cal. 159, 159–160; *People v. Gallardo*, *supra*, 41 Cal.2d 57, 66.) Escape is "an unlawful departure from the limits of an inmate's custody [citations]." (*People v. Gallegos* (1974) 39 Cal.App.3d 512, 515.) Appellant had only prepared for a departure, he had not started going

---

[216]Dicken testified that appellant had a four-to-six-inch piece of sharpened steel and that Aragon had a makeshift spear. (RT 42: 6425.) However, authorities searched both the damaged cell and the cell to which they transferred the two inmates. What they found were unsharpened pieces of a decorative piece of cast metal, perhaps a vent cover. One fragment was blunt and apparently too short to hold as a weapon (1¼" to 3" long), but the other could be gripped in a manner would permit a very blunt-tipped 1¼" prong to protrude. (RT 42: 6455–6459, 6475–6477; Exs. 386–388, copied at Clerk's Supplemental Transcript on Appeal: Photographs — Exhibits 2: 513–518 ["SCT — Photos"].)

anywhere. Just as one who has not committed "a direct, though ineffectual, . . . murderous act" has not attempted murder, appellant had not attempted to escape. (*People v. Hernandez*, *supra*, 30 Cal. 4th 835, 868.) Had the trial court or jury considered the distinction, it would have had to confront the facts that no "appreciable fragment of the crime [had] been accomplished" (*People v. Memro*, *supra*, 38 Cal.3d at p. 698), that appellant's acts had not "go[ne] so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances" (*ibid.*), and that those acts had not "reach[ed] far enough towards the accomplishment of the desired result to amount to the commencement of the consummation" (*People v. Miller*, *supra*, 2 Cal.2d at p. 530). The "consummation" was leaving, and appellant had not "commence[d]" that. (Cf. *State v. Hanks* (Conn.App. 1995) 665 A.2d 102, 107–108 [overcoming guard and entering room with switches that controlled doors constituted sufficient proof of attempted escape].)[217] As appellant's prosecutor put it, the plan was uncovered "before they made their move . . . ." (RT 54: 8030.) Thus appellant was not "putting his . . . plan into action . . . ." (*People v. Kipp*, *supra*, 18 Cal.4th 349, 376.)

Appellant had only placed himself in a position where he could decide whether or not to go through attempting an escape, and so far his answer had been negative. (Cf. *People v. Phillips* (1985) 41 Cal.3d 29, 84 [factual question existed as to whether "defendant was actually serious about going through with the elaborately constructed [murder] scheme" he had concocted].) There was insufficient evidence to prove an attempt.

---

[217]It is difficult to find cases on attempted escape versus preparation, perhaps because prosecutors normally charge only completed crimes like destroying jail property, when there has not been a real attempt. (See, e.g., *People v. Boren* (1903) 139 Cal. 210 [defendant cut cell bars]; *People v. Sheldon* (1886) 68 Cal. 434[defendant dug hole in floor and removed door].)

D. The Absence of an Attempt Rendered the Evidence Inadmissible at Penalty

Appellant's attorney believed that the evidence of escape preparations was admissible in the penalty phase as showing an aggravating circumstance under Penal Code section 190.3, factor (b). (See RT 48: 7201 [objecting only to portion of evidence regarding defendant's statement of intent, explicitly conceding the rest].) This mistake eviscerated his attempts to keep the testimony out at guilt, because it foreclosed an argument on how prejudicial the evidence would be during penalty deliberations, in which it had no legitimate use. It will, therefore, be dealt with first here.

Factor (b) allows a jury to consider, as an aggravating circumstance, any "criminal activity" that involves the "use or attempted use of force or violence or the express or implied threat to use force or violence." (§ 190.3, factor (b).) Appellant's conduct, to be useable as aggravation under this provision, had to be a crime. (*People v. Bacigalupo*, *supra*, 1 Cal. 4th 103, 148; *People v. Phillips*, *supra*, 41 Cal. 3d 29, 72.) And it had to involve force or violence—actual, attempted, or threatened—against a person. (§ 190.3, factor (b); *People v. Bacigalupo*, *supra*, 1 Cal. 4th at p. 148.) An actual escape attempt, if proven, would have met the criminality test. Theoretically, it might or might not have met the violence test, depending on the facts.[218] (*People v. Mason* (1991) 52 Cal.3d 909, 955.) But the only crime appellant was shown to have committed in his escape preparations was one neither alleged in the

---

[218]Concretely, the escape "attempt" shown by the prosecution's evidence here could not—even if a criminal attempt—meet the requirement of a threat to use violence, as explained in Arguments XIV.D and XV, below. However, appellant's attorney cannot be faulted for failing to object on this basis because this Court had held, prior to appellant's trial, that similar evidence on the violence element was sufficient to submit to the jury. (See, e.g., *People v. Mason* (1991) 52 Cal. 3d 909, 954–956.)

notice of aggravation nor argued to the jury, damaging jail property. (See § 4600.) Such action cannot meet the violence requirement, as the only injury was to property. (*People v. Boyd* (1985) 38 Cal.3d 762, 776–777.) The failure to prove attempt meant failure to prove a violent crime, which rendered the evidence inadmissible as aggravation. (*People v. Bacigalupo*, *supra*, 1 Cal. 4th at p. 148; *People v. Phillips*, *supra*, 41 Cal. 3d at p. 72, fn. 5.)

"A reasonably competent attorney patently is required to know the state of the applicable law . . . ." (*Everett v. Beard* (3d Cir. 2002) 290 F.3d 500, 509.) "At the least, defense counsel in a criminal case should understand the elements of the offenses with which his client is charged and should display some appreciation of the recognized defenses thereto." (*Scarpa v. Dubois* (1st Cir. 1994) 38 F.3d 1, 10; see also *People v. Pope* (1979) 23 Cal. 3d 412, 425 ["duty to investigate carefully all defenses of fact and of law that may be available"].) Trial counsel's failure to raise the lack of the departure-in-progress element of attempted escape as a bar to penalty-phase use of the escape-preparation evidence permitted evidence which should not have been part of the penalty calculus to be put before the jury. Appellant was therefore deprived of his Sixth Amendment rights to effective assistance of counsel, unless there was no prejudice. (*Strickland* v. *Washington*, *supra*, 466 U.S. 668, 687.) And counsel's omission resulted in a trial in which his Eighth an Fourteenth Amendment rights to a fair, reliable, and non-arbitrary penalty verdict were violated as well. Prejudice is shown below.

In addition to counsel's ineffectiveness, there was judicial error. The trial court was required to tell the jury what "other crimes" could be considered as circumstances in aggravation. (*People v. Robertson* (1982) 33 Cal. 3d 21, 55, fn. 19.) In accordance with that duty, it affirmatively instructed that a juror could consider the purported escape-attempt evidence in aggravation, if the

juror considered the crime to have been proven beyond a reasonable doubt. (RT 54: 8065; see also 8063.) Since there was no substantial evidence of an attempted escape, the instruction was error. (*People v. Phillips*, *supra*, 41 Cal. 3d 29, 72, fn. 25.)

E. There Was a Meritorious Section 352 Objection to Use of the Evidence To Prove Guilt

1. The Probative Value Was Minimal and Grossly Cumulative

As noted above, appellant's attorney made, and then abandoned, an effort to exclude the evidence from the guilt phase of the trial. Once it is understood that the evidence was inadmissible at penalty, its inadmissibility at the guilt phase becomes clear as well. The theory under which the evidence was offered and received was that the escape preparations tended to show consciousness of guilt. (CT 5: 1036–1037; RT 30: 4740.) For this purpose, the doctrine is so broad that mere preparations can be admissible. (*People v. Williams*, *supra*, 44 Cal.3d 1127, 1143–1144.) However, even in the abstract, escape evidence is extremely weak circumstantial evidence of guilt. It is true that an effort or plan to escape may result from consciousness of guilt, a subsidiary fact which in turn has some tendency to prove actual guilt. (See *People v. Williams*, *supra*, 44 Cal.3d 1127, 1143, fn. 9, on the four-step chain of inferences required to infer guilt.) But it may also result from a belief that—guilty or not—conviction is likely (see *People v. Terry* (1970) 2 Cal.3d 362, 395), or from an inability to tolerate the conditions of pretrial confinement—especially where, as here—the escape preparations did not take place until 16 months after the defendant was arrested (*ibid.*), or even from boredom.[219]

---

[219]Here, as noted previously, the removable bars gave appellant and his (continued...)

These abstract considerations pale, however, next to the concrete realities of this trial, where consciousness of guilt was not a contested issue. First, the prosecution already had the defendants' week-long flight to show consciousness of guilt. (RT 37: 5627–5653; 3SCT 2: 321–323.) Second, for appellant, charged in 11 incidents, the probative value was further diminished by the fact that anticipation of conviction on any of them could have motivated escape. Thus, even to the extent that his preparations may have showed consciousness of guilt, the next question would have been, "Guilt of what?" (See *People v. Morris* (1991) 53 Cal. 3d 152, 195.) But what truly shows the pretextual nature of the whole prosecutorial thrust was that appellant's consciousness of guilt—along with guilt itself—was firmly established by his confession. The escape preparations were remarkably weak evidence, and cumulative to very strong evidence, to assist the prosecution in making its guilt-phase case. (See RT 42: 6485 [making a similar objection, Self's attorney points out lack of necessity for further evidence allegedly showing consciousness of guilt].) Thus under Evidence Code section 352, which trial counsel did initially invoke, the probative value of the evidence was embarrassingly poor.

2. The Prejudicial Effect Was Extreme

At the same time, the potential for prejudice at the penalty phase—where, as shown above—the evidence would have been inadmissible, was huge. This was clearly the reason the prosecution sought to introduce it. Indeed, while the prosecutor did mention the evidence in his guilt-phase

---

[219](...continued)
cellmate no opportunity for hostage-taking that was not already available because of the jail's routine of taking them out together for recreation time. (RT 42: 6465–6466.) And the jail did not take the matter seriously enough to separate the two inmates. (RT 42: 6475.)

argument, as he basically had to after fighting to get it in, he made much more use of it at penalty. (Compare RT 46: 6970–6971 with RT 48: 7268 and 54: 8026–8027, 8030.)

Those in the bar or on the bench can underrate the impact of a prosecutor's drawing jurors' attention to the possibility of escape and other future violence, knowing that this Court's caseload includes precious few "lifers" who have escaped or killed again. In other jurisdictions, too, those who have killed almost uniformly seem to settle down—or be effectively contained—far more than they reoffend, as they mature in prison. (Tabak, *A Reply* (2001) 33 Conn. L. Rev. 1297, 1304.)

However, the perspective of lay jurors, who were suddenly exposed for the first time to people whom they may have seen as desperados, is quite different. This Court has long acknowledged "the overriding importance of 'other crimes' evidence to the jury's life-or-death determination . . . ," an acknowledgment based in part on early jury research. (*People v. Robertson* (1982) 33 Cal.3d 21, 54 [quotation], citing *People v. McClellan* (1969) 71 Cal.2d 793, 804, fn. 2 [jury research]; see also *People v. Steele* (2002) 27 Cal.4th 1230, 1245 ["evidence of other crimes is inherently prejudicial"].) That general problem is grossly magnified when the "other crime" is an escape or attempted escape, because it triggers speculative, unfounded, but powerful fears that the defendant will get out, hurt or kill people again, and perhaps even retaliate against the jurors. Thus the Court has also recognized the particularity of the problem here, i.e., "that 'erroneous admission of escape evidence may weigh heavily in the jury's determination of penalty.'" (*People v. Jackson*, *supra*, 13 Cal.4th 1164, 1232, quoting *People v. Gallego*, *supra*, 52 Cal.3d 115, 196.) Similarly, as noted previously, such testimony "may be highly prejudicial in undermining juror confidence in the sentence of life

imprisonment without parole as an alternative to death." (*People v. Kaurish*, *supra*, 52 Cal.3d 648, 710.)

These acknowledgments are borne out by indirect but powerful empirical evidence. Jurors often fear criminal defendants in general. (*United States v. Scarfo* (3rd Cir. 1988) 850 F.2d 1015, 1023 ["As judges, we are aware that, even in routine criminal cases, veniremen are often uncomfortable with disclosure of their names and addresses to a defendant"].) Study after study of capital-case decision-making shows that "discussion of the defendant's dangerousness occupies a large portion of the time jurors spend deliberating on whether a death sentence is appropriate . . . ." (Claussen-Schulz & Pearce, *Dangerousness, Risk Assessment, and Capital Sentencing* (2004) 10 Psychol. Pub. Pol'y & L. 471, 480 [reviewing the literature].) Similarly,

> The empirical evidence shows overwhelmingly that concern about the defendant's eventual release from prison significantly biases jurors in favor of death, regardless of jurisdiction, regardless of whether LWOP is a sentencing option, and regardless of whether the prosecution explicitly raises future dangerousness.

(Mulroy, *Avoiding "Death by Default": Does the Constitution Require a "Life Without Parole" Alternative to the Death Penalty?* (2004) 79 Tul. L. Rev. 401, 430.) Among jurors who are initially undecided on penalty, the degree to which they fear the defendant is strongly correlated to their final vote for life or death. (Garvey, *Capital Sentencing*, *supra*,75 N.Y.U. L. Rev. 26, 66–67.) Similarly, jurors who hold the mistaken belief that defendants will be released on parole in a few years are far more likely to vote for death. (Bowers & Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing* (1999) 77 Tex. L. Rev. 605.)

These dynamics—all pertaining to capital trials in general—clearly

apply a fortiori when the background level of fear is magnified by the specter of the defendant not being released, but committing a violent escape. Thus, in a study of the effect of prosecutorial misconduct on mock jurors, an argument emphasizing future dangerousness, including the possibility of the defendant's escape if not executed, had a stronger impact than statements that crime was increasing in the absence of executions, that the district attorney's office rarely sought the death penalty, and that we are at war against a criminal element that is winning and that must be eradicated like the enemy soldiers in any other war. (Platania & Moran, *Prosecutorial Misconduct*, *supra*, 23 Law & Hum. Behavior 471, 476, 478–479, 481.)

Clearly, as this Court has repeatedly acknowledged, the potential for prejudice by bringing in the specter of escape was extreme. Had the Evidence Code section 352 objection been fully litigated, and with an awareness of the inadmissibility of the evidence at penalty, any rational exercise of discretion would have required depriving the prosecution of the minimal probative value on guilt which the escape-preparations evidence added to appellant's confession and the other evidence against him. Thus trial counsel's failure to insist on correct application of the law of attempt rendered his performance deficient on the guilt-phase question which he did raise. That deficient performance was also prejudicial to the extent, at a minimum, of permitting the evidence to come in. Its prejudicial impact on the jury itself is discussed in section G, below.

F. The Instructions Told the Jury to Treat Preparations as an Attempt.

It has been shown above that appellant's preparations for an escape did

not amount to an attempted escape,[220] and that activity that was not such an attempt could not be used as aggravation.[221] Therefore a jury that understood and followed the law would not have used this evidence in deciding penalty. In other words, if the instructions had been adequate, the jurors themselves theoretically could have obviated the effect of the errors in admitting the testimony. Moreover, even if the evidence were properly before the jury, it would have been required to decide, under adequate instructions, if the escape-attempt allegation was proven. The instructions that were given, however, first stated, but ultimately negated, the correct principles.

Appellant's jury was instructed as follows:

> [1] An attempt to commit a crime consists of two elements, namely, a specific intent to commit the crime, and a direct but ineffectual act done toward its commission. [2] In determining whether or not such an act was done, it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed, on the other. [3] Mere preparation, which may consist of planning the offense or of devising, obtaining or arranging the means for its commission, is not sufficient to constitute an attempt. [4] However, *acts* of a person who intends to commit a crime *will constitute an attempt where those acts clearly indicate a certain, unambiguous intent* to commit that specific crime. [5] *Such acts must be an immediate step in the present execution of the criminal design*, the progress of which would be completed unless interrupted by some circumstance not intended in the original design.

(CT 7: 1609, 9: 1986; RT 46: 7067; 54: 8062–8063, emphasis and sentence numbers added; see CALJIC No. 6.00.)

> A person, who has once committed acts which constitute an attempt to commit a crime, is liable for the crime of attempted

---

[220]See pages 347–350, above.

[221]See page 351, above.

> escape by force or violence[222] even though he does not proceed further with the intent to commit the crime, either by reason of voluntarily abandoning his purpose or because he was prevented or interfered with in completing the crime.

(CT 7: 1610; 9: 1987; RT 46: 7067; 54: 8063; see CALJIC No. 6.01.)

> If a person intends to commit a crime but, *before committing any act* toward the ultimate commission of the crime, freely and voluntarily abandons the original intent *and makes no effort to accomplish it*, such person has not attempted to commit the crime.

(CT 7: 1611; 9: 1988; RT 46: 7067; 54: 8063, emphasis added; see CALJIC No. 6.02.)

The first sentence of the first instruction explains that not only intent, but an act is required. The second and third sentences correctly state that the act must go beyond mere preparation, to actually beginning to carry out the offense. Setting up the capacity to begin it is not enough.

These propositions, however, are immediately negated in the fourth sentence: "However, acts of a person who intends to commit a crime will constitute an attempt where those acts clearly indicate a certain, unambiguous intent to commit that specific crime." The element of committing an act that "commence[s] . . . the doing of the criminal deed," as stated in the first two sentences, is no longer an element at all. Rather, it is enough that the act simply be clear circumstantial evidence of the *other* element—intent. But acts of mere preparation, such as sending for the preacher for an illegal marriage, arranging for abortions and accepting money, or removing cell bars for an escape, can show intent. Moreover, the instructional sentence at issue not only contradicts the previous two but effectively negates them. This is because it

---

[222]This is how the instruction was delivered in the penalty phase. In the guilt phase, the phrasing was "liable for the crime attempted." (CT 7: 1610; RT 46: 7067.)

begins with the word *however*. That transition presents the newly-stated rule (acts showing intent are enough) as an exception to the first version (acts of preparation are not enough). This permitted the jury to harmonize the instructions, rather than make the unlikely assumption that they were contradictory.

The next sentence did not correct the problem. It stated, "Such acts must be an immediate step in the present execution of the criminal design, the progress of which would be completed unless interrupted by some circumstance not intended in the original design." An "immediate step in the present execution of the criminal design" is, unfortunately, not equivalent to "commencement of the doing of the criminal deed" (sentence 2). For all that needs to be executed is some part of "the criminal design," and surely the design, or plan, would include the preparations. Moreover, considering the instruction as a whole, this sentence is explicitly an elaboration of the preceding one, the one that explains that the *actus reus* need only be one that tends to prove criminal intent. Commencing planned preparations meets that limited requirement.

CALJIC No. 6.02 completes the nullification of the requirement that the actual crime—not just preparations—be begun. This is the third instruction, which explains when voluntary abandonment negates attempt: "If a person intends to commit a crime but, before committing any act toward the ultimate commission of the crime, freely and voluntarily abandons the original intent and makes no effort to accomplish it, that person has not attempted to commit the crime." This complements the second instruction, CALJIC No. 6.01, which explains that voluntary abandonment is not a defense once an act constituting an attempt has taken place. But under CALJIC No. 6.02, abandonment makes one innocent only if he or she "makes no effort" to

accomplish "the original intent," i.e., drops the plan before "committing any act" towards its "ultimate commission." But if one does an act in preparation, one *has* made an effort and committed an act. And if it is too late for exculpation via abandonment, then, under CALJIC No. 6.01, it is because the crime of attempt has already been committed.

While initially stating the correct rule, the instructions to appellant's jury ended up negating it, permitting intent, plus preparations that show that intent, to be treated as a criminal attempt. Rather than simply being told that preparation alone is insufficient for the *actus reus* and that acts that initiate the substantive crime—here, a departure from custody—had to have been begun, the jury was told the opposite.[223]

G. Respondent Cannot Demonstrate Harmlessness

1. The Errors Violated State Law and the Federal Constitution

There were three errors: (1) admitting the escape-preparation evidence during the guilt phase, (2) allowing it to be argued as aggravation during the penalty phase and instructing the jury that it was available for that purpose, and

---

[223]Cf. the Judicial Council's attempt instruction, adapted here for the crime of attempted escape:

". . . [T]he People must prove that: [¶] 1. The defendant took a direct but ineffective step toward committing [attempted escape]; [¶] AND [¶] 2. The defendant intended to commit [attempted escape].

"A direct step requires more than merely planning or preparing to commit [attempted escape] or obtaining or arranging for something needed to commit [attempted escape]. A direct step is one that *goes beyond planning or preparation and shows that a person is putting his or her plan into action.* A direct step indicates a definite and unambiguous intent to commit [attempted escape]. It is a direct movement towards the commission of the crime *after preparations are made.* It is an immediate step *that puts the plan in motion* so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt." (CALCRIM No. 460, emphasis added.)

(3) failing to ensure that the jury understood that the purported escape attempt could not be weighed as a circumstance in aggravation if it was only preparation. They all, however, had a single ultimate effect. Evidence that should not have been available as an aggravating circumstance was considered by the jury for that purpose. This result cannot be shown to be harmless.

The instructional errors (in designating the evidence as available for aggravation and in defining attempt), besides being of state law, were federal constitutional error under the Eighth Amendment:

> Employing an invalid aggravating factor in the weighing process "creates the possibility . . . of randomness," [citation]. by placing a "thumb [on] death's side of the scale," [citation], thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," [citation].

(*Sochor v. Florida* (1992) 504 U.S. 527, 532, quoting *Stringer v. Black* (1992) 503 U.S. 222, 236, 235, modifications in original.) The instructions further violated appellant's rights to trial by a jury adequately instructed in the law, under the Sixth and Fourteenth Amendments, and to a fair trial, under the Fourteenth.

The federal harmlessness standard therefore applies to the instructional errors (both defining attempted escape and listing it as potential aggravation), placing on respondent the burden of showing that the errors were harmless beyond a reasonable doubt, i.e., could not have "possibly influenced the jury adversely . . . ." (*Chapman v. California*, *supra*, 386 U.S. 18, 23.) Similarly, since this is a death-penalty case, even only state-law error would be harmless only if it were possible to eliminate every "reasonable possibility" of an impact on a juror's decision. (*People v. Brown*, *supra*, 46 Cal.3d 432, 447.)

The error of admitting the evidence at the guilt phase would, considered alone, involve a different standard. This is because counsel's ineffectiveness in presenting the case for exclusion failed to preserve the issue for review,

leaving only the ineffectiveness claim itself. A conviction obtained against a defendant who did not receive effective representation is invalid if "there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner. (*Strickland* v. *Washington* [, *supra*,] 466 U.S. 668, 687 . . . .)" (*In re Jones* (1996) 13 Cal.4th 552, 561.) However, since counsel's omissions had the effects of making the penalty verdict arbitrary and unreliable and depriving him of a fair trial on penalty, *Strictland's* broader latitude for upholding the verdict is unsupportable. This Court should apply *Chapman* or the equivalent *Brown* standard to all the errors. Even under *Strickland*, however, a reasonable probability is only a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) This is a lesser showing than requiring the defendant to show that the deficiency in representation more likely than not affected the outcome. (*Id.* at p. 693.) Moreover, it is applied differently when considering capital-case penalty error. (*Id.* at p. 704 (conc. opn. of Brennan, J.).) This is because of the lesser burden of retrying penalty only, the qualitatively higher stakes, and the requirement "that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." (*Ibid.*)

Preliminarily, the errors in the instructions defining attempt are not rendered harmless by the two sentences which correctly state the "mere preparations" rule. When instructions are contradictory, a reviewing court is unable to find harmlessness on the basis of a correct statement of the law because it is unable to know whether the jury went with the right rule or the wrong rule. (*Francis v. Franklin* (1985) 471 U.S. 307; see also *People v. Ford* (1964) 60 Cal.2d 772, 796, overruled on another point in *People v. Satchell* (1971) 6 Cal.3d 28.) Moreover, as noted above, the only common-

sense interpretation of the instructions was that they harmonized their own conflicts by the use of the word "however" to explain that an act clearly showing intent meets the *actus reus* requirement.

2. The Evidence Concerning Preparation Versus Attempt Does Not Permit a Finding of Harmlessness

The errors cannot be held harmless on the basis that no juror could have a reasonable doubt as to whether appellant's escape preparations ripened into an attempt. As shown above, rational jurors, properly instructed, *could not* find that appellant had moved from the preparations part of the purported plan to commencing his departure from the prison. A rational juror who knew what the issue was would be compelled to have a doubt—more than a doubt—and disregard the evidence, at least if it had been possible to do that. But the erroneous definition of the in-progress element of attempt meant that the jurors could not properly analyze whether the evidence qualified as aggravation.

3. Using Attempted Escape As Aggravation Could Well Have Affected the Penalty Decision

The only remaining basis for respondent to argue harmlessness would be that its purported escape-attempt evidence was actually useless to its case, a waste of time for both its attorney who presented it and the jury, all twelve of whose members would have inevitably voted for death in any event. This is not the case. There is no basis for excluding every reasonable doubt as to whether a juror was affected by erroneously considering the attempted-escape evidence.

a. Prosecutor's Use of "Escape Attempt" In Argument

A finding of harmlessness is particularly unjustified when the prosecutor has emphasized the evidence in question in arguing for death, as he did here. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 753–754; *Johnson v.*

Mississippi (1988) 486 U.S. 578, 586, 590 & fn. 8; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *People v. Roder* (1983) 33 Cal. 3d 491, 505; cf. *People v. Hinton* (2006) 37 Cal. 4th 839, 868.) The prosecutor stated that there were only two kinds of aggravation in the case, the circumstances of the crimes and the other-offenses evidence. (RT 54: 8005.) As discussed previously, it cannot be shown that all jurors accepted the prosecution version of how aggravated the circumstances of the crimes, given the jury's well-founded skepticism about Munoz's veracity, as demonstrated in the acquittals on Counts XIII and XIV. As to the other aggravation which the prosecutor argued, his discussion of the other-crimes evidence constituted the final portion of his penalty argument, the clincher to a one-two punch on how the death penalty was not only "just" but "necessary" in appellant's case. (RT 54: 8026–8030.) "Necessary" because, as he had explained in the opening statement, "the price of compassion for this murderer will be more victims." (RT 48: 7271.) But most of the other-crimes evidence involved assaults that, unfortunately, were not at all uncommon in the jail populace, and which were too minor to lead to either criminal charges or discipline. The rest—other than the supposed attempted escape—were possessions of shanks that were never used.[224] While clearly some jurors would have been seriously impacted by that evidence and the prosecutor's argument that it showed what to expect of appellant in the future, others could have seen the conduct as something that

---

[224]This analysis assumes arguendo that all the other-crimes evidence would have even been available for consideration by a jury considering the force and violence element. But see Arguments XIV and XV, below, contesting their admissibility and the instructions defining that element. To the extent that most of that evidence should have been excluded as well, or considered under a stricter standard, any argument for harmlessness of the purported escape attempt is even weaker.

is typical of a large stratum of the jail population.[225] "[I]n light of what the media informs us of what is happening in our penal institutions today . . . possession of 'a shank' by an inmate probably only reflects or indicates that the individual possessed same in order to keep himself from getting abused, maimed, or killed by his fellow inmates . . . ." (*Barney v. State* (Tex.Cr.App. 1985) 698 S.W.2d 114, 130 (dis. opn. of Teague, J.).) It is likely that some of appellant's jurors had the same reaction. Such jurors would have seen appellant's actions in the county jail as unsavory and unfortunate but would not necessarily have seen them as enough, even with the circumstances of the charged crimes, to push them over the line separating them from imposing the severe sentence of lifetime incarceration on appellant to deciding he must be killed. (Cf. *People v. Gonzales* (June 12, 2006, No. S072946) __ Cal.4th __, __, slip opn., p. 36 ["The aggravating evidence of defendant's other crimes (possession of an assault weapon, two assaults on inmates, and possession of a shank in jail), although serious, was not overwhelming"].)

At the same time, there is no basis for excluding the possibility that adding the purported escape attempt did push one or more jurors over that line. The prosecutor recalled what he correctly labeled the "plan to escape" during his penalty phase opening statement. (RT 48: 7268.) Then he mentioned the alleged attempt twice in the concluding portion of his argument for death, the part that sought to show why death was "necessary." First he used it to lead off his catalogue of all the unadjudicated crimes of violence which he was alleging took place. (RT 54: 8026.) Then, after arguing that appellant would endanger those whom he encountered in prison if allowed to live, the

---

[225]For purposes of analyzing a claim of harmlessness, the evidence is taken in a light most favorable to the appellant. See authorities cited at page 113, footnote 69, above.

prosecutor argued that the purported escape attempt showed that appellant "is not content to remain in custody." (RT 54: 8030.) He stated that "someone would have been most likely hurt or killed" if the plan had not been discovered. (*Ibid.*) After arguing that appellant "showed a certain amount of sophistication" in getting hacksaw blades and concealing the cut bars, he said that "[w]ith LWOP he has 30, 40, 50 years to think and scheme." (*Ibid.*) This was how the prosecutor concluded his discussion of the specific evidence in aggravation, before winding up his argument. (*Ibid.*) (Cf. *People v. Box* , *supra*, 23 Cal. 4th 1153, 1204–1205 [weak evidence of nonviolent escape plan, introduced at guilt phase to show consciousness of guilt, could not have affected penalty verdict, where escape issue was not mentioned during penalty-phase argument].) The prosecutor violated the ban on arguing the possibility of future escape (see *People v. Kaurish*, *supra*, 52 Cal. 3d 648, 710), and no juror could fail to consider that possibility after hearing the evidence, considering the argument—including the "50 years to think and scheme" point—and being told by the court that the "escape attempt" could be considered in aggravation.

The prosecutor thus made a potent and frightening argument, one capable of making jurors wonder whether society, or they themselves, would be safe from appellant if he were incarcerated for life. As shown in detail in the probative/prejudice analysis at pages 355–357, above, jurors fear criminal defendants in general; capital jurors' penalty decisions are heavily influenced by the degree of their fear; and the potential of a future escape heightens that fear and the probability of death verdict. Since "'erroneous admission of escape evidence may weigh heavily in the jury's determination of penalty.'" (*People v. Jackson*, *supra*, 13 Cal.4th 1164, 1232), the errors here cannot be held harmless under any standard, and particularly not one where the burden

rests on respondent to eliminate all reasonable doubts as to whether they contributed to a juror's decision.[226]

b. This Court's Analysis in *Jackson*

In *People v. Jackson*, *supra*, the defendant contended that erroneous admission of evidence of a nonviolent escape "allowed the prosecutor to depict him as a significant escape risk, thereby implanting in the minds of jurors the notion that the death penalty was the only means of protecting the public from his future dangerousness." (13 Cal.4th 1164, 1232–1233.) This Court acknowledged that the "argument may be plausible in the abstract," but found it "ultimately unpersuasive under the facts of this case." (*Id.* at p. 1233.) The most significant reasons for that holding are absent from appellant's case:

> [T]here was already admissible evidence of one escape, from the Riverside County jail, in which defendant actively participated through the restraint and robbery of a jail guard. The evidence of the second[,] nonviolent escape in this case is merely cumulative. It is highly unlikely defendant would have appeared as a significantly greater escape risk merely because, in addition to the Riverside escape, he took advantage of what was evidently the low security of a jail in rural Oregon by breaking a window and absconding.

---

[226]Appellant has also shown that some jurors may well have minimized the significance of the escape-attempt evidence. (P. 126, above.) This came up in demonstrating why, absent error, failure to agree on a death verdict was possible. With other evidence, too, he will sometimes show how one matter could have been taken extremely seriously by a juror and thus have been prejudicial, and also point out how a juror (a different one) could have found the same issue of minimal importance and thus found the case for death less than overwhelming absent *other* error. There is nothing inconsistent about these stances. The same facts can be viewed from quite different perspectives by different people, which is one reason why we have trials and have them before juries who are required to deliberate. Because—in California—we do not require them to agree on the reasons for their penalty verdict, the different views of a particular item offered as aggravation may remain unresolved.

(*Ibid.*) But here there was nothing cumulative about the alleged attempt; it was the only one. Moreover, the purported plan was far more dangerous and suggestive of willingness to take desperate measures than running away from a rural jail.

Moreover, in *Jackson* both the defense attorney and the court made remarks which "countered" the impact of the evidence regarding the Oregon walkaway. (*Id.* at pp. 1233–1234.) Neither happened here. The claim that was "plausible in the abstract" in *Jackson* was that use of escape as aggravation "allowed the prosecutor to depict him as a significant escape risk, thereby implanting in the minds of jurors the notion that the death penalty was the only means of protecting the public from his future dangerousness." (13 Cal.4th at p. 1233.) Here that "plausible" claim rests in concrete circumstances that lack *Jackson's* most persuasive reasons for finding the damage minimal.

Erroneously admitting the evidence as aggravation and misdefining attempt were substantial errors, not "procedural fly specks." (*People v. Easley* (1983) 34 Cal.3d 858, 890 (dis. opn. of Richardson, J.).) There is nothing in appellant's case that brings it within the limited circumstances where substantial error can be known not to have affected a penalty verdict. (See pp. 82 et seq., above.) Appellant was not shown in other ways to be escape-prone. Nothing cured the errors. In other words, nothing negates the possibility—indeed likelihood—of their impacting one or more jurors.

It would require omniscience to uphold a death verdict by concluding that every juror was unaffected by the purported aggravation which the incorrect instructions on attempt required him or her to consider as aggravation. The trial court cited the supposed escape attempt in denying the motion to modify the penalty (RT 55: 8232), and there is no basis for

concluding that it was not also a factor in a juror's calculus. It is possible that it was, and this is a "realistic . . . possibility," not "a 'mere' or 'technical' possibility" based on "the possibility of arbitrariness, whimsy . . . and the like," and its admission and use therefore require reversal. (*People v. Brown*, *supra*, 46 Cal.3d 432, 448.) By the same token, respondent cannot show harmlessness beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18.) The death judgment must be reversed.

//

//

VII

THE HARASSMENT OF TYREID HODGES DID NOT INVOLVE VIOLENCE AND WAS THEREFORE INADMISSIBLE AS AGGRAVATION, AND ITS ERRONEOUS LABELING AS AGGRAVATING VIOLENT CONDUCT SKEWED THE JURY'S ASSESSMENT OF THE OTHER EVIDENCE OF AGGRAVATION

"Evidence of defendant's background, character, or conduct which is not probative of any specific listed factor [in section 190.3] . . . is . . . irrelevant to aggravation." (*People v. Boyd* (1985) 38 Cal. 3d 762, 774.) One of the judgments made in drafting the statute's list of aggravating factors is that "nonviolent misdemeanors are not important enough to be given any weight in deciding whether to impose a death penalty." (*Ibid.*) In appellant's case, however, the prosecution was permitted to introduce—as a reason to execute appellant—his post-arrest harassment of Tyreid Hodges, a pretrial detainee facing many charges of child molestation. Nothing done to Hodges was a violent crime, within the meaning of section 190.3—or any scheme that could comport with Eighth Amendment demands of rationality in deciding who should be put to death. It was an error of law, therefore, to admit the evidence. The testimony was prejudicial in itself, and—since the jury was told that, if the incidents happened, they were violent criminal activity that it should consider as aggravating circumstances—it artificially inflated the seriousness of the jailhouse assaults that actually did have a violent component.

A. Facts and Procedural Background

Appellant moved pretrial to exclude from the prosecution's case in aggravation the county jail incidents involving Hodges because the force alleged to have been used did not rise to the level envisioned by Penal Code section 190.3, factor (b). He also cited various state and federal constitutional rights, including those guaranteed by the Eighth Amendment. (CT 6: 1337, 1343; see also CT 6: 1175–1176 [notice of aggravation].) The three events

as to which notice was given to the defense were throwing a shampoo bottle at Hodges, throwing hot water or hot urine at him, and throwing urine at him. Appellant's attorney apparently had informal notice of an incident involving throwing something containing feces.[227] (CT 6: 1175–1176; RT 51: 7500.)

Appellant's attorney contended that the incidents were not within the scope of section 190.3, which contemplates more violent assaults. (CT 6: 1343; RT 51: 7500.) The prosecutor stated that the incidents were misdemeanor assaults or batteries, arguing that factor (b) has no threshold of seriousness. (RT 51: 7500.) The trial court overruled the objection on the basis that it was enough that the incidents involved assaultive behavior. (RT 51: 7501.)

Hodges then testified vaguely as to a number of incidents that were spread over a seven-month period. (RT 51: 7502–7505.) He and appellant were never face-to-face, but, from underneath one or the other's cell door or through other gaps, there were attacks with water and mop water, and, he said, appellant flooded his cell by plugging up the shower. Once Hodges was squirted on the back of his jumpsuit with urine from a plastic bottle as he passed by appellant's cell. Appellant told him to stay in his cell: molesters have no day room rights. He added that, if he had his way, he would take Hodges out. (RT 51: 7502–7505.)

On another occasion, during appellant's day room time, a milk carton containing feces was placed under Hodges's door and stomped on, causing feces to splatter on his foot and part of his pant leg. Once appellant squirted hot urine under the door from a plastic bottle, saying that such activity would

---

[227]The notice in aggravation also alleged a criminal threat, but no testimony regarding that allegation was presented. (CT 6: 1176; RT 51: 7500–7516.)

continue until Hodges arranged to be moved elsewhere. Other times, a shampoo bottle with a liquid in it and a hair brush were flung in his direction from the gap under appellant's cell door, and once a bar of soap came from appellant's or a nearby cell. All the other inmates harassed him as well, but Hodges felt that appellant was serious about it in a way that they were not. (RT 51: 7505–7516.)

B. Under Penal Code § 190.3 and the Eighth Amendment, It Takes More Violence Than a Technical Battery to Render Unadjudicated Misconduct a Reason to Vote for Death

1. Factor (b) Contemplates the Violence That Makes Crimes Aggravated

The trial court's ruling was error.[228] At the time of trial, this Court had already implicitly rejected the view that any assault or battery, i.e., any unlawful touching, was admissible under factor (b). In *People v. Raley* (1992) 2 Cal. 4th 870, the Court upheld admission of evidence of a section 288 violation only because the evidence showed that the child victim's resistance to a lewd touching was overcome through implicit use of force. (*Id.* at p. 907.) Thus the crime was admissible at penalty because it was a classic crime of force or threat of force. If the Court's position had been that the unlawful touching alone was sufficient to qualify as force or violence, it would have upheld the admission of the evidence on that more straightforward basis, if more had not been required.

The language and purpose of section 190.3 also make clear that factor

---

[228]Appellant's complaint is that the trial court committed legal error in interpreting section 190.3, not that it abused its discretion in applying an evidentiary rule which it understood. "Interpretation and applicability of a statute or ordinance is clearly a question of law. [Citations.]" (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 317, p. 355.) De novo review is therefore called for. (*People v. Louis* (1986) 42 Cal. 3d 969, 986.)

(b) is aimed at what are commonly understood as violent crimes, separate and apart from whether they constitute technical assaults. "[S]ection 190.3 expressly excludes evidence of criminal activity, except for felony convictions, which activity 'did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence.' . . . The purpose of the statutory exclusion is to prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision." (*People v. Boyd* (1985) 38 Cal.3d 762, 776, fn. omitted; accord, *People v. Stanley* (1995) 10 Cal.4th 764, 823.) A crime that qualifies under the force or violence provision does so because it "shed[s] a significant light on defendant's character and history for the purpose of assessing the appropriate penalty." (*People v. Grant* (1988) 45 Cal.3d 829, 851.) Even felonies, if not violent, are entitled to some weight only if evidenced by a conviction; otherwise their limited probative value fails to justify the time involved in proving them. (*People v. Balderas* (1985) 41 Cal.3d 144, 202.)

The proposition, argued by appellant's prosecutor and accepted by the trial court (RT 51: 7500–7501), that there can be no misdemeanor assault or technical battery that is de minimis for purposes of factor (b), ignores this statutory context. A battery is committed by "the least touching," if wrongful, and an assault requires only an attempt to commit such a touching. (*People v. Colantuono* (1994) 7 Cal.4th 206, 214.) There has to be some point where such a touching "is not of a type which should influence a life or death decision." (*People v. Stanley*, *supra*, 10 Cal.4th 764, 823.) It was reached here. If it is unclear whether or not the electorate intended de minimis "violence" to qualify when it approved the initiative, it should be resolved by application of both the rule of lenity (*People v. Hernandez* (2003) 30 Cal. 4th

835, 869–870) and, as shown below, by effectuating the electorate's intent to avoid possible constitutional challenges to the statute (*id.* at p. 867).

The shampoo bottle sent in Hodges' direction from under a door was not otherwise described, but the trial court should have understood—from everyday experience, knowledge of jail security, and the evidence that a shampoo bottle was also used to squirt one of the liquids (RT 51: 7507–7508)—that it was plastic. All of the interactions took place when either appellant or Hodges was locked inside a cell, and the item or substance came through a slot in the door or the gap under it. (RT 51: 7503–7509.) In this unit the doors were solid, with a narrow glass window at eye level for a person standing, a food slot, and a gap beneath the door. Clearly appellant's ability to see, to aim, and to propel things was limited. (RT 51: 7502; 50: 7420, 7449–7450; Exs. 431, 432, reproduced at SCT — Photos 2: 582, 584.)

In any event, what appellant attempted and accomplished with Hodges was not what the electorate, which enacted section 190.3 in the 1978 Briggs Initiative, was thinking about when it thought of violent crime. In a half dozen incidents spread over a seven-month period (see RT 51: 7502), urine hit Hodges in the back; fecal material landed on his foot and part of his pant leg—the only places it could have hit him when squirted under a door; and a plastic bottle, a hairbrush, a bar of soap, and a liquid, which may have been water, missed him. (RT 51: 7503–7509.) These actions were immature and, in some cases, disgusting. But "prosecution evidence of background and character" is not automatically relevant in our sentencing scheme, which excludes such evidence unless it pertains to one of the listed factors. (*People v. Boyd* (1985) 38 Cal.3d 762, 774–775.) If such serious conduct as a previously unadjudicated fraud scheme, which had separated a dozen people

from their life savings, would not be admissible because it was not violent, surely some kind of "violence" beyond the gross pranks endured by Hodges was envisioned when violent crimes were categorized for different treatment. As it was, the misconduct towards Hodges might have belonged in a probation report to inform a judge's conventional sentencing decision, but not in a jury's weighing of the case for or against death.

This conclusion is reinforced by reflecting on how the expression "force or violence" is usually used in the criminal law. For example, section 667.5, subdivision (c), is a 23-item enumeration of violent felonies for purposes of enhancing other kinds of sentences. Most of the crimes are of the order of murder, rape, robbery, and kidnaping. The least violent are lewd acts on a child, extortion on behalf of a criminal street gang, and burglary of a dwelling while an inhabitant is present. No misdemeanor is included. (§ 667.5.)

To take a specific illustration, robbery is the taking of another's property by means of force or fear. (§ 211.) Similarly, it is a felony to force someone to participate in various sex acts through violence or the threat thereof. (§§ 261 et seq.) Crimes such as these are not accomplished by threatening to spray feces on the victim's foot or by sliding a plastic shampoo bottle in their direction. Except for the misdemeanor treatment of technical batteries, the force or violence that concerns the criminal law is more than this. Appellant's conduct towards Hodges cannot be what the people had in mind when, accepting the balance struck by the Briggs Initiative's drafters regarding what background and character evidence would be admissible, they decided to exclude unadjudicated behavior which did not involve "the use or attempted use of force or violence" or threat thereof. (§ 190.3.) When the public worries

about violent crime, it is not thinking of poop on a shoe.[229]

2. The Eighth Amendment Requires a More Restrictive Interpretation of the Statute than the Trial Court Applied

Apart from legislative intent, the conclusion that minor acts of jailhouse harassment do not qualify as aggravation is constitutionally compelled. Therefore the "established rule of statutory construction [which] requires [this Court] to construe statutes to avoid constitutional infirmities" comes into play. (*McClung v. Employment Development Dept.* (2004) 34 Cal. 4th 467, 477, internal quotations and brackets omitted.) Moreover, this particular law was consciously drafted with the aim of withstanding likely constitutional challenges. (*People v. Boyd, supra*, 38 Cal.3d 762, 773, fn. 5.) This Court interprets the statute with those aims in mind. (*People v. Hernandez* (2003) 30 Cal. 4th 835, 867.)

> Under the Eighth Amendment, a state may not make application of the death penalty depend upon a particular characteristic of the offense or the offender if selection of such a characteristic "makes no measurable contribution to acceptable

---

[229]In *People v. Pinholster* (1992) 1 Cal. 4th 865, the Court briefly noted that, if it were to reach the merits of a waived claim, it would have upheld use of an incident where the defendant threw a cup of urine in a deputy's face. (1 Cal.4th at p. 961.) The Court seemed to accept the notion that any battery would qualify under factor (b). Apart from being dictum, there was no indication that the Court had been called upon to reach the reasons offered here on why not every offensive touching is a crime of violence for purposes of factor (b). Moreover, the case is distinguishable on the facts: directing a body fluid at a person's face, where the eyes are vulnerable and the oral and nasal orifices are exposed, is both more invasive and more dangerous than squirting it on someone's back or under their door.

Soon after *Pinholster*, this Court decided *People v. Raley, supra*, 2 Cal. 4th 870. As noted above, in *Raley* the Court found a lewd touching to be a crime of force, not on a "least touching" theory, but because a typical threat of force put the victim in fear. (*Id.* at p. 907.)

> goals of punishment." *Coker v. Georgia*, 433 U.S. 584, 592 . . . (1977) (plurality); see *Thompson v. Oklahoma*, 487 U.S. 815, 837–38 . . . (1988) (plurality); *Tison v. Arizona*, 481 U.S. 137, 149, . . . (1987); *Enmund v. Florida*, 458 U.S. 782, 798–801 . . . (1982).

(*Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, 1308.) *Beam* noted that the high court has recognized retribution, deterrence, and incapacitation as acceptable purposes of capital punishment. (*Ibid.*) "Thus, before a state may base its decision to execute a defendant on a defendant's particular characteristics, the state must demonstrate that its reliance on such characteristics serves to further its interest in retribution, in deterrence, or in the elimination of those likely to kill again." (*Ibid.*) Not only, therefore, was section 190.3 written to "prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision" (*People v. Boyd, supra*, 38 Cal.3d 762, 776), but interpreting it in such a manner is constitutionally compelled. Placing, in the scales of death, conduct which is repellent but is, in the scheme of things, de minimis and sophomoric, violates the rationality and non-arbitrariness which the Eighth Amendment requires. "[T]he factors listed in . . . section 190.3 'properly require the jury to concentrate upon the circumstances surrounding both the offense and the offender, rather than upon extraneous factors having no rational bearing on the appropriateness of the penalty.'" (*People v. Musselwhite, supra*, at p. 1268, quoting *People v. Sanders* (1995) 11 Cal.4th 475, 564, alterations in original.) But when factor (b) is broadened as it was here, "factors having no rational bearing" on penalty are placed before the jury, under instructions that they are to be considered.

The trial court's view of factor (b) also permits arbitrary and capricious imposition of the death penalty, in further violation of the Eighth Amendment. This is because some juries would discount the kind of misconduct at issue here, while others would agree with appellant's prosecutor (RT 54: 8027,

8029) that it was important. And it undermines the heightened need for reliability in the determination that death is the appropriate penalty. (*People v. Horton* (1995) 11 Cal.4th 1068, 1134, citing federal law; see also *Booth v. Maryland* (1987) 482 U.S. 496, 502 [Eighth Amendment constraints on state relevance determinations], overruled on another point in *Payne v. Tennessee* (1991) 501 U.S. 808.)

C. The Error Was Prejudicial

Even considered alone, the error regarding the Hodges incidents cannot be known to have failed to contribute to a juror's penalty assessment. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 447–448.) Appellant can argue to this Court that the misconduct was minor in the scheme of things, and, having seen far worse conduct, the Court will probably agree. On the other hand, the prosecutor had his own judgment of the value of the evidence before a lay jury. He took the time to collect reports of the misconduct, evaluate them, and turn them over in discovery (RT 48: 7211); he insisted on placing the evidence before the jury (RT 51: 7500–7501); and he had Hodges transported from state prison to testify (RT 51: 7509–7510). In argument he used the evidence as part of his thesis that appellant should be executed because, if not executed, he would continue to hurt anyone whom he did not like, creatively using whatever means are at his disposal. (RT 54: 8027, 8029.) Even the trial court, in denying the motion to modify the verdict, cited the Hodges harassment—and appellant's claim that "if given the opportunity[, he] would take [Hodges] out"[230]—as a

---

[230]Again, for this Court's evaluation of the evidence, it must be recognized that inmates in this unit were let out of their cells only one at a time and thus were always separated from each other by a metal door. (RT 50: 7420, 7448–7450; 51: 7502, 7508; Exs. 431, 432, reproduced at SCT (continued...)

reason why the evidence supported the death verdict. (RT 55: 8232.)

In the past this Court has found harmlessness where the misconduct erroneously admitted was relatively minor in comparison to that properly admitted and to the capital crimes themselves. (E.g., *People v. Tuilaepa* (1992) 4 Cal. 4th 569, 591.) Such a holding would be inappropriate here, given the prosecutor's judgment that the benefits of putting on the evidence justified the effort; his use of the material in argument; the impossibility of knowing the penalty calculus in each juror's mind; and the fact that, in a particular decision to impose the death penalty, it may be that nothing that establishes a new fact is cumulative because the entire process is one of cumulating the evidence for and against death.

Moreover, the evidence probably had a dramatic effect in quite another fashion. The trial court instructed the jury that the factor (b) conduct, if committed, involved force or violence and thus qualified as aggravation. (CT 9: 1991.) In other words, the jurors were told that the Hodges incidents *were* the kind of violent conduct which the jury should weigh in the balance. (See

---

[230](...continued)
— Photos 2: 582, 584.) So appellant's statement that, "if he had his way about it," he would "take . . . out" Hodges was among appellant's unpleasant comments to the man, not a threat. (RT 51: 7505.) Most elements of a criminal threat under section 422, including that Hodges experienced fear as a result of appellant's statement, were not even attempted to be proved by the prosecutor. Appellant's lack of access to Hodges rendered two of those elements—that the threat conveyed an immediate prospect of its execution, and that any fear on the part of the recipient was reasonable—incapable of proof. (See § 422 and *In re George T.* (2004) 33 Cal. 4th 620, 630.) Presumably this is why the prosecutor declined to try to prove a criminal threat. (See p. 372, fn. 227, above.)

Here, however, the context is a prejudice analysis. And the point is that jurors could have been as troubled by the ugly remark as the trial court was and, like the latter, seen it as part of the case for death, despite the lack of statutory authorization for viewing it as such.

CT 9: 1989 [instruction to decide penalty based on the listed factors].) So even more important than the weight which the jurors might have given the Hodges evidence was the lesson it thus carried. Their education in what conduct tends to make a defendant more death-worthy included being told that flinging a shampoo bottle under a door and squirting what may have been hot water in someone's direction mattered in their penalty choice. Under the law, supposedly, even this was the kind of "violence" that they should include in their calculus. Therefore the more serious aggravating evidence (the beating of Medeiros for his candy, the beating of the orange-suited Jutras, the channel-changer attack on Thibedeau) was given an entirely inappropriate boost in its potency. If chucking a shampoo bottle under a door was significant, hurting someone with fists or the striking them with a jury-rigged spear mattered a lot more.

This, by the way, is another weighty reason why the admission of the testimony must be considered error. If, as the trial court believed, there were no threshold level of force or violence for conduct to qualify as aggravation under factor (b), the use of relatively minor misconduct would effectively skew the jurors' entire aggravation/mitigation calculus by giving them a distorted picture of how to view not only the minor misconduct but more serious offenses as well. By way of analogy, in *Apprendi v. New Jersey* (2000) 530 U.S. 466 Justice Thomas pointed out that applying a mandatory-minimum statute to a sentence has an effect even when the judge sentenced above the minimum, because "it is likely that the change in the range available to the judge affects his choice of sentence." (*Id.* at p. 522 (conc. opn. of Thomas, J.); see also *id.* at pp. 512–513.) This is because a seven-year sentence means something different in a five-to-ten-year range than it does in a zero-to-ten range. (*Ibid.*) Similarly, a delineation of the range of aggravating conduct

culpable enough to weigh in the death calculus affects how a juror sees any particular conduct within that range. Where it lies on the continuum depends on how the continuum is drawn, and here the continuum was drawn wrong.

The likelihood that such an occurrence contributed to the judgment cannot be ruled out. As appellant has explained (pp. 82 et seq.), the harmlessness inquiry cannot depend on this Court's own assessment of the strength of the cases for aggravation and mitigation, but simply on whether the error resulted in the admission of evidence "which possibly influenced the jury adversely . . . ." (*People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *Chapman v. California, supra*, 386 U.S. 18, 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 965 [state-law penalty-phase harmlessness test is equivalent to federal].) This means that it "might have affected a capital sentencing jury." (*Satterwhite v. Texas*, (1988) 486 U.S. 249, 258.) It is not possible to rule out any substantial error's having affected the penalty-phase outcome (*People v. Hamilton, supra*, 60 Cal.2d 105, 136–137), unless it only further proved a conclusively-established fact or was nullified by curative action.

Moreover, it is clear that in this case, a juror whose deliberations were not affected by error could have voted for life, given the mitigating evidence, appellant's youth and lack of a prior record, and reasons to doubt the veracity of Jose Munoz's account of appellant as the aggressor or a shooter at Lake Mathews. (See pp. 107–124, above.) There was "evidence that could rationally lead [jurors] to a contrary finding with respect to" the question at issue—the appropriate penalty—and that is enough to negate harmlessness under the federal standard. (*Neder v. United States, supra*, 527 U.S. 1, 19; see *In re Lucas* (2004) 33 Cal.4th 682, 735 [recognizing, in prejudice analysis, that childhood abuse, turbulent family background, and positive human qualities could have produced LWOP verdict even with "the brutality of the charged

offenses, the vulnerability of the victims, and the existence of a prior violent assault"].)

Here, the prosecutor judged the Hodges evidence important, and a juror or jurors may well have agreed. The court instructed the jury—in both the usual sense and in the sense of teaching it—to consider all the factor (b) evidence (shank possessions, assaults, purported escape attempt) under a standard in which even the Hodges harassment incidents were to be considered violent and worth weighing in the scales. The possibility that an understanding, so shaped, contributed to a juror's eventual decision to vote for death cannot be excluded as unreasonable. (*People v. Brown*, *supra*, 46 Cal.3d 432, 447–448; see also *Chapman v. California*, *supra*, 386 U.S. 18, 24.) The penalty judgment must be reversed.

//

//

VIII

EXCLUSION OF MITIGATING EVIDENCE THAT APPELLANT WAS RAISED BY AN INCEST SURVIVOR WAS CONSTITUTIONAL ERROR AND REQUIRES REVERSAL OF THE DEATH JUDGMENT

During the penalty phase, appellant sought admission of his mother's testimony that, as a child, she had been raped repeatedly by two of her brothers. The testimony would have helped explain, and thus make more credible, her account of the abuse and neglect of her children by showing a cause of psychological problems that would make her the mother she portrayed herself to be. The trial court excluded the testimony. This was error under the Evidence Code and under appellant's constitutional rights to due process, to compulsory process, and to present a defense, as well as his rights to an individualized sentencing determination, and reliability and fundamental fairness in the penalty trial. (Evid. Code §§ 210, 351, 780; U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17.) The error turned out to be quite significant, as the prosecutor argued to the jury that Mrs. Self could not have been nearly as bad a mother as she portrayed herself to be. It also deprived the jury of an explanation of appellant's animus toward child molesters.

A. Factual and Procedural Background

Both appellants called their mother, Maria Self, to testify at the penalty phase. They sought to elicit her testimony that her brothers Joe and Ernie raped her, on an ongoing basis, from when she was six years old through age thirteen.[231] (RT 52: 7731, 7733.) They told the trial court that the relevance

---

[231]The questions at issue were asked, and the offer of proof made, by Self's attorney. However, the entirety of Maria Self's testimony was in front of both juries. (See RT 52: 7697–7786.) Appellant Romero's attorneys (continued...)

was two-fold. First, they anticipated prosecutorial argument that the abuse and neglect to which she testified was exaggerated (RT 52: 7733) or "didn't happen or that she is making these things up to gain sympathy for her sons." (RT 52: 7734; cf. RT 54: 8020–8023 [prosecutor so argues in summation].) The testimony about her own abuse would help support her credibility by providing some explanation for her conduct. (RT 52: 7731, 7734.) Second, she would be testifying that at some points her neglect of her children included knowingly leaving them in the care of these violent and sexually abusive uncles. (RT 52: 7734–7735; see also RT 52: 7736–7739 [testimony about Joe and Ernie being around the boys continuously from 1975 to 1979].)

The trial court agreed that her credibility would be in issue (RT 52: 7734), along with "what she did or did not do to her sons." (RT 52: 7731.) But the court did not "see the relevance of putting evidence on as to why certain events in her past caused her to engage in this level of behavior." (RT 52: 7731.) The court ruled that the proffered evidence was irrelevant, "in that it does not relate to factors in mitigation for the defendants," and there was no issue before the jury as to why she behaved as she did. (RT 52: 7735.) Were it relevant, it would be excludable under section 352 of the Evidence Code, as "highly prejudicial" and likely to confuse and mislead the jury. (RT 52: 7735.)

B. Applicable Law and Standard of Review

1. Courts May Not Exclude Relevant Mitigating Evidence

Except as otherwise provided by statute, all relevant evidence is admissible. (Evid. Code § 351.) "'Relevant evidence' means evidence, *including evidence relevant to the credibility of a witness* . . . , having any

---

[231](...continued)
argued in favor of admission of the evidence as well. (RT 52: 7734–7735.)

tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210, emphasis added.) The relevance of credibility evidence is re-emphasized in section 780 of the Evidence Code: "[T]he court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing . . . ." "Evidence tends 'in reason' to prove a fact when 'the evidence offered renders the desired inference more probable than it would be without the evidence.' [Citations.]" (*People v. Warner* (1969) 270 Cal.App.2d 900, 907–908.)

Putting aside for a moment the constitutional framework, relevant evidence is subject to discretionary exclusion if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code § 352.) Section 352 "looks to situations where evidence may be misused by the jury . . . [, i.e., where it] would 'arouse the emotions of the jurors' or 'be used in some manner unrelated to the issue on which it was admissible.' (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1016 . . . .)" (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1851.) The concept refers "to evidence which uniquely tends to evoke an emotional bias against . . . [a party] and which has very little effect on the issues." (*People v. Bolin* (1998) 18 Cal.4th 297, 320; *People v. Wright* (1985) 39 Cal.3d 576, 585.) In applying section 352, "courts must focus on the actual degree of risk that the admission of relevant evidence may result in undue delay, prejudice, or confusion." (*People v. Hall* (1986) 41 Cal.3d 826, 834.) An important, and less drastic, alternative to section 352's remedy of excluding evidence entirely is using a limiting instruction to prevent its improper use. (Evid. Code § 355; *People v.*

Sweeney (1960) 55 Cal.2d 27, 42–43; see also *Inyo Chemical Co. v. City of Los Angeles* (1936) 5 Cal.2d 525, 544.)

In criminal cases, the Constitution adds an important dimension to such issues, even in non-capital cases. A criminal defendant has a right to offer testimony in his or her own behalf, under both the right to a fair trial guaranteed by due process (*Chambers v. Mississipi* (1973) 410 U.S. 284, 294–295) and the Sixth Amendment right to compulsory process (*Taylor v. Illinois* (1988) 484 U.S. 400, 409). More generally, the Sixth and Fourteenth Amendments together establish "a meaningful opportunity to present a complete defense." (*Holmes v. South Carolina* (2006) __ U.S. __, __ [164 L. Ed. 2d 503, 509; 126 S. Ct. 1727, 1731], quoting *Crane v. Kentucky* (1986) 476 U.S. 683, 690.) Thus, state rules excluding various kinds of evidence for legitimate policy reasons have been found unconstitutional where they conflict with the right to present a defense. (*Id.*, 164 L.Ed.2d at pp. 509–510, 126 S.Ct. at pp. 1731–1732; *Taylor v. Illinois*, *supra*, 484 U.S. at p. 429 (dis. opn. of Brennan, J) [citing cases invalidating specific applications of rules barring use of hearsay, accomplice testimony, testimony of interested witnesses, and testimony of witnesses whose memories were hypnotically refreshed].) These rights extend to evidence pertaining to the credibility of witnesses. (See *Davis v. Alaska* (1974) 415 U.S. 308; *Smith v. Illinois* (1968) 390 U.S. 129; *Pointer v. Texas* (1965) 380 U.S. 400, 403–404.)[232]

---

[232]The cited cases deal with impermissible restrictions on cross-examination, under the Confrontation Clause. But the importance of that right stems from its value in testing "the believability of a witness and the truth of his testimony." (*Davis v. Alaska*, *supra*, 415 U.S. 308, 316.) Indeed, the reason that the confrontation right applies to the states is that such testing of a witness's credibility is required in the fair trial guaranteed by due process. (*Pointer v. Texas*, *supra*, 380 U.S. 400, 404–406.) Since the complementary (continued...)

Yet another layer of protection applies when a person on trial for his or her life seeks to present a mitigation case:

> To guarantee that capital sentencing decisions are as individualized and reliable as the Constitution demands, the Eighth Amendment requires that the defendant may not be barred from introducing any relevant mitigating evidence. (*Skipper v. South Carolina* [(1986)] 476 U.S. [1,] 4–8 . . .; see *Eddings v. Oklahoma* (1982) 455 U.S. 104, 112–116 . . .; *Lockett v. Ohio* (1978) 438 U.S. 586, 597–605 . . . (plur. opn. by Burger, C. J.); *Bell v. Ohio* (1978) 438 U.S. 637, 642 . . .(plur. opn. by Burger, C. J.).) . . . [W]hen any barrier, whether statutory, instructional, evidentiary, or otherwise [citation], precludes a jury or any of its members [citation] from considering relevant mitigating evidence, there occurs federal constitutional error, which is commonly referred to as "*Skipper* error." [Citations].

(*People v. Mickey* (1991) 54 Cal.3d 612, 692–693.)

The compulsory-process/due-process rights—unlike the Eighth Amendment right to present mitigation—are not absolute, but "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. [Citation.]." (*Chambers v. Mississisippi*, *supra*, 410 U.S. 284, 295; see also *id.* at pp. 298–302.) Infringements on them, however, "require[] that the competing interest be closely examined." (*Id.* at p. 295) In evaluating such claims, the United States Supreme Court makes a fact-specific examination of the interests at issue in each case. (See *Taylor v. Illinois*,

---

[232](...continued)
Compulsory-Process Clause includes the right to present a witness's testimony (*Taylor v. Illinois*, *supra*, 484 U.S. 400, 409), clearly that clause, too, includes testimony pertaining to the witness's believability. (See Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, (1978) 91 Harv. L. Rev. 567, 601; cf. *Giglio v. United States* (1972) 405 U.S. 150, 153–154; *Napue v. Illinois* (1959) 360 U.S. 264, 269; *Washington v. Texas* (1967) 388 U.S. 14, 23; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56.)

supra, 484 U.S. 400, 414–417; *Green v. Georgia* (1979) 442 U.S. 95, 97; *Chambers v. Mississippi*, *supra*, 410 U.S. 284, 298–302.)

2. Standard of Review

This Court has often stated generally that the standard of review for claims of error in the admission or exclusion of evidence, including rulings on relevance, is abuse of discretion. (E.g., *People v. Cox* (2003) 30 Cal.4th 916, 955; *People v. Waidla* (2000) 22 Cal.4th 690, 717.) Even where the need to protect constitutional rights is not involved, however, such statements are too broad and do not reflect the Court's actual practice. For example, this Court routinely analyzes, as matters of law which require no deference to the trial court, questions of whether past-misconduct evidence was admissible. (E.g., *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 109–110; *People v. Carter* (2003) 30 Cal.4th 1166, 1202–1204; *People v. Boyd* (1985) 38 Cal.3d 762, 775–779.) Witkin does not list relevance rulings as among those where a court has discretion. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 357, pp. 405–406; see also 1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 4, pp. 325–326, § 26, pp. 351–353.) Neither does McCormick. (1 McCormick, Evidence (5th ed. 1999) Relevance, § 185, pp. 637–648.)

Appellant has searched in vain for an explanation for a policy of treating relevance rulings as within the trial court's discretion, in the face of Evidence Code section 350's flat command that only relevant evidence is admissible and section 351's similarly flat command that, except as otherwise provided by statute, all relevant evidence is admissible. If traced backwards to its origins, the line of authority stating the formula peters out in cases involving no general principles, but very specific situations where discretion

was established by statute or logically required.[233] "'Discretion is the power to make the decision, one way or the other.' [Citation.]" (*People v. Carmony* (2004) 33 Cal.4th 367, 375; see also *People v. Barnett* (1946) 27 Cal.2d 649, 657 [where a court has discretionary power, within limits it "gives latitude to the trial judge to express his own convictions"].) Presumably this Court's approach does not mean that a trial court has discretion to violate a defendant's statutory rights to present relevant evidence (Evid. Code §§ 210, 351, 780), or, where implicated, his associated constitutional rights to present a defense and to a fair, reliable, and non-arbitrary penalty determination (U.S. Const., 6th,

---

[233]For example, tracing this Court's citations to its prior cases, many go back to *People v. Green* (1980) 27 Cal.3d 1, 19. *Green* bases its characterization of the rule on a citation to *People v. Warner* (1969) 270 Cal.App.2d 900, 908, "and cases cited." That Court of Appeal opinion simply cites the pre-Evidence-Code cases *People v. Smith* (1939) 13 Cal.2d 223, 227; *Adkins v. Brett* (1920) 184 Cal. 252, 258; *Larson v. Solbakken* (1963) 221 Cal.App.2d 410, 420; and *Moody v. Peirano* (1906) 4 Cal.App. 411, 418. Of these, *Smith* speaks of a limited situation, the trial court's discretion to permit a testifying defendant to give something of his background even if not specifically relevant. (13 Cal.2d at p. 227.) *Adkins* states only that when evidence can be both probative and prejudicial, whether to rely on a limiting instruction or to exclude the testimony is "largely" in the trial court's discretion. (184 Cal. at p. 258.) *Moody* only recognizes a trial court's discretion regarding how far to allow impeachment of a witness on collateral matters, and it relied on former Civil Code section 1868, which explicitly gave the trial court discretion on that issue. (4 Cal.App. at p. 415–418.) *Larson* does state an abuse-of-discretion standard regarding relevance rulings but relies in turn on cases with more limited holdings. (221 Cal.App.2d at p. 420, citing *Moody v. Peirano*, *supra*, 4 Cal.App. 411, 418; *Adkins v. Brett*, *supra*; *McGuire v. Navarro* (1958) 165 Cal.App.2d 661, 664 [discretion regarding what would now be an Evidence Code § 352 issue]; and McCormick, Evidence, § 152, pp. 315–321.) Finally, while appellant has not consulted the (unspecified) edition of McCormick cited by *Larson v. Solbakken*, *supra*, a more recent edition fails to suggest that relevance questions are committed to the discretion of the trial court. (1 McCormick, Evidence (5th ed. 1999) Relevance, § 185, pp. 637–648.)

8th & 14th Amends.). After all, where the Legislature meant to grant trial courts discretion in evidentiary rulings, it did so. (E.g., Evid. Code §§ 320, 352, 772, 802.)

As a matter of policy, it is clear that trial courts are not normally better situated to determine relevance. The test is based on logic, not observation of witnesses. It is whether the evidence has "any tendency in reason to prove or disprove" a disputed fact (Evid. Code § 210), i.e., whether it "tends 'logically, naturally, and by reasonable inference' to establish material facts . . . ." (*People v. Hart* (1999) 20 Cal.4th 546, 606, fn. 16). This Court generally treats that question as having a clear yes-or-no answer and gives it the de novo analysis which it clearly invites. (E.g., *People v. Brown* (1994) 8 Cal.4th 746; *People v. Mickle* (1991) 54 Cal.3d 140, 169, 192, 193, 196.) This is true even where the Court has stated that the trial court has broad discretion in determining relevance. (E.g., *People v. Heard* (2003) 31 Cal.4th 946, 972–975; *People v. Scheid* (1997) 16 Cal.4th 1, 14–17.)

On the other hand, perhaps there are some judgment calls, on the margins, where an argument could be made for allowing trial courts some latitude, at least when no constitutional rights are implicated and no serious prejudice results. An example would be in allowing or excluding "facts that merely fill in the background of the narrative and give it interest, color, and lifelikeness." (1 McCormick, Evidence, *supra*, Relevance, § 185, p. 637.) Presumably this is what the abuse-of-discretion standard means in this context. Despite their broad language, in all of the cases which appellant has found stating the abuse-of-discretion formula, such as those cited in the preceding pages, the actual mode of analysis was de novo review.

The situation here was not one requiring leeway for the trial court. The prosecutor made an argument for irrelevance, but, as shown below, accepting

the prosecutor's claim was unreasonable and a mistake, not a debatable judgement call regarding, e.g., evidence of background facts. Appellant therefore seeks neutral review of his contention based on the clear commands of the Evidence Code and his rights under the Constitution, not on an erroneous framing of the question as whether the trial court abused its discretion.

Once relevance is found, however, the alternative basis for the trial court's ruling—its explicit discretionary authority under Evidence Code section 352—would, in most situations, be reviewed for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) However, the impingement on appellant's rights to present a defense and to present all mitigating evidence changes the standard. In reviewing such claims, the United States Supreme Court treats the issue as a matter of law and accords no deference to the trial court. (See *Skipper v. South Carolina*, *supra*, 476 U.S. 1, 4; *Eddings v. Oklahoma*, *supra*, 455 U.S. 104, 113–116; *Green v. Georgia* (1979) 442 U.S. 95, 97; *Lockett v. Ohio*, *supra*, 438 U.S. 586, 608; *Chambers v. Mississippi*, *supra*, 410 U.S. 284, 302–303.) So does this Court. (See *People v. Whitt* (1990) 51 Cal.3d 620, 647; *People v. Lucero* (1988) 44 Cal.3d 1006, 1026–1027.) The extent of a defendant's constitutional rights is not committed to the discretion of trial courts to handle in varying ways according to their views of what is appropriate. (Cf. *People v. Carmony*, *supra*, 33 Cal.4th 367, 375 [discretion is the power to rule either way].)

C. The Trial Court's Failure to Acknowledge, or Understand, the Probative Value of the Evidence for the Case in Mitigation and its Unspecified and Unjustified Concern About Prejudice Resulted in an Erroneous Ruling

Under the principles outlined in part B.1, above, exclusion was error. The trial court was mistaken in believing that the evidence was irrelevant, as well as in its belief that it would have a prejudicial impact.

1. The Evidence Had Probative Value Regarding Maria Self's Credibility, the Extent of Her Neglect of Appellant, and the Nature of the Family System in Which He Was Raised

Any relevance question has two sub-issues: whether the proffered evidence relates to a fact that is material, and whether or not it tends to prove or disprove that fact. (Evid. Code § 210; 1 Witkin, Cal. Evidence, *supra*, Circumstantial Evidence, §§ 3, 4, pp. 323–326.) The trial court accepted the materiality of Maria Self's credibility, stating more than once that it was placed in issue by the simple fact of her testifying. (RT 52: 7733, 7734.) This was correct,[234] and it was borne out by the prosecutor's later argument that she grossly exaggerated her parenting deficits (RT 54: 8020–8023). But the court disagreed that her incest history tended to show that she was telling the truth, as it did not "see the relevance of putting evidence on as to why certain events in her past caused her to engage in this level of behavior." (RT 52: 7731.) The court ultimately ruled that the proffered evidence was irrelevant, "in that it does not relate to factors in mitigation for the defendants," and there was no issue before the jury as to why she behaved as she did. (RT 52: 7735.)

---

[234]See Evidence Code section 210; see also 3 Witkin, California Evidence, Presentation at Trial, *supra*, section 360, p. 447 (rehabilitation is not permitted until there has been an attempt at impeachment, "[e]xcept in criminal cases").

This was simply wrong. As with other issues, evidence going to credibility is relevant if it has "any tendency in reason to prove or disprove the truthfulness of [a witness's] testimony at the hearing . . . ." (Evid. Code § 780.) "[A] host of research and clinical studies . . . indicate" what was well known in the culture by the time of appellant's trial: "that adult survivors of incest suffer from devastating personal and interpersonal difficulties." (Kirschner, Kirschner & Rappaport, Working with Adult Incest Survivors: The Healing Journey (1993) p. 3.) Without the rape/incest background, Maria Self's story of addiction and of abusing and neglecting her children and raising them in chaos had no explanation except for a bad marriage, and, as the prosecutor was later to argue (RT 54: 8020, 8022), her obvious bias in wanting her sons to live. Her own background made her account of how she treated her children considerably more plausible, for it made obvious the probability that, while a young mother, she had serious psychological problems.[235] It also supported the testimony, provided by Maria's niece Sheila Torres, regarding Maria's hatred of males and her taking that hatred out on her sons. (RT 53: 7904–7905.)

It is unquestioned that prosecutors may introduce evidence of a defendant's motive, because it provides a reason for the alleged criminal action and thus makes it more likely that the defendant committed it than if there were no reason. (See 1 Witkin, Cal. Evidence, *supra*, Circumstantial Evidence, § 119, pp. 466–468.) When the shoe was on the other foot, however, the trial court could "see no issue before the jury as to the reason

---

[235]This itself was a disputed point. She had testified about seeking help while raising her sons and finally receiving psychiatric diagnosis and treatment three to four years before trial. (RT 52: 7711–7712.) The prosecutor sought to imply that her condition was of recent vintage, brought on by her sons' arrests. (RT 52: 7758–7759.)

why [Maria Self] did or did not do certain things to the defendants." (RT 52: 7735.) Just as with defendants, however, evidence that would provide some reason for Maria Self's actions made the claims that she committed those actions more plausible. It did not alone establish them to a certainty. It was, however, evidence "having any tendency in reason to prove" to prove that her account of that behavior was true (Evid. Code §§ 210, 780), for it would have "'. . . render[ed] the desired inference more probable than it would be without the evidence.'" (*People v. Warner*, *supra*, 270 Cal.App.2d 900, 907–908; cf. *Skipper v. South Carolina*, *supra*, 476 U.S. 1, 7–8 [state could not exclude, as cumulative, testimony of disinterested witnesses corroborating mitigating facts testified to by defendant and his wife].) Excluding her rape/incest history would be like permitting a defendant to try to show that his father beat him regularly and severely, while excluding as irrelevant the explanatory and corroborating fact that the father was an alcoholic. (Cf. *People v. Michaels* (2002) 28 Cal.4th 486, 506 [capital defendant's father "was a violent alcoholic who beat defendant"].)

It has long been accepted in capital cases that mitigation evidence pertaining to the background and character of the defendant may include the history of family members. (See *People v. Wharton* (1991) 53 Cal.3d 522, 545 [capital defendant's mother testified that she left her family home at age 11 when stepfather tried to molest her]; *People v. Rowland* (1992) 4 Cal.4th 238, 255 [capital defendant's parents testified that they "each came from violent, alcoholic homes" and were sexually victimized as children].) In *Wiggins v. Smith* (2003) 539 U.S. 510, the Supreme Court held that a competent attorney would normally prepare a social and family history of a capital defendant, and it found it likely that, in the case before it, such an attorney would have placed that history before the jury. (*Id.* at pp. 524–525, 535.) Here, a social and

family history of appellant would have included the information which the trial court excluded. Moreover, in *Wiggins*, the information which counsel should have unearthed and introduced included the defendant's mother's alcoholism, which the Court clearly saw as shedding light on the abuse and neglect which the defendant suffered at her hands. (*Id.* at pp. 516–517, 524–525, 535.) The relevance of Maria Self's being an untreated[236] survivor of incestuous childhood rape over a seven-year period was comparable. But by the narrow logic of appellant's trial court, neither a mother's alcoholism nor a mother's history likely to cause serious psychological damage would "relate to factors in mitigation for the defendants." (RT 52: 7735.) Only her direct acts towards them—"what she did or did not do to her sons"—would. (RT 52: 7731.)

The illogic of the trial court's failure to see the nexus between Maria Self's history and her behavior can only be explained by the fact that the court's focus was fixed elsewhere. It apparently lost sight of the credibility issue and saw the question as whether the evidence supplied direct mitigation for the defendants, or whether it mitigated the mother's culpability, for her parenting, which—of course—would be irrelevant.[237] (See the court's statements at RT 52: 7731 [inability to "see the relevance of putting evidence on as to why certain events in her past caused her to engage in this level of behavior"]; 7735 [the main impact of the evidence was to "invoke sympathy for her, not for the defendants"]; 7733 [same, agreeing with prosecutor on the

---

[236]See RT 52: 7711–7712, 7759.

[237]This happened despite the fact that the defendants' attorneys had quite clearly explained that the testimony was needed to defuse any prosecutorial argument that the mother's account of abuse and neglect was exaggerated or false (RT 52: 7733, 7734), and that the testimony about her own abuse would help by providing some explanation for her conduct. (RT 52: 7731, 7734.)

point], 7735 [the proffered evidence "does not relate to factors in mitigation *for the defendants*," emphasis added]; *ibid.* [there was no issue before the jury as to why Maria Self behaved as she did].)

The court's error may well have been an honest one, but, if so, it totally misunderstood the issue before it. Thus, if the ruling had been a matter for its discretion, it could not effectively exercise that discretion. In *Martin v. Alcoholic Beverage Control Appeals Bd.* (1961) 55 Cal.2d 867, 875, this Court stated that proper exercise of discretion requires the trial court to be informed of and consider both the facts and the applicable legal principles. By the same token, a court cannot properly exercise its discretion if it does not understand the contention before it.

This Court has explained a distinction which appellant's trial court failed to see. In *People v. Rowland* (1992) 4 Cal.4th 238, the Court held that the background of the defendant's family "is of no consequence in and of itself," i.e., is not relevant mitigation per se. (*Id.* at p. 279.) The Court added this caveat: "To be sure, the background of the defendant's family is material if, and to the extent that, it relates to the background of defendant himself." (*Ibid.*; see *Penry v. Lynaugh* (1989) 492 U.S. 302, 318 [sentencer must be permitted to consider "evidence relevant to the defendant's background . . . that mitigate[s] against imposing the death penalty"].) Surely, being raised by an untreated incest survivor would be an example of the latter class of evidence. Significantly, in *Rowland* evidence of the defendant's mother's incest history, along with other evidence of multigenerational family dysfunction, had been admitted by the trial court. (*Id.* at p. 255.) The dispute on appeal was about whether it was error for the prosecutor to argue that much of the testimony had nothing to do with the defendant. Because the import of the remarks was only that "the background of defendant's family does not

matter if it does not touch his own," thereby stressing the proper standard by which to judge the testimony, there was no error. (*Id.* at pp. 279–280.) Here, what should have similarly been a question for the jury was never placed before it.

Appellant's trial court never addressed his second proffered ground of relevance: that Maria's willingness to leave the boys where Joe and Ernie had unfettered access to them was itself a further instance of ongoing neglect. (See RT 52: 7734–7735; see also RT 52: 7736–7739.) In this manner, too, the evidence was "proffer[ed] as a basis for a sentence less than death" and therefore had to be admitted. (*Eddings v. Oklahoma*, *supra*, 455 U.S. 104, 110; cf. *People v. Turner* (2004) 34 Cal.4th 406, 414 [evidence admitted that mother divorced father after he molested one of their children, then sent defendant and siblings to live with the father].)[238]

---

[238]The defendants' trial attorneys did not bring the constitutional bases for admitting the evidence to the trial court's attention. Strictly speaking, the exception for an objection made on state grounds involving the same facts and a "similar" legal standard (*People v. Yeoman* (2003) 31 Cal.4th 93, 117; see also *People v. Partida* (2005) 37 Cal. 4th 428) may not apply, since the constitutional dimension of the argument constrains any discretion which the trial court may have had under state law. However, the same principles underlying that exception make it clear that if it is unavailable, the futility exception (*People v. Boyette* (2003) 29 Cal.4th 381, 432) does apply. Neither the right to present a defense nor the right to present mitigation would have impressed a court utterly unable to recognize the relevance of the proffered testimony. Thus counsel's omissions did not deprive the trial court of an opportunity to adjudicate the issue properly. (See *People v. Partida*, *supra*, 37 Cal. 4th at p. 435.)

Other exceptions to the preservation requirement also apply. (See *People v. Vera* (1997) 15 Cal.4th 269, 276–277 [deprivation of fundamental constitutional rights]; *People v. Hines* (1997) 15 Cal.4th 997, 1061 [pure question of law on undisputed facts]; *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 [Court's discretion to consider claims for which right to review (continued...)

Like evidence analyzed by this Court under different circumstances, Maria Self's experience at the hands of her brothers "clearly satisfied the relevancy requirement under the very broad standard of relevance embodied in Evidence Code section 210." (*People v. Scheid*, *supra*, 16 Cal.4th 1, 16.)

2. The Evidence Was Not Prejudicial to Respondent's Case

The trial court, after ruling that evidence as to Maria Self's background was irrelevant, added as an alternative ground that, were it relevant, it would be excludable under section 352 of the Evidence Code, as "highly prejudicial" and likely to confuse and mislead the jury. (RT 52: 7735.) Even if appellant's constitutional right to present evidence probative of his mitigation case did not deprive the trial court of section 352 discretion on the issue, its holding would have been erroneous and an abuse of discretion.

By its terms, section 352 permits discretionary exclusion of evidence only where its probative value "is *substantially* outweighed" by the probability

---

[238](...continued)
has been forfeited]; *People v. Hill* (1992) 3 Cal.4th 959, 1017, fn. 1 (conc. opn. of Mosk, J.) [same; constitutional right to correction of miscarriage of justice prevails over judicially-created waiver rules].)

The Court should also view the error in its constitutional context because of the state's own interest in a fair and reliable penalty verdict. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1074.)

Finally, to the extent that there is any doubt about whether the trial court would have known of the constitutional context of the evidentiary issue, competent counsel would have been required to apprise it of the higher standard imposed by constitutional law. Similarly, given the well-known difference in reversal rates between this Court and those of the federal system, counsel should have cited appellant's federal constitutional rights to preserve the issue in case state post-conviction remedies were unsuccessful. As there can be no tactical reason for failure to do so, that failure amounted to ineffective assistance. (U.S. Const., 6th Amend.; *Strickland v. Washington* (1984) 466 U.S. 668.)

that admission will create "a *substantial* danger of *undue* prejudice." (Emphasis added.) As noted above, "prejudice" in this context refers "to evidence which uniquely tends to evoke an emotional bias against . . . [a party] and which has very little effect on the issues." (*People v. Bolin*, *supra*, 18 Cal.4th 297, 320; *People v. Wright*, *supra*, 39 Cal.3d 576, 585.) In applying section 352, "courts must focus on the actual degree of risk that the admission of relevant evidence may result in undue delay, prejudice, or confusion." (*People v. Hall* (1986) 41 Cal.3d 826, 834.) Here, the court did not explain in any manner how the proffered testimony would confuse or mislead the jury, or why it was "highly prejudicial." (RT 52: 7735.) In explaining its view of the lack of relevance, however it mentioned that, while sympathy for the defendants was relevant, the testimony would invoke sympathy for Maria Self. (RT 52: 7735; see also 7733.) The prosecutor had urged exclusion under section 352 "as an attempt to play on the sympathies of the jury in a matter that has no apparent connection to these boys." (RT 52: 7732.)

If this was the trial court's concern, it was both misguided and difficult to fathom. It is a rare trial, civil or criminal, that involves no testimony from a witness whose story might evoke some sympathy. This is not normally a reason to prevent the witness from providing relevant testimony; jurors are generally trusted to remember what the case before them is about. This trust, by the way, is carried to an extreme when victim-impact testimony is permitted. To go to the other extreme and hold that there is a substantial risk that the jury would be unable to fairly consider a death verdict because of the defendants' mother's history of child sexual abuse seems both beyond comprehension and the height of unfairness.

Here, both defendants had been convicted of three murders and numerous other crimes. Other evidence about assaultive jail misconduct was

introduced that permitted the prosecutor to make a future-dangerousness argument, which, as appellant shows in Argument IX, below, can have a strong influence on a jury. (RT 54: 8026–8030.) By the same token, enough of a case in mitigation was made to legitimately give jurors a reason to pause before imposing the ultimate sanction. (See pp. 107–124, above.) As far as appeals to sympathy and emotion went, anything to be gained by admitting the bare fact of Maria Self's abuse history was insignificant. Indeed, the rape evidence was not comparable, in sympathy-evoking potential, to the evidence which the *prosecutor* elicited from Maria Self about how much suffering her sons' legal situation had been causing her. (RT 52: 7758–7760; see also RT 54: 8020.) For jurors ready to punish the murders with a death sentence, creating a further bit of sympathy for Maria Self on the basis of what she suffered in childhood would not have carried a feather's weight in the balance. "[T]he actual degree of risk" of undue prejudice or confusion (*People v. Hall*, *supra*, 41 Cal.3d 826, 834) was inconsequential, not "substantial" (Evid. Code § 352). The trial court's belief that the information was confusing and "highly prejudicial" (RT 52: 7735) might have been rooted in the same mistake that blinded it to the probative value of the evidence: a notion that the defendants were for some reason trying to mitigate the mother's culpability. Even if the defense had been trying to excuse the mother's actions, however, it is difficult to see how the prosecution could have been prejudiced—any rational juror would have considered her blameworthiness beside the point.

There was a serious lack of evenhandedness in the trial court's assessments of prejudice. As set forth more fully in Argument X, below, the trial court admitted, over objection, a statement by appellant describing to a visitor how he would fashion a lethal weapon and use it on a child molester if one were celled near him, holding that there was no "substantial danger that"

the statement "would mislead the jury in any way." (RT 51: 7482.) That was its conclusion despite the power of future-dangerousness evidence and the fact that the evidence was admissible not for the seemingly obvious purpose of showing future dangerousness, which is not a statutory aggravator, but only to corroborate Olen Thibedeau, who had been attacked months earlier. (See pp. 422 et seq., below.) The trial court's high level of trust in the jury's capacity to avoid misusing that evidence contrasts sharply with that court's extreme concern that a critical fact supporting Maria Self's credibility might also evoke sympathy for her, thereby becoming "highly prejudicial" and likely to confuse and mislead the jury on the issue of penalty. Even-handed concern for prejudice would have produced opposite results on both questions. The trial court's fears regarding the Maria Self evidence were inexplicable.

In *Olden v. Kentucky* (1988) 488 U.S. 227, evidence that an alleged white rape victim was living with a black man was excluded because its probative value was outweighed by what the Kentucky Court of Appeals saw as a risk of "extreme prejudice against" the complainant. (488 U.S. at pp. 230–231.) Because the relationship created a possible motive to fabricate the charge, the Supreme Court's per curiam reversal did not see the "speculative" possibility of prejudice as creating even a close question. (*Id.* at pp. 229, 232.) Here the risk of prejudice was far less than that created by interracial cohabitation in Kentucky in 1988.

If anything was required to protect the legitimate interests of respondent, it was a limiting instruction. The court could have told the jury that the testimony was being admitted for whatever value the jury might find it had in assessing the truth of Maria Self's testimony about her behavior and in understanding the defendants' own upbringing, not to elicit sympathy for her. (Evid. Code § 355; *People v. Sweeney, supra*, 55 Cal.2d 27, 42–43) But

the act of hypothesizing such an instruction evokes a sense of how foolish and unnecessary it sounds. The far more extreme remedy of exclusion was serious error. Because the evidence would have corroborated a key prong of appellant's mitigation case and the prejudice to respondent was minimal, if any, exclusion was a clear abuse of any discretion which the trial court may have had. The constraints on that discretion imposed by the right to present a defense, and the absence of discretion to exclude mitigation in a capital trial (*People v. Mickey*, *supra*, 54 Cal.3d 612, 692–693), make the error that much clearer.

D. The Error Requires Reversal

This Court should not undertake a harmlessness analysis when the sentencing jury has been deprived of mitigating evidence, for it cannot be known what impact that evidence may have had on one or more jurors. In the cases which established that the right to individualized sentencing required the sentencer to consider all relevant proffered mitigation, the United States Supreme Court reversed without entertaining the possibility of harmlessness. (*Eddings v. Oklahoma*, *supra*, 455 U.S. 104, 112–116; *Bell v. Ohio*, *supra*, 438 U.S. 637; *Lockett v. Ohio*, *supra*, 438 U.S. 586.) Later, however, in *Skipper v. Oklahoma*, *supra*, 476 U.S. 1, some confusion was introduced. The court considered three contentions put forward by the state for the proposition that the exclusion of mitigating evidence was proper. The third was "that exclusion of the proffered testimony was proper because the testimony was merely cumulative" to other evidence already introduced. (*Id.* at p. 7.) In rejecting this claim, the court showed how the additional evidence could have mattered to the jury, stating, "[C]haracterizing the excluded evidence as cumulative and its exclusion as harmless is implausible on the facts before us."

(*Id.* at p. 8.) The court concluded that discussion by saying that excluding the evidence was "sufficiently prejudicial to constitute reversible error." (*Ibid.*)

Here, as in *Skipper*, the "why-the-evidence-mattered" discussion can be characterized as either showing how there was error or how it was prejudicial. Given the constitutional sensitivity surrounding exclusion of evidence that could have helped the defendant avoid a death sentence, this Court should take the approach of *Eddings*, *Lockett*, and *Bell* as more representative of the high court's stance on the question of prejudice than the spilling over of one issue into the other, characterized by the opinion in *Skipper*.

Respondent could not prevail here even if a harmlessness analysis were appropriate. The trial court's ruling deprived the jury of only one fact, but its likely consequences were too grave to be considered harmless. As Self's attorneys had predicted, the prosecutor argued to the jury that helping her sons was more important to Maria Self than telling the truth. (RT 54: 8020.) He added that her testimony was overwhelmingly vague in terms of names and dates and unsupported by corroborating documents (RT 54: 8020–8021) and claimed that "[t]hese things were kept vague for a reason" (RT 54: 8021). He added that her prior statement to the investigator and answers which she gave on cross-examination showed that she was trying to grossly exaggerate her failings as a mother. (RT 54: 8021–8023.)

The jury could see that the witness cared about appellant as of the time of trial. (See RT 54: 8020, 8022 [prosecutor so argues].) What it did not see was any explanation for how her parenting as a young mother could have been so at odds with how she came across at trial and with the behavior which even minimal maternal instincts would produce. It would take the grossest speculation to hold (1) that no juror accepted the prosecutor's position that her portrayal of herself was essentially false, (2) that such destruction of the

mitigation case had no effect on such a juror's vote, and (3) that providing an *explanation* of why she would have been promiscuous, drug-abusing, rageful, and hence abusive and neglectful as a mother could not have defused the argument. (See *Clemons v. Mississippi* (1990) 494 U.S. 738, 753–754; *Johnson v. Mississippi* (1988) 486 U.S. 578, 586, 590 & fn. 8; *Skipper v. South Carolina, supra*, 476 U.S. 1, 8, all of which refused to find harmlessness in the face of prosecutorial argument making use of an error; see also *People v. Roder* (1983) 33 Cal. 3d 491, 505; cf. *People v. Hinton* (2006) 37 Cal. 4th 839, 868.)

Moreover, as mentioned previously, the testimony explained and corroborated another family member's testimony about Maria's antagonism towards males and her telling her sons that they were no good because they were boys. (RT 53: 7904–7905.)

Further, the evidence was directly mitigating (as opposed to corroborative), in that it tended to show that appellant was raised by a person whose mental health was seriously compromised. Particularly important here is the context: the prosecutor, having successfully urged the court to exclude the incest/rape testimony, later sought to portray her mental health difficulties as the result of her sons' criminality and its consequences, turning what should have been mitigation into aggravation. (See RT 52: 7758–7760; 54: 8020.) This was but one step removed from obtaining the exclusion of evidence, then urging the jury to draw certain inferences from its absence, which is misconduct. (See *United States v. Silva* (9th Cir. May 28, 1993, No. 92-10006) 1993 U.S. App. LEXIS 24412, *12–*13; *People v. Daggett* (1990) 225 Cal. App. 3d 751, 758; *People v. Varona* (1983) 143 Cal. App. 3d 566, 570.)

The other ground which was urged for admission of the evidence—further proof of Maria Self's neglectfulness, in her permitting her sons to spend long hours, over several years, in the company of her rapists—was also valid. Maria testified as to one instance in which she learned that Joe and Ernie had been threatening her sons and forcing them to drink beer. (RT 52: 7737–7739.) Saying more about who these men really were would have itself strengthened the defense picture of her poor mothering.

Moreover, appellant's aggressiveness towards child molesters in jail appears in a different light—not excusable, but more understandable—once it is known that his mother was a child-molestation victim. Considering how hard the prosecutor stressed, in argument, the jail conduct and appellant's statement about child molesters (RT 48: 7268–7270; 54: 8027–8028), the explanatory power of the excluded evidence on this point, too, could well have made a difference to one or more of appellant's jurors.

As appellant has explained in preceding arguments, the penalty verdict was not a foregone conclusion.[239] As appellant has also explained (pp. 82 et seq., above), because of the unknowability of jurors' subjective weighing processes and other limitations of the appellate process, a finding that error could not have contributed to a juror's decision generally requires the error to have been trivial or to have produced results that were either undeniably cumulative of a fact established beyond doubt or, conversely, undeniably undone by some other action. (*Chapman v. California, supra*, 386 U.S. 18, 24; *People v. Brown, supra*, 46 Cal.3d 432, 448; *People v. Hamilton* (1963) 60 Cal.2d 105, 136–137; and other cases cited at pp. 82 et seq., above) None of those conditions pertains here. Giving the jury a better basis for believing

---

[239]See the summary at page 281, above, and the detailed treatment at pages 107–128, above.

Maria Self and understanding appellant could most certainly have affected a juror's vote.

It would require unseemly, and unconstitutional, speculation to rule out that possibility, and the penalty judgment must therefore be reversed.

//

//

IX

THE PROSECUTOR OBTAINED A DEATH VERDICT THROUGH HEAVY RELIANCE ON FUTURE DANGEROUSNESS, WHICH IS NOT A STATUTORY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STATE LAW AND THE FEDERAL CONSTITUTION

Under section 190.3, "matters not within the statutory list [of aggravating and mitigating circumstances] are not entitled to any weight in the penalty determination." (*People v. Boyd* (1985) 38 Cal.3d 762, 773.) Attempting, in argument, to get the jury to consider such matters would therefore be error or misconduct. (See *People v. Young* (2005) 34 Cal.4th 1149, 1219 [accepting premise that arguing non-statutory aggravation would be error]; *People v. Walker* (1988) 47 Cal.3d 605, 649–650 [same].) Future dangerousness is not a listed circumstance in aggravation. Yet appellant's prosecutor clinched his penalty-phase argument with an extended riff on what has been called "the standard prison guard argument," i.e., painting a picture of what a danger appellant would be to his custodians if given a life sentence. (*Tucker v. Francis* (11th Cir. 1984) 723 F.2d 1504, 1506.)

Obtaining a death sentence on a basis other than that authorized by statute violated not only state law, but appellant's state and federal rights to due process and a reliable penalty determination. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15.) The use of a compelling, but objectively misleading, argument was a further violation of due process and the Eighth Amendment.

A. The Prosecutor Relied Heavily on a Future Dangerousness Argument

Appellant's prosecutor stressed future dangerousness in his penalty-phase opening statement. (RT 48: 7268–7271.) He then devoted the final four pages of his summation to the factor (b) evidence of unadjudicated crimes

allegedly committed by appellant while in custody on the instant charges. (RT 54: 8026–8030.) He had stated that there were but two kinds of aggravation in the case: the circumstances of the crimes of which the defendant had been convicted, and the other-crimes evidence. (RT 54: 8005.) He introduced his discussion of the latter by reminding the jurors that in jury selection they had talked about the possibility of having to "decide what is the just and necessary verdict." (RT 54: 8026.) "Just," he added, "is when the penalty, the punishment fits the crime," and that was what he had just finished arguing. (*Ibid.*) Continuing, he used the future-dangerousness argument as the clincher:

> And necessary. Necessary is what needs to be done. And what needs to be done is that Mr. Romero needs to be executed.
>
> Romero made your job, your verdict, very clear. I'm not saying easy, but clear. He has shown in jail since his arrest that he is not done hurting people, that he still wants to kill and rob and terrorize and hurt.

(*Ibid.*) After discussing the shank possessions, the escape plan, the harassment of Tyreid Hodges, and the three jailhouse assaults, he added that appellant

> is telling you what to expect from him. You don't need a crystal ball to know what to expect from Mr. Romero in the future. . . . And this . . . is how he acted when he had his trial pending . . . . [¶] How will he act if he gets life without parole?

(RT 54: 8028.) For "LWOP . . . is an American Express card for violence. He can beat people, shank people, do whatever he wants. Not another day can be given to him." (RT 54: 8029.) And imprisoning him, the prosecutor continued, is not safely separating him from society, just putting him in another part of it, where he will come into contact "with many, many people, nurses, clerks, guards, counselors, other inmates. . . . He has 30, 40, 50 years of victims ahead of him if he has an LWOP . . . . He will hurt them." (*Ibid.*) Further, the purported escape attempt showed that he will try to get out of custody, at the risk of others' lives. (RT 54: 8030.)

The prosecutor concluded the argument for death with the observation that the defense will be asking for mercy and compassion, adding,

> But if you extend compassion, sympathy, or mercy to the defendant, it will come at a price. A future victim will pay the price for the mercy that you would extend to the defendant. Maybe it will be another inmate. Maybe it will be your neighbor's son who is working in the prison.
>
> Consider 50 years of what you have seen of the last three years.[240] Don't let the price of your compassion be another victim.

(RT 54: 8030.) This was a very powerful argument, but nothing in it pertained to California's statutory weighing scheme.

B. It Is Error to Argue Future Dangerousness, and This Court Has Never Made a Reasoned Decision to the Contrary

As noted previously, future dangerousness is not a statutory aggravating circumstance, and the jury is to weigh only factors that are. (§ 190.3; *People v. Boyd*, *supra*, 38 Cal.3d 762, 773.) It would logically follow that a prosecutor's remarks emphatically urging use of such extra-legal aggravation constitute error.[241] (See *People v. Young*, *supra*, 34 Cal.4th 1149, 1219; *People v. Walker*, *supra*, 47 Cal.3d 605, 649–650.) There are, however, prior opinions of this Court stating otherwise.

In *People v. Michaels* (2002) 28 Cal.4th 486, where the prosecutor also argued that the defendant would be a danger to prison guards if allowed to live, this Court stated:

---

[240]This May, 1996, argument was clearly still emphasizing the jail-offenses evidence: appellant was arrested in December, 1992. (RT 37: 5638–5639.)

[241]A claim of prosecutorial error is not dependent on bad faith on the part of the prosecutor. (*People v. Hill* (1998) 17 Cal. 4th 800, 822–823 & fn. 1.)

> Defendant contends that because future dangerousness is not a listed aggravating factor, the prosecutor can argue that point only to rebut defense argument or evidence. We disagree. This court has "repeatedly declined to find error or misconduct where argument concerning a defendant's future dangerousness in custody is based on evidence of his past violent crimes admitted under one of the specific aggravating categories of section 190.3." (*People v. Ray* (1996) 13 Cal.4th 313, 353 . . . .) Likewise, in *People v. Champion* (1995) 9 Cal.4th 879, 940 . . . , we said: "Although we have held that at the penalty phase of a capital case the prosecutor may not introduce expert testimony forecasting that, if sentenced to life without the possibility of parole, a defendant will commit violent acts in prison (*People v. Murtishaw* (1981) 29 Cal.3d 733, 779 . . .), we have never held that in closing argument a prosecutor may not comment on the possibility that if the defendant is not executed he or she will remain a danger to others. Rather, we have concluded that the prosecutor may make such comments when they are supported by the evidence."

(*People v. Michaels*, *supra*, 28 Cal.4th 486, 540–541.)

It is true that the Court has frequently held that such argument is not error or misconduct. However, it has never actually addressed the contention that future dangerousness is not an authorized circumstance in aggravation, despite the disposition of the claim in *Michaels*. One can trace the entire chain of cases, reaching all the way back from the two cited in *Michaels*, without finding one that does more than distinguish *People v. Murtishaw* on the basis that there was no expert testimony predicting future violence,[242] hold that a future-dangerousness argument did not invite speculation about the

---

[242]*People v. Champion*, *supra*, 9 Cal.4th 879, 940 (dictum); *People v. Bell* (1989) 49 Cal.3d 502, 548–550; *People v. Adcox* (1988) 47 Cal.3d 207, 257–258; *People v. Bean* (1988) 46 Cal.3d 919, 951; *People v. Poggi* (1988) 45 Cal.3d 306, 337; *People v. Dyer* (1988) 45 Cal.3d 26, 81 (dictum); *People v. Miranda* (1987) 44 Cal.3d 57, 110–111; *People v. Davenport* (1985) 41 Cal.3d 247, 288.

defendant's future release[243] or was not unsupported by the evidence,[244] or, like *Michaels* itself, simply note that the Court has rejected previous attacks on future-dangerousness arguments.[245] The latter group of cases often use broad language like "we have concluded that the prosecutor may make such comments . . . ." (*People v. Champion*, *supra*, 9 Cal.4th 879, 940 [dictum].) However, "[i]t is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.) Notwithstanding the generalized language regarding the historical disposition of challenges to future-dangerousness arguments, appellant can find no case that has actually considered on its merits the proposition raised in *Michaels* and here.

The problem was, however, addressed in a concurring opinion by Justice Mosk:

> Under the 1978 death penalty law, the circumstances material to sentence are those defined in Penal Code section 190.3. (*People v. Boyd* . . . .) The aggravating circumstances do *not* include future dangerousness. (See Pen. Code, § 190.3.) . . . [S]ome of our cases may be read to suggest that under the 1978 death penalty law, the People may always argue future dangerousness in every case. The source of this mischievous notion is dictum

---

[243]*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.

[244]*People v. Rich* (1988) 45 Cal.3d 1036, 1123; *People v. Davenport*, *supra*, 41 Cal.3d 247, 288.

[245]*People v. Ray*, *supra*, 13 Cal.4th 313, 353; *People v. Pinholster* (1992) 1 Cal.4th 865, 963–964 (dictum); *People v. Fierro* (1991) 1 Cal.4th 173, 249; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1270; *People v. Taylor* (1990) 52 Cal.3d 719, 750; *People v. Hayes* (1990) 52 Cal.3d 577, 635–636; *People v. Silva* (1988) 45 Cal.3d 604, 639 [adding that argument properly rebutted appellant's evidence and argument on his presenting no threat in prison].

> in the plurality opinion[246] in *People v. Davenport* (1985) 41 Cal.3d 247, 288 . . . . The dictum does not even acknowledge *People v. Boyd* . . . . It merely—and ineffectively—attempts to distinguish *People v. Murtishaw* . . . . In that case . . . we held that expert opinions on future dangerousness could not be presented. . . . We reasoned: "(1) expert predictions that persons will commit future acts of violence are unreliable, and frequently erroneous; (2) forecasts of future violence have little relevance to any of the factors which the jury must consider in determining whether to impose the death penalty;[247] (3) such forecasts, despite their unreliability and doubtful relevance, may be extremely prejudicial to the defendant." ([*Murtishaw*, *supra*, 29 Cal.3d] at p. 767.) . . . The *Davenport* plurality . . . implied that argument by a prosecutor is not as potentially prejudicial as opinion by an expert. . . . That . . . is of no consequence: unless and until the issue is raised by the defendant, future dangerousness is simply immaterial under the 1978 death penalty law.

(*People v. Taylor*, *supra*, 52 Cal.3d 719, 752 & fn. 1 (conc. opn. of Mosk, J.).) No opinion of this Court has reasoned to the contrary. Future-dangerousness arguments are statutorily barred.

This conclusion may be troubling because of the superficial appeal of the prosecutor's argument, the now-common nature of such argument, and its

---

[246]It was dictum because the issue was addressed by the *Davenport* plurality after it had decided that reversible error had occurred on other grounds. Neither of the concurring opinions joined the plurality's discussion of "issues addressed in the plurality opinion to provide guidance on the retrial . . . ." (41 Cal.3d at p. 295 (conc. opn. of Broussard, J.); see also *id.* at pp. 290–294 (separate opn. of Bird, C.J.).)

[247]*Murtishaw* was decided under the 1977 statute, under which the list of factors to be weighed was not exclusive. Its conclusion about relevance applies a fortiori to prosecutions under current law, where the list is exclusive. (Cf. *People v. Murtishaw*, *supra*, 29 Cal.3d 733, 773 with *People v. Boyd*, *supra*, 38 Cal.3d 762, 772–773.)

settled constitutionality[248] in jurisdictions where legislatures included future dangerousness among aggravating circumstances. But the prosecutorial argument is troubling as well. The appeal of the proposition that the dangerous killer will produce more victims if given only LWOP is precisely why it is grossly prejudicial. And it is an incredibly mistaken proposition. This Court's caseload is full of instances in which prosecutors use "the standard prison guard argument" (*Tucker v. Francis*, *supra*, 723 F.2d at p. 1506), i.e., argue that a prisoner will likely kill again in prison, yet remarkably devoid of those where it actually happened.[249] Appellant himself—the supposed menace to "nurses, clerks, guards, counselors, other inmates" (RT 54: 8029)—has, as of this writing, been housed for five years in the least-restrictive section of death row, a relatively small area reserved for model prisoners.[250] This is unsurprising, in the light of empirical studies of prisoners

---

[248]See *Barefoot v. Estelle* (1983) 463 U.S. 880; *Jurek v. Texas* (1976) 428 U.S. 262.

[249]Nineteen cases involving the argument are cited above, at pages 410–412 and the accompanying footnotes. See also Kiersh, *How to Use and Combat Experts in Federal Death Penalty Cases* (2000) Ann. 2000 ATLA-CLE 1793 (published on Westlaw without pagination) ("The government will argue [in any case] that your client is so violent and has been convicted of such heinous crimes that he or she must be executed in order to prevent him or her from being a future danger to other members of the prison population") (*Use of Experts*).

[250]This assertion, while stating a fact outside of the record, can be easily verified by respondent. (See *People v. Sohrab* (1997) 59 Cal.App.4th 89, 95, fn. 5 [reviewing court may consider undisputed facts not in record but stated in briefs]; see also *Dix v. Superior Court* (1991) 53 Cal. 3d 442, 449.) Moreover, it is provided not as an "adjudicative fact" about "what the parties did, what the circumstances were, what the background conditions were," but—like the published empirical data which it illustrates—a "legislative fact"

(continued...)

whose death-sentences were commuted to life imprisonment because of appeals. Their disciplinary rates were far lower than those of the general population. (Kiersh, *Use of Experts*, *supra*; see also Tabak, *A Reply* (2001) 33 Conn. L. Rev. 1297, 1304; Marquart & Sorenson, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders* (1989) 23 Loyola L.A. L.Rev. 5, 8–10, 20, 24–27; see also *Wiggins v. Smith* (2003) 539 U.S. 510, 526 [criminologist testified "that inmates serving life sentences tend to adjust well and refrain from further violence in prison"]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1112–1115 [two experts from California prison system offered to testify about lifers' tendency to mature into model prisoners].)

Similarly, in *People v. Murtishaw*, *supra*, 29 Cal.3d 733, this Court reviewed numerous studies showing that the proportions of false positives in even mental health experts' predictions of future dangerousness were extremely high, and that the experts were wrong more than they were right. (*Id.* at pp. 768–769.) Twenty years later, the experts were doing no better. (Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process* (2003) 60 Wash. & Lee L. Rev. 353, 362–363.) So it is no surprise that prosecutors and juries are way off on this issue as well. Despite the surface appeal of the future-dangerousness argument, holding prosecutors to arguing lawful aggravation will not deprive the justice system of any of its capacity for reliability; it will improve it.

---

[250](...continued)
that "informs a court's legislative judgment on questions of law and policy." As such, it requires less formal fact-finding procedures. (Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L.Rev. 364, 402, 404 (1942); see also Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 Vand. L.Rev. 111 (1988).)

There is another problem with the Court's broad statements that future dangerousness may be argued "when . . . supported by the evidence." (E.g., *People v. Champion, supra*, 9 Cal.4th 879, 940.) Just as section 190.3 provides an exclusive list of factors that may be considered in aggravation, it also provides a parallel list of subjects on which evidence may be presented, and future dangerousness is not among them. Since future dangerousness is such a potent argument, the Court's permitting end-runs, in argument, around the legislative exclusion of future dangerousness as an aggravating factor encourages prosecutors to find pretexts for obtaining admission of evidence that will then be used to argue future dangerousness. Thus, as Argument X, below, shows, at appellant's trial, the prosecutor convinced the court to admit a statement in which appellant claimed he would harm child molesters if they were housed near him. The attorney claimed that the purpose was only to corroborate a supposedly impeached witness who said appellant had assaulted him months earlier. But when it came time to argue to the jury, the prosecutor did not bother to bolster the witness's credibility, which had never been attacked; he used the statement only to make a very powerful future dangerousness argument, which arguably was "supported by the evidence." (*Champion, supra*, 9 Cal.4th at p. 940.) Thus this Court's refusal, to date, to enforce the ban on using future dangerousness as aggravation is simultaneously undermining the ban on admission of evidence that only goes to that issue.

In any event, the Court should confront the issue which it has to date avoided in *Michaels* and prior cases and acknowledge the simple fact that future dangerousness is not among those circumstances which the jury is authorized to weigh. Moreover, the lawlessness of depriving appellant of his life on a basis not authorized by the controlling legislation would also violate

his state and federal due process rights. (U.S. Const., 8th Amend.; Cal. Const., art. 1, §§ 7, 15; *Hicks* v. *Oklahoma* (1980) 447 U.S. 343, 346; *Hewitt* v. *Helms* (1983) 459 U.S. 460, 471–472; cf. *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631–633 [judicial expansion of legislated criminal liability "is wholly foreign to the American concept of criminal justice"]; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642–643 [prosecutorial error infecting the entire proceeding with unfairness violates due process].) In addition, the element of unreliability introduced by relying on a speculative factor, so subjectively compelling and yet objectively so likely to be false, violates the Eighth Amendment's reliability requirement. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1134.)

C. The Error Is Reviewable

Appellant did not object to the error at trial, but the omission does not require this Court to affirm his death sentence based on a penalty decision that was heavily contaminated by a powerful but unauthorized consideration.

The rule that review of unobjected-to prosecutorial error is forfeited does not apply where objection would have been futile. (*People v. Panah* (2005) 35 Cal.4th 395, 462.) The exception applies here, given this Court's broad statements, prior to appellant's 1996 trial, that future-dangerousness arguments are permissible. (E.g., *People v. Pensinger*, *supra*, 52 Cal.3d 1210, 1270.)

A claim of prosecutorial error is also reviewable where an "admonition would have been insufficient to cure the harm . . . ." (*People v. Panah*, *supra*, 35 Cal.4th at p. 462.) This Court explained the meaning of that exception in discussing an argument asserting powerfully that the death penalty is a deterrent:

> [A]n admonition to disregard [the prosecutor's] improper statements . . . would not have cured the error. This is not a case

> in which a misstatement of law or of the evidence in the record could have been corrected by the court or the prosecutor himself had it been called to their attention. [Citation.] . . . At most [the court] could admonish the jury to disregard the prosecutor's statements; it could not erase them from the jurors' minds or explain why they should not be considered without further magnifying their impact.

(*People v. Love* (1961) 56 Cal.2d 720, 733.) Here, too, a "disregard-that-bell" instruction could not have unrung it.

The Court should reach the merits of appellant's claim of error.

D. The Error Was One of the Main Points Urged in Argument and Was Therefore Prejudicial

The error—constituting as it did one of the primary pillars of the case for death made to appellant's jury—was prejudicial under any standard. The penalty verdict was not a foregone conclusion.[251] There is nothing in appellant's case that brings it within the limited circumstances where substantial error can be known not to have affected a penalty verdict. Specifically, the future-dangerousness argument did not duplicate some other legitimate argument, and nothing cured the error. (See pp. 82 et seq., above.) So nothing prevented it from having its intended effect, i.e., being an argument "which possibly influenced the jury adversely . . . ." (*People v. Neal* (2003) 31 Cal.4th 63, 86, quoting *Chapman v. California*, *supra*, 386 U.S. 18, 24; *People v. Ashmus* (1991) 54 Cal.3d 932, 965.)

As noted previously, emphasis in a prosecutor's argument is alone enough to necessitate rejecting the possibility of penalty-phase harmlessness. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 753–754; *Johnson v. Mississippi* (1988) 486 U.S. 578, 586, 590 & fn. 8; see also *Skipper v. South*

---

[251]See the summary at p. 281, above, and the detailed treatment at pp. 107–128, above.

Carolina (1986) 476 U.S. 1, 8; *People v. Roder* (1983) 33 Cal. 3d 491, 505; cf. *People v. Hinton* (2006) 37 Cal. 4th 839, 868.) As described in detail above, pages 409–410, appellant's prosecutor devoted the final four pages of his penalty summation to demonstrating to the jury that appellant's execution was "necessary." (RT 54: 8026–8030.) "[H]e is not done hurting people, . . . he still wants to kill and rob and terrorize and hurt." (RT 54: 8026.) "LWOP . . . is an American Express card for violence." (RT 54: 8029.)

> [B]eing in prison isn't being out of our society, it's just being in another part of our society. . . . [Appellant] will come into contact with many, many people, nurses, clerks, guards, counselors, other inmates. [¶] And what we know about him is that he likes to hurt people. The best predictor of the future is the past. He has 30, 40, 50 years of victims ahead of him if he has an LWOP . . . . He will hurt them. . . . He can't be fixed. You can't transplant a conscience into somebody

(*Ibid.*) There was much more in this vein, but the upshot was, "Don't let the price of your compassion be another victim." (RT 54: 8030.)

The prosecutor acknowledged that rendering a death sentence would be difficult for the jurors.[252] "Evidence matters; closing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323.) It is inconceivable that the powerful logic of avoiding having the blood of another victim on their hands, delivered in the final minutes of an impassioned plea for death, failed to help many jurors render the sentence which the prosecutor asked for.[253] But to say this is to

---

[252]After urging the jurors not to show compassion at the cost of more victims, he stated, "The death verdict is the clear verdict. It's not the easy one. None of you will like it. None of you will feel good about it, but it's what needs to be done." (RT 54: 8030.)

[253]In one empirical study, mock jurors were more influenced by a (continued...)

assert far more than is required for reversal. Rather than requiring a probability of the error having influenced the outcome, reversibility requires only a possibility of its having done so, a possibility not founded on an assumption of jury caprice. (*People v. Brown*, *supra*, 46 Cal.3d 432, 448.) And under the federal constitutional test, at least, it is respondent who must rule out any influence of the error on a juror. (*Chapman v. California*, *supra*, 386 U.S. 18, 24; see also *People v. Guerra* (2006) 37 Cal. 4th 1067, 1144–1145 [equivalency of California test].) This respondent cannot do.

As discussed in Argument I, above, this Court modified the "any-substantial-error" reversibility test for error affecting penalty only because the post-*Furman* statutes somewhat channeled and guided the jurors' discretion with a list of potential aggravating circumstances. (See *People v. Brown* (1988) 46 Cal.3d 432, 447–448; *People v. Phillips* (1985) 41 Cal.3d 29, 83 (plur. opn.); *People v. Robertson* (1982) 33 Cal.3d 21, 63 (conc. opn. of Broussard, J.); *People v. Hines* (1964) 61 Cal.2d 164, 169, disapproved on another ground in *People v. Murtishaw* (1981) 29 Cal.3d 733, 774, fn. 40; *People v. Hamilton*, *supra*, 60 Cal.2d 105, 136–137.) But here the dikes that should have channeled that discretion were breached: the prosecutor got his listed factors, plus an unlisted one that was so potent that it was a primary thrust of his argument. And it cannot be argued that the error was

---

[253](...continued)
future-dangerousness argument than by brief victim-impact arguments and by numerous items of prosecutorial misconduct, including statements that crime was increasing in the absence of executions, that the office rarely sought the death penalty, that we are at war against a criminal element that is winning and that must be eradicated like the enemy soldiers in any other war, and that we must remove cancers like the defendant from the body of our civilization to save it. (Platania & Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials* (1999) 23 Law & Hum. Behavior 471, 476, 478–479, 481.)

insubstantial, such as a technical slip or the admission of evidence on a point otherwise beyond dispute. Even using the "reasonable possibility" gloss on the any-substantial-error standard, it is clear that the possibility that the unlawful argument contributed to one or more jurors' decisions is a "realistic" one. (*People v. Brown*, *supra*, 46 Cal.3d 432, 448.) That is to say, it cannot be said that postulating a vote for life without the error assumes "arbitrariness, whimsy, caprice 'nullification,' [or] the like" on the part of the juror involved. (*Ibid.*) Nor can it be said that the argument could not have contributed to a juror's decision. (*Chapman v. California*, *supra*, 386 U.S. 18, 24.) The penalty judgment must be reversed.

//

//

X

THE PROSECUTOR MISLED THE COURT AS TO HIS INTENDED USE OF TESTIMONY ABOUT APPELLANT'S MUSINGS REGARDING WHAT HE WOULD DO TO A CHILD MOLESTER, IN A SUCCESSFUL ATTEMPT TO PERSUADE THE COURT TO ADMIT INADMISSIBLE EVIDENCE

A prosecutor commits misconduct if he or she uses deceptive methods to attempt to persuade a court of the prosecution's position. (*People v. Hill* (1998) 17 Cal. 4th 800, 819.) Here, the prosecutor obtained a questionable ruling from the trial court, permitting admission of an extremely prejudicial statement by appellant about what he would do to a child molester, a statement that had no probative value on a disputed issue, by misleading the court as to the purpose to which it would be put. He stated that the statement was needed to show the identity of Olen Thibedeau's attacker, even though appellant conceded that identity was incontestible. (RT 50: 7466–7469; 51: 7476–7482.) Later the prosecutor relied heavily on the statement in argument. He did not, however, mention it for the purpose he had put forth in arguing for its admission. Rather, he used it as character evidence showing future dangerousness—to the point where he told the jury that the attitude shown in the statement "gives you your verdict right there." (RT 54: 8028.) By convincing the court that he needed the evidence to prove identity, the prosecutor avoided section 190.3's exclusion of miscellaneous bad-character evidence (*People v. Boyd* (1985) 38 Cal.3d 762, 774) and violated appellant's rights to, and the state's interest in, a fair and reliable penalty determination and a fundamentally fair penalty trial. He also deprived appellant of the protections of state law, and in so doing further violated appellant's due process rights. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. 1, § 17.)

A. Facts and Procedural Background

The prosecutor sought penalty-phase admission of a statement in which appellant stated an inclination to attack child molesters if they were put near him. The trial court recognized that the statement was not a crime, and that it therefore failed to qualify as aggravation. It rejected two rationales put forwarded by the deputy district attorney, each to the effect that the statement was circumstantial evidence tending to prove other facts which it was entitled to prove. One was that the statement helped prove the identity of the person who assaulted child molester Olen Thibedeau with a "spear" or channel-changer while appellant was in custody. (RT 48: 7206–7210; see also 7201.)

Later, however, the prosecution notified defense counsel of its intent to introduce into evidence a second such statement, one which appellant made to his girlfriend Stephanie Stinson at the jail in February, 1995, eight months after the Thibedeau incident:[254]

> I don't like violence. I try to avoid it. But when they stick a child molester next door to me— expect me not to do something, I'll be his friend, talk to him real nice, bring him close to the door, and then make a little spear about this long, about this skinny, that's real hard and won't bend. You put a pencil at the end of it and strips of wood. . . . Stick him in his neck.[255]

---

[254]The Thibedeau incident took place in June of 1994. (RT 50: 7427.)

[255]Exhibit 435-A, a transcript of the taped statement, could not be located by the trial court. (See clerk's certificate attached to the inside back cover of the Fourth Supplemental Clerk's Transcript.) The text above is appellant's own transcription of Exhibit 435, the tape which was played for the jury at RT 51: 7522 and RT 54: 8028. It is also nearly identical to the way the transcript was quoted during the hearing on the statement's admissibility. (See RT 50: 7467.)

(Ex. 435; see also RT 50: 7465, 7466.) Appellant objected that it, too, was a non-criminal threat of future action and thus unauthorized aggravation. (RT 50: 7466; see RT 48: 7201–7202, 7206.) This time the prosecutor argued that appellant had attacked Thibedeau's credibility by cross-examining him on his record of sex offenses against children. He said that the statement at issue was "essentially" an admission or confession regarding the attack. (RT 50: 7467.)

Appellant's attorney argued that the statement was not an admission or confession, pointing out that it occurred months after the Thibedeau incident and spoke of future action. Both he and the prosecutor also noted ways in which the hypothesized assault differed from the manner in which the Thibedeau assault was committed. (RT 50: 7468, 7469.) Appellant's counsel contended that the statement was not needed to corroborate Thibedeau. Since the identity of his attacker was beyond dispute, the statement was being brought in as inadmissible future-dangerousness aggravation. (RT 50: 7468; see also RT 51: 7521.)

After taking the matter under submission, the trial court stated that Thibedeau had been impeached with his numerous prior convictions, which would permit an argument that he was not to be believed. The prosecution was entitled to rehabilitate him with the taped conversation, which sufficiently resembled the facts of the Thibedeau attack that the jury could consider it as an admission or confession. (RT 51: 7476–7477.) Reiterating that there could be no issue as to whether appellant attacked Thibedeau, appellant's attorney explained that his going over Thibedeau's record of molestation convictions was merely part of a showing that, because of his status, attacks on him were not uncommon. (RT 51: 7477–7478.) The court thought that credibility was being attacked, stated that it did not know whether appellant would argue that Thibedeau was not to be believed, and overruled the objection. (RT 51: 7478.)

Defense counsel then added that the testimony should be excluded under Evidence Code section 352, given its limited capacity to add to the prosecution case and its tendency to show future dangerousness. (RT 51: 7479–7480.) The court reaffirmed its prior holding. (RT 51: 7482.)

The prosecution called Stinson to describe the circumstances of the conversation and authenticate the tape. It was played for the jury, and the jurors were given transcripts of it. (RT 51: 7517–7519, 7521–7522.) When it was time to argue the case to the jury, the prosecutor went first, knowing that he would have no opportunity for rebuttal after appellant's counsel argued. (See RT 51: 7531.) This, then, was his only chance to use the statement to support Thibedeau. Nothing in the evidentiary picture had changed—other than the admission of the statement—since its admissibility was argued. Despite his professed concern that appellant's counsel would question the proof of the Thibedeau attack, the prosecutor treated the Thibedeau attack as uncontested. He did not argue that Thibedeau should be believed, much less use appellant's statement to support that proposition. (See RT 54: 8027–8028.)

He did, however, use the statement. As noted previously, the theme of the prosecutor's penalty argument was that a death sentence was both just and necessary. In what was transcribed as the last four pages of the summation, he argued that appellant's post-arrest conduct showed that his execution was necessary to avoid the creation of future victims. (RT 54: 8026–8030.) The attorney recounted each of the various incidents, then spent a paragraph on how the jury should view appellant's behavior with Thibedeau. Then he played the Stinson tape:

> He is proud of it. Romero is proud of it. You heard him fondly remembering this event on tape.

(Tape played.[256])

> He is so proud. Mr. Romero gives you your verdict right there. You can't expect him not to do something like this. He said it, "But when they stick a child molester next door to me and not expect me to do something . . ." He is telling you what to expect from him. You don't need a crystal ball to know what to expect from Mr. Romero in the future.

(RT 54: 8028.)

B. The Statement Was Inadmissible for the Purpose for Which the Prosecutor Used It

Evidence is relevant in the penalty phase of a capital trial only if it tends to prove or disprove a circumstance in mitigation or one of the statutorily enumerated factors in aggravation. (§ 190.3; *People v. Boyd, supra*, 38 Cal.3d 762, 773.) Evidence of bad character, unless it somehow involves one of the listed factors, is not to be admitted or weighed in determining penalty. (*People v. Boyd, supra*, 38 Cal.3d at p. 774.)

Here, the statement at issue—on its face and as interpreted for the jury in the prosecutor's argument—was a rather elaborate portrayal of what authorities could expect if they housed appellant with child molesters. It was the sort of miscellaneous bad-character evidence that, to jurors deciding a sentence, would intuitively seem pertinent. Such evidence is not, however, on the exclusive list of statutory circumstances in aggravation, which is intended to make California's death penalty law constitutional by circumscribing the jury's discretion. (§ 190.3; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 109; *People v. Boyd, supra*, 38 Cal.3d 762, 773–775.)

Even given what the court below thought the testimony would be used for, its ruling was highly questionable. Were it not for the wide latitude

---

[256]See transcription at p. 423, above.

evidentiary rulings receive on review, it would be contested in this appeal. Appellant's attorney repeatedly assured the trial court that he did not see appellant's guilt of the Thibedeau attack as controvertible. (RT 50: 7468; 51: 7477–7478.) It was not.[257] "If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code sections 210 and 350 respectively." (*People v. Bonin* (1989) 47 Cal.3d 808, 848–849; see also *People v. Price* (1991) 1 Cal.4th 324, 417 [a fact is not disputed unless a party contests it].) If it were not technically irrelevant, the evidence would have been entirely cumulative. Moreover, it had very little legitimate probative value regarding the assault. The statement was not a confession. (*People v. Fitzgerald* (1961) 56 Cal.2d 855, 861 [confession is an acknowledgment of guilt].) Appellant did not speak of past action; the

---

[257]The defense cross-examination tended to show that the witness was a member of a group on whom attacks were not uncommon, not that the assault did not happen or that appellant was not the perpetrator. (RT 50: 7438–7444.) There were no questions about the charged incident, Thibedeau's ability to identify appellant, or his truthfulness. A single question—about favorable treatment—went to bias, but the answer was that, on the contrary, the witness's absence from the prison cost him privileges. (RT 50: 7443.) Any aggressiveness in counsel's establishing Thibedeau's record was clearly in an attempt to diminish appellant's culpability in attacking him. (Cf. RT 51: 7500.)

Moreover, Thibedeau reported the incident less than a day after being transferred to appellant's pod. (RT 50: 7427–7429.) His complaint to authorities apparently did not name appellant, whom he did not know, but referred only to the occupant of cell 15. (RT 50: 7429, 7433, 7436; but see RT 50: 7452.) Thus the circumstances were inconsistent with his having any animus towards appellant. His account was corroborated by deputies, who saw the weapon, received an immediate report from an agitated Thibedeau, and found materials used for making the implement in appellant's cell. (RT 50: 7446–7764.) No exculpatory evidence was offered. In his argument to the jury, counsel did not dispute that appellant perpetrated the attack.

prosecutor was right in characterizing—for the jury—the statement as expressing appellant's policy regarding what could be expected of him in the future. (Ex. 435, quoted above at p. 423; RT 54: 8028.) And the facts in his hypothetical scenario were significantly different from what he had done to Thibedeau eight months earlier.[258] The statement may have been a warning to appellant's jailers, since Stinson testified that she knew that the conversation could have been monitored, so appellant probably did as well. (See RT 51: 7523.) As a statement of policy or inclination, it could be seen as an admission, tending somewhat to corroborate Thibedeau, but only in an inadmissible way, by showing a predisposition to carry out such attacks. (Evid. Code § 1101; *People v. Roldan* (2005) 35 Cal.4th 646, 407; *People v. Rowland* (1992) 4 Cal.4th 238, 261.) Were it admissible, its potential for misuse by the jury, in the face of the its dubious probative value, should have lead to its exclusion. (Evid. Code § 352; *People v. Filson* (1994) 22 Cal.App.4th 1841, 1851.)

Be that as it may, the prosecutor managed to obtain a favorable ruling by convincing the court that he needed the statement to corroborate Thibedeau. Then he failed to use it in that way and used it, instead, in the prohibited manner in which appellant's counsel had feared the jury would misuse it, i.e., to show future dangerousness, a character trait not listed in section 190.3 as a

---

[258]He spoke of what would happen if they put a child molester "next door to me," but he and Thibedeau had been at opposite ends of the tier. (Compare Ex. 435 with RT 50: 7427–7429, 7434, 7439.) The weapon he postulated was a "little" spear, reinforced with wood strips, and tipped with a pencil, none of which were true of the 50"-long, broken-toothbrush-tipped object he used against Thibedeau. (Compare Ex. 435 with RT 50: 7452–7453, 7459; see also RT 7469.) And he said that he would stick the victim in the neck, not the abdomen. (Compare Ex. 435 with RT 50: 7432; see also RT 50: 7468.)

a topic regarding which evidence is admissible. (See RT 51: 7480; *People v. Boyd, supra*, 38 Cal.3d 762, 774.) When the prosecutor succumbed to the temptation to argue for the admission of evidence that would be potent if used for a purpose ruled illegitimate, by coming up with various other reasons why it might be admissible, he deceived the court and fell into error.[259] (*People v. Hill, supra*, 17 Cal. 4th 800, 819.)

The error, besides violating state law, violated appellant's right to a fair trial under due process, his due-process right not to have state-law protections arbitrarily withdrawn,[260] and his rights to a fair, reliable, and non-arbitrary penalty determination. (U.S. Const., 8th & 14th Amends.; *Hewitt v. Helms* (1983) 459 U.S. 460, 471–472; *California v. Ramos* (1983) 463 U.S. 992, 999; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Booth v. Maryland* (1987) 482 U.S. 496, 502, overruled on another point in *Payne v. Tennessee* (1991) 501 U.S. 808; *People v. Horton* (1995) 11 Cal.4th 1068, 1134; *Vansickel v. White* (9th Cir. 1999) 166 F.3d 953, 957; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.)

---

[259]Human nature being what it is, it is conceivable that, when the prosecutor cast about for a basis for admissibility of a very useful piece of evidence, he deceived himself at the same time that he was deceiving the trial court. However, "[b]ecause we consider the effect of the prosecutor's action on the defendant, a determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct." (*People v. Crew* (2003) 31 Cal. 4th 822, 839.)

[260]Appellant is referring to the statutory rule against use of non-statutory aggravation. (*People v. Boyd, supra*, 38 Cal.3d 762, 774.)

C. The Error Was Prejudicial

The tape of the contested statement clearly would not have been admitted but for the bogus justification for its admission. (See RT 48: 7201, 7202, 7206, 7209–7210; 50: 7465–7466; 51: 7478; *People v. Boyd, supra,* 38 Cal.3d 762, 774.) It was played for the jurors twice, and they each received a copy of a transcript of it. (RT 51: 7521–7522; 54: 8028.)

As noted above, the prosecutor told the jury that a death sentence was both just and necessary. The concluding portion of the argument used appellant's jail misconduct as evidence that his execution was necessary to avoid the creation of future victims. (RT 54: 8026–8030.) This is when he replayed the illegitimately-admitted tape which, he said, "gives you your verdict right there." With it, "[y]ou don't need a crystal ball to know what to expect from Mr. Romero in the future." (RT 54: 8028.) This was, in the transcript, two pages before the conclusion of the argument. Here, in the climax of the prosecutor's argument for death, was the extra-statutory aggravator—a threat of future action—which appellant's attorney had complained, in the face of the prosecutor's denials, was the gist of the contested evidence.

Future dangerousness is well recognized to be high on the list of penalty juries' concerns. (*Deck v. Missouri* (2005) 544 U.S. 622, 633; see also *Rompilla v. Beard* (2005) 545 U.S. 374, __ [162 L. Ed. 2d 360, 380; 125 S.Ct. 2456, 2470] (conc. opn. of O'Connor, J.); Claussen-Schulz & Pearce, Dangerousness, Risk Assessment, and Capital Sentencing, 10 Psychol. Pub. Pol'y & L. 471, 480 (2004) [reviewing the empirical literature].) Emphasis in a prosecutor's argument is alone enough to necessitate rejecting the possibility of penalty-phase harmlessness regarding error in admitting the evidence emphasized. (*Clemons v. Mississippi* (1990) 494 U.S. 738, 753–754; *Johnson*

v. Mississippi (1988) 486 U.S. 578, 586, 590 & fn. 8; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 8.) Here, respondent's attorney's view of the impact of the statement was that it "gives you your verdict . . . " (RT 54: 8028.) Even if respondent were now to switch its stance and argue that it was insubstantial, respondent still could not demonstrate that no juror was influenced by the evidence and argument. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 448.) The penalty judgment must be reversed.

//

//

XI

GIVING A NON-UNANIMITY INSTRUCTION REGARDING ONLY UNADJUDICATED OFFENSES WAS UNFAIRLY ONE-SIDED AND UNCONSTITUTIONALLY IMPLIED A NEED FOR UNANIMITY ON MITIGATION

The trial court instructed appellant's jurors, in the language of CALJIC No. 8.87, that it is "not necessary for all jurors to agree" as to whether appellant had been proven guilty of previously unadjudicated crimes. (CT 9: 1991; RT 54: 8065–8066.) This states the law as interpreted by this Court.[261] (See, e.g., *People v. Caro* (1988) 46 Cal.3d 1035, 1057.) Similarly, jurors must be permitted to consider mitigation without unanimously agreeing on it, although the reasons are different. (*People v. Breaux* (1991) 1 Cal.4th 281, 314 (*Breaux*), citing *Mills v. Maryland* (1988) 486 U.S. 367 [a scheme that could force a death verdict that most jurors opposed, or that all opposed but for different reasons, was fatally arbitrary].) However, *Breaux* holds that the defendant is not entitled to a specific non-unanimity instruction as to mitigation. (*Id.* at pp. 314–315; accord, *People v. Crew* (2003) 31 Cal. 4th 822, 860.) The CALJIC pattern instructions read to appellant's jury do not provide one. In these circumstances, the prosecution should not be permitted to obtain a special instruction to that effect regarding other-crimes evidence but should, like the defendant (see *Breaux*, *supra*, 1 Cal. 4th at pp. 314–315), have to rely on the jury's understanding of the overall sentencing scheme.

The imbalance in the instant case not only was unfair per se, violating due process, but it strongly implied that unanimity regarding mitigating circumstances was required before jurors could take them into account, thus

---

[261]Appellant challenges this rule in Argument XIII.E, below. The instant claim does not depend on that challenge; rather, it assumes arguendo the propriety of the non-unanimity rule.

violating the rule of *Mills v. Maryland, supra*, 486 U.S. 367. It further violated appellant's right to trial by a properly instructed jury and to equal protection of the laws. (U.S. Const., 6th, 8th & 14th Amends.)

A. The Instruction Was Infirm for Its Lack of Even-Handedness

"There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles." (*People v. Moore* (1954) 43 Cal.2d 517, 526–527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) In *Moore* one of the errors that led to reversal was a quite subtle violation of this principle: giving the prosecution's requested instructions on self-defense, which stated the law correctly but phrased it in terms of when self-defense would not have been shown, while refusing the defendant's proposed instructions, which stated the same rules in positive terms. (*Ibid.*) The problem was much more blatant here, as the prosecution's lack of need for unanimity was pinpointed, while the defendant's was not conveyed in any way whatsoever. This lack of evenhandedness itself violated due process.

B. The Instruction's Exclusiveness Implied a Unanimity Requirement for Mitigation

Here there was not only the unfairness of giving emphasis to a rule favoring death without giving equal mention to its counterpart, but there was also a strong likelihood of actually confusing the jury into thinking that non-unanimity applied only in the context in which it was said to apply.

This Court, in upholding a refusal to give a non-unanimity instruction regarding mitigation in *People v. Breaux*, *supra*, distinguished *Mills v. Maryland*, *supra*, 486 U.S. 367, because *Mills* involved a verdict form that

carried a substantial possibility of misleading the jurors into thinking that unanimity was required. (1 Cal.4th at pp. 314–315.) This Court saw no comparable danger of the *Breaux* jury's being mislead, since "[t]he only requirement of unanimity was for the verdict itself.... The instructions that were given in this case unmistakably told the jury that each member must individually decide each question involved in the penalty decision." (*Id.* at p. 315.)

In contrast, the instructions in appellant's case did not mention "individually decid[ing] each question."[262] (*Ibid.*) CALJIC No. 17.40, the guilt-phase instruction on the duty to deliberate, was repeated. But it only tells the jurors that, in fairness to both parties, none may abdicate his or her responsibility to participate fully in arriving at a verdict.[263] (CT 9: 2008.) CALJIC No. 8.88, which requires unanimity on whether the balance of aggravating and mitigating circumstances warrant a death sentence, was also given. (CT 9: 2011–2012.) However, there was nothing in the entire set of instructions to set forth that subordinate questions, such as whether particular circumstances were present or what weight should be given them, were up to the individual jurors. (CT 9: 1964–2014; cf. 3 Witkin & Epstein, Cal. Criminal Law (3rd ed. 2000) Punishment, § 435, p. 582.) Except, that is, for the non-unanimity instruction regarding other-crimes evidence.

---

[262]Citing *Breaux*, appellant had requested such an instruction, but it was refused—erroneously—as duplicative of CALJIC No. 17.40. (4SCT 2: 449–450; 6SCT 134, ¶ 59; RT 53: 7474.)

[263]Because CALJIC No. 17.40 was drafted for use in guilt deliberations, where the unanimity requirement applies not only to the final vote, but also to each element of an offense, it obviously was not intended to address non-unanimity on questions subordinate to the ultimate one. It does not do so.

It would be irrational, even if the jurors' slate had been blank, to assume that they understood a never-stated non-unanimity rule. Moreover, they had just completed the guilt phase, where questions on constituent elements of final verdicts did generally require unanimous answers. Singling out other-crimes aggravation for a non-unanimity instruction was the final nail in the coffin for any chance of their knowing the constitutionally required framework.

This Court recognized this effect in an indistinguishable situation in *People v. Roldan* (2005) 35 Cal. 4th 646. In *Roldan* the trial court had refused to instruct that a mitigating factor need not be proved beyond a reasonable doubt. Noting that instructions that could confuse the jury should be refused, this Court held that it was appropriate to refuse the proposed instruction, because it "implies erroneously that aggravating factors must be proved beyond a reasonable doubt." (*Id.* at p. 741.) By the same reasoning, stating the non-unanimity principle only as it applies to an aggravating factor clearly implies that other circumstances in aggravation or mitigation require unanimity.

Roldan's reasoning follows from well-settled principles for construing language. Courts assume that neither legislators (*Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 225–226) nor people entering into contracts (*Super 7 Motel Associates v. Wang* (1993) 16 Cal.App.4th 541, 546) add redundant, meaningless language when drafting statements that have legal significance. This is a common-sense assumption, and there is no reason to postulate that jurors reason differently. They would not believe that the highly technical instructions given them contained surplusage, specifically, that the non-unanimity instruction regarding factor (b) allegations added nothing.

This way of looking at the matter would have led the jury to apply another common-sense principle aiding comprehension, one also distilled into a maxim for construing both statutes and contracts. The concept is that the expression of one thing implies the exclusion of others. (*Stevenson v. Drever* (1997)16 Cal.4th 1167, 1175 [contract]; I*n re Carissa G.* (1999) 76 Cal.App.4th 731, 737 [statute].) As this Court understood in *Roldan*, jurors, too, will naturally believe that if the instructions make a point of specifying that a rule applies to one area of their deliberations, it does not apply to others. Thus, this Court has frequently and summarily upheld a pattern instruction, CALJIC No. 8.85, which tells the jury what factors to consider without telling them that it may consider no factors in aggravation that are not on the list. (E.g., *People v. Taylor* (2001) 26 Cal.4th 1155, 1180.) This is presumably because a jury that is told what factors to consider and that the list is non-exclusive as to mitigating factors will recognize that the list *is* exclusive regarding aggravation. Similar reasoning on the part of jurors will exclude mitigation from the non-unanimity rule, when a court mentions only its application to the prosecution's other-crimes evidence.

In sum, an instructional scheme that consistently describes individual weighing of the reasons for and against voting for death and demands unanimity only on the final outcome could perhaps be relied on to convey to the jurors that the unanimity formerly required of them when considering each element of a crime or special circumstance is not required when considering mitigating circumstances. But the instructional set given appellant's jurors was not such a scheme.[264] Even if it were, its capacity to convey that

---

[264]It us unclear why this Court and the CALJIC committee refuse to mandate an instruction that would set forth a principle that is so clearly the (continued...)

understanding would have been fatally subverted in two different ways when other-crimes evidence was singled out as not requiring unanimity. First, the clear implication was that other factors must be found true by the whole jury before a juror doing his or her weighing can consider them. And there was a serious lack of evenhandedness in emphasizing a rule favorable to the prosecution and not its defense counterpart.

C. Use of the Instruction Was Reversible Error

The lack of impartiality between the parties in formulating instructions violated the state and federal due process clauses and the right to trial by a properly instructed jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 16.) "'[C]reat[ing] the possibility . . . of randomness' [citation] by placing a 'thumb [on] death's side of the scale,' [citation]" violated the Eighth Amendment. (*Sochor v. Florida* (1992) 504 U.S. 527, 532.) So did creating a substantial possibility that the jurors did not understand that they should take individually into account whatever mitigation each believed to be true. (*Mills*

---

[264](...continued)
law. Prosecutors and civil litigants are not required to hope that jurors will guess at the rules of law that might favor them, and capital defendants should not be required to do so, either.

The Judicial Council instructions are now clear on the general rule of non-unanimity as to both aggravation and mitigation:

> Each of you must decide for yourself whether aggravating or mitigating factors exist. You do not all need to agree whether such factors exist. If any juror individually concludes that a factor exists, that juror may give the factor whatever weight he or she believes is appropriate.

(CALCRIM No. 766.) However, they, too, contain the defect of then singling out other-crimes evidence for emphasis in this regard. (CALCRIM No. 764.) Nevertheless, appellant's right to equal protection of the laws (U.S. Const., 14th Amend.) alone entitles him to at least be tried before a jury instructed on the general principle of non-unanimity applicable to the penalty phase.

v. Maryland, supra, 486 U.S. 367.) Moreover, appellant's right to equal protection of the laws entitles him to, at least, be tried before a jury instructed in the manner provided by the Judicial Council Instructions. (U.S. Const. 14th Amend.; see fn. 264, p. 437, above.)

Under *Mills*, respondent's burden, should it argue harmlessness, is quite high. Where mitigating evidence is presented and the jury charge was such that a reviewing court "cannot conclude, with any degree of certainty, that the jury did not adopt [an] interpretation of the jury instructions" that precluded them from understanding that each juror should take into account whatever mitigation he or she believed to be true, penalty reversal is required. (486 U.S. at pp. 377–378.) Here, an interpretation that singling out evidence of other-crimes aggravation for a non-unanimity instruction was not surplusage, but meant that it was to be handled differently from the mitigation evidence, would have been eminently reasonable. Therefore this Court cannot conclude that appellant's jury did not adopt such an interpretation, and reversal is required.

//

//

XII

REFUSING TO INSTRUCT THE JURY ON MUNOZ'S SENTENCE AS A BASIS FOR LENIENCY, AND PROHIBITING ARGUMENT ON THE POINT, WAS FEDERAL CONSTITUTIONAL ERROR

Appellant asked that his jury be instructed that it could consider an accomplice's more lenient sentence as a mitigating factor. (8 CT 1944C–1944D; RT 53: 7984–7985.) The trial court denied the request and also directed counsel not to argue Jose Munoz's lesser sentence as a reason for a life sentence for appellant. (RT 53: 7985–7986.) Because the evidence was indeed mitigating—in the constitutional sense of offering the jury a reason to impose a sentence less than death—and because the Eighth Amendment requires that the jury consider all such evidence, the ruling was error. As to prejudice, the jury probably believed that Munoz, at a minimum, demanded the killing of Sergeant Feltenberger and fired his shotgun at the heads of Ken Mills and Paulita Williams. It also may well have believed he had a much larger role than he claimed in the Lake Mathews and Aragon homicides. That made Munoz at least as culpable as appellant, and yet he received a sentence from which he could be paroled when he is in his fifties. It is impossible to exclude the possibility—indeed likelihood—that jurors, if permitted and urged to consider these facts in deciding appellant's fate, would have voted differently.

//

//

A. A Capital Jury Must Be Permitted to Decide for Itself the Relevance of a Codefendant's Sentence

1. A Jury May Not Be Precluded from Considering Any Mitigating Evidence, and the U.S. Supreme Court Deems Evidence of the Type at Issue Here to Be Mitigating

Under the Eighth Amendment, a capital sentencer must consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Skipper v. North Carolina* (1986) 476 U.S. 1, 4; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110; see also *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plur. opn.).) The test of whether evidence amounts to mitigation for purposes of the rule that the sentencer must consider it is simply whether the fact at issue "might serve 'as a basis for a sentence less than death[,]'" even where it "would not relate specifically to petitioner's culpability for the crime he committed." (*Skipper v. North Carolina*, *supra*, 476 U.S. 1, 5, 4.)

The high court has also concluded, "There is no question that" the fact "that none of [a defendant's] accomplices received a death sentence" was "nonstatutory mitigating evidence." (*Parker v. Dugger* (1991) 498 U.S. 308, 314.) Since the jury must consider all mitigating evidence offered, and because more lenient treatment of accomplices is mitigation, it follows that "the jury is the body that must consider whether the non-death sentence of an accomplice is mitigating or irrelevant." (*McLain v. Calderon* (C.D.Cal.1995) 1995 WL 769176, *73, affd. (9th Cir. 1998) 134 F.3d 1383.)

This Court, however, like some others,[265] has held that the jury can be precluded from considering a codefendant's treatment. (E.g., *People v. Vieira* (2005) 35 Cal.4th 264, 299; see also *People v. Bemore* (2000) 22 Cal.4th 809, 857–858.) The Court's view has been that "[t]he focus in a penalty phase trial of a capital case is on the character and record of the individual offender. The individually negotiated disposition of an accomplice is not constitutionally relevant to defendant's penalty determination." (*People v. Danielson* (1992) 3 Cal.4th 691, 718; *People v. Johnson* (1989) 47 Cal.3d 1194, 1249; see also *People v. Belmontes* (1988) 45 Cal.3d 744, 810–812.) When *Parker v. Dugger's* characterization of an accomplice's lenient treatment as mitigating was brought to its attention, this Court found that it provided no guidance:

> "The *Parker* court merely concluded a Florida trial judge, in sentencing the defendant to death, had in fact considered the nonstatutory mitigating evidence of the accomplice's sentence, as under Florida law he was entitled to do. (*Parker*, *supra*, 498 U.S. at pp. 314-315 . . . .) *Parker* does not state or imply the Florida rule is constitutionally required, and California law is to the contrary." [Citation.]

(*People v. Bemore*, *supra*, 22 Cal.4th 809, 858.) This assertion misreads *Parker*, which actually does state that the Florida practice is constitutionally required: "We must assume that the trial judge considered all this [non-statutory mitigating] evidence before passing sentence." (*Parker v. Dugger*, *supra*, 498 U.S. 308, 314.) The reason for that assumption was that, "[u]nder

---

[265]E.g., *Beardslee v. Woodford* (9th Cir. 2004) 358 F.3d 560, 579, summarily rejecting the claim with citations to the brief discussions in *Schneider v. Delo* (8th Cir.1996) 85 F.3d 335, 342, and *Brogdon v. Blackburn* (5th Cir.1986) 790 F.2d 1164, 1169. Contra, *Brookings v. State* (Fla.1986) 495 So.2d 135, 142–143; see also *People v. Gleckler* (Ill. 1980) 411 N.E.2d 849, 858–861 [reviewing court vacates death sentence because of disproportionality between codefendants].

both federal and Florida law, the trial judge could not refuse to consider any mitigating evidence. . . . *Eddings v. Oklahoma* . . . ; *Lockett v. Ohio* . . . ." (*Id.* at p. 315.) This is not a statement that Florida *elects* to treat such evidence as mitigating.[266] Indeed, the thrust of the *Lockett/Eddings* rule cited in *Parker* is that what evidence is mitigating is not a question of state law at all. (See *People v. Easley* (1983) 34 Cal.3d 858, 878, fn. 10 [Court directs substitution of *Lockett* language for statutory language in jury instructions].) If any fact-finder could reasonably consider the evidence in question to tend to favor a mitigated sentence, the federal Constitution demands that the sentencer consider it. (*McKoy v. North Carolina* (1990) 494 U.S. 433, 440.)

Appellant respectfully submits that this Court, having misread *Parker*, must reconsider its own holdings that state law controls.

2. Reasonable Jurors, Like Various Courts, Congress, and the High Court, Could and Probably Would Consider the Evidence to Favor a Mitigated Sentence

The high court's having spoken on the matter is enough. However, given that respondent might contend that the *Parker's* conclusion is neither controlling[267] nor persuasive, appellant considers the issue more deeply.

---

[266]It is true that the high court also discussed Florida law. A sub-issue in *Parker* was whether the sentencing judge had considered an accomplice's lesser sentence as mitigation, though in Florida, as in California, it was not specifically authorized to do so by statute. In that context, the Court observed that the evidence "was of a type that the Florida Supreme Court had in other cases found sufficient to preclude a jury override." (*Parker*, *supra*, 498 U.S. 308, 315.) This does not negate the statement, quoted above, that "federal and Florida law" required the evidence to be considered. (*Ibid.*)

[267]The statement in *Parker* is not its ultimate holding, but neither is it mere dictum. "[S]tatements necessary to the decision are binding precedents . . . ." (*Western Landscape Construction v. Bank of America* (1997) (continued...)

If the constitutional slate were blank, a legislator drafting a death-penalty statute could argue for exclusion of the treatment of a similarly culpable codefendant because decisions made in his or her case shed little light on the proper treatment of the individual before the sentencer. The counter-argument—which appellant would argue is much more compelling—is that such evidence has at least some mitigating force for two reasons, which are set forth below. Constitutionally speaking, however, what matters is not which position is right, but that seeing the evidence as potentially mitigating is reasonable. This is because, for the purposes of the rule that the sentencer must consider all mitigation, "'[r]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder *could reasonably deem to have mitigating value*. . . . [Citation.]'" (*McKoy v. North Carolina*, *supra*, 494 U.S. 433, 440, emphasis added; see also CALCRIM No. 763 ["In reaching your decision, you may consider . . . anything you consider to be a mitigating factor"].) To the extent that there is any gate-keeping role for a trial court in determining relevance, it could only

---

[267](...continued)
58 Cal. App. 4th 57, 61, cited with approval in *Kertesz v. Ostrovsky* (2004) 115 Cal. App. 4th 369, 376 ; see also 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 945–946, pp. 986–988.) *Parker* held that the defendant had been denied meaningful appellate review by the Florida Supreme Court because the latter court had erroneously believed that the trial court had found that there were no mitigating factors. A necessary basis for the high court's holding was its finding that there was uncontroverted mitigation—including the accomplices' sentences—that the judge would have known he was required to consider. (498 U.S. 308, 313–318, 322.) Thus the statement that the accomplices' sentences were unquestionably mitigation was a finding "necessary to the decision," not just an "explanatory observation[]." (*Western Landscape*, *supra*, 58 Cal. App. 4th at p. 61.)

be, therefore, to decide if a reasonable fact-finder could deem the matter mitigating.

Crucially, the sense in which *mitigation* is used in this context is not whether the fact at issue tends to mitigate the defendant's culpability, but whether it is "evidence in mitigation of punishment." (*Skipper v. South Carolina*, *supra*, 476 U.S. 1, 4.) Thus the test is whether it "'would be mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" (*Id.* at pp. 4–5; see also CALCRIM No. 763 ["A mitigating circumstance is something that reduces the defendant's blameworthiness *or otherwise supports a less severe punishment*," emphasis added].) In this context, the treatment of Jose Munoz in this case tended to support a rational inference that appellant's character was not such as compelled a death sentence. For the state, with the actual or expected approval of a court, did not deem the character of another young man who had conducted himself at least equally violently to compel a sentence of death, or even lifelong incarceration. This consideration may or may not be so weighty as to have been determinative, but it surely would "have [had] mitigating value." (*McKoy v. North Carolina*, *supra*, 494 U.S. 433, 440.) That is enough to require its consideration by the sentencer. (*Ibid.*)

Moreover, the fate befalling a co-perpetrator was a circumstance of the crimes for which appellant was to be punished. (§ 190.3, subd. (a).) How assault victims and murder victims' survivors are coping even 20 years after the attacks that changed their lives is a circumstance of those crimes under current California law. (*People v. Brown* (2004) 33 Cal.4th 382, 397.) For the purpose at hand, there is no logical distinction between considering a crime's consequences for its victims and considering its consequences for the perpetrators. If the effects on victims years later are a circumstance of it, i.e.,

"[t]hat which surrounds [it] materially, morally, or logically" (*People v. Edwards* (1991) 54 Cal.3d 787, 833),[268] so are the effects on the perpetrators' lives.

Morally, and in the view of most people not schooled in the death-penalty law of jurisdictions like California, the whole picture of the circumstances surrounding these crimes surely includes what punishment the state sought for a co-perpetrator. The law does not *require* equal treatment of codefendants, a fact which could be conveyed to the jurors in an appropriate instruction. But many sentencers—judges and juries—find relevance in how those who are equally or more culpable are punished for the same crimes. They consider the fate of codefendants because of deep-seated social, cultural, and moral notions of fair treatment, sometimes to the point of violating rules prohibiting such consideration in non-capital cases. (See *Sanders v. Woodford* (9th Cir. 2004) 373 F.3d 1054, 1067, reversed on another ground sub nom. *Brown v. Sanders* (2006) __ U.S. __ [163 L.Ed. 2d 723; 126 S. Ct. 884] ["The jury might also have chosen to be lenient with Sanders because Maxwell, despite her initiative in bringing about the murder, was not even charged"]; *United States v. Douglas* (9th Cir. 1993) 1993 WL 503268 [district court improperly ordered downward departure in interests of parity between codefendants]; *United States v. Vilchez* (9th Cir. 1992) 967 F.2d 1351, 1352–1353 [same]; *Osborn v. Schillinger* (D.Wyo. 1986) 639 F.Supp. 610, 620 [disproportionate sentences were surprisingly unfair, but not unconstitutional]; see also *Brookings v. State*, *supra*, 495 So.2d 135,

---

[268]Even if this Court agrees with appellant's challenge, in Argument II, above, to its expansive definition of "circumstances of the crime," a fact-finder could still *rationally* consider the consequences for perpetrators to be among the circumstances of a crime.

142–143; *People v. Gleckler*, *supra*, 411 N.E.2d 849, 858–861.) Thus Congress, in passing the federal death penalty statute, specified that where others who are equally culpable will not be subject to the death penalty, that fact is a mitigating circumstance which the sentencer "shall consider." (18 U.S.C. § 3592(a)(4); see also 21 U.S.C. § 848(m)(8).) That provision "reflects a determination by Congress that it is appropriate for jurors to consider questions of proportionality and equity when they are evaluating whether a death sentence is appropriate." (*United States v. Bin Laden* (S.D. N.Y. 2001) 156 F.Supp.2d 359, 369.)

The purpose of this digression into policy arguments for treating the evidence at issue here as relevant is not to suggest that this Court is free to make law in this area, nor to raise the separate question of whether California law includes an enforceable right to proportionate treatment. It is simply to explain the notion which the Supreme Court relied on in *Parker v. Dugger*: that a rational sentencer could consider relevant the lenient sentence accorded a similarly culpable codefendant. Once this is recognized, *Parker's* conclusion that the sentencer was required to take such evidence into account is inescapable. If Congress and various courts, including the United States Supreme Court, could so deem evidence of an accomplice's sentence, surely such a view is reasonable. Therefore the evidence is mitigating for purposes of the Eighth Amendment. (*McKoy v. North Carolina*, *supra*, 494 U.S. 433, 440.) And, as *Lockett*, *Eddings*, and many other cases hold, a sentencer must consider relevant mitigating evidence.

The prosecutor made his decision to give Munoz life, and he was not entitled to insulate that decision from consideration by the jury. He could argue why Munoz deserved better than appellant, or why it did not matter, but it was up to the jury to decide the value of this potentially mitigating fact.

Here the trial judge's refusal to identify Munoz's treatment as possible mitigation or permit appellant to do so was therefore error, in violation of appellant's rights to due process, to present a defense on penalty, to a fair trial, and to a fair, reliable, non-arbitrary, and individualized penalty determination under the Sixth, Eighth, and Fourteenth Amendments..

B. The Error Was Prejudicial

Because the trial court's rulings violated the Eighth Amendment, respondent has the burden of proving that the error did not "possibly influence[] the jury adversely." (*Chapman v. California* (1967) 386 U.S. 18, 23.) As appellant has explained previously, the verdict was not a foregone conclusion.[269] Because of the unknowability of jurors' subjective weighing processes and other limits of appellate review, errors of substance affecting penalty can be found harmless only in special cases such as where the effects are somehow negated. (*Chapman v. California*, *supra*, 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 447–448; *People v. Hamilton* (1963) 60 Cal.2d 105, 136–137; and see discussion and other cases cited at pp. 82 et seq., above.)

1. Some Jurors Undoubtedly Saw Munoz's Culpability as at Least as Great as Appellant's

Respondent cannot meet its burden because the error surely was one which could have "influenced the jury adversely." (*Chapman v. California*, *supra*, 386 U.S. 18, 23.) Many jurors must have found the truth of who pulled which trigger in the Lake Mathews and Aragon shootings impossible to sort out. Lacking objective evidence, they were forced to rely on the mutual finger-pointing in appellant's and Munoz's statements, and, as shown at pages

---

[269]See the summary at p. 281, above, and the detailed treatment at pp. 107–128, above.

113–124, above, Munoz's credibility left a great deal to be desired. But some things were clear, and in no credible version was Munoz a non-violent or passive participant, even if he succeeded in killing no one. Munoz repeatedly told Self to kill Feltenberger, using what Feltenberger described as a clear, commanding voice. (RT 32: 4952, 4957, 4965–4966; 39: 6012–6014.) Saying, "Die, Bitch," Munoz did his best to shotgun Paulita Williams in the head at point-blank range. (RT 34: 5232–5233; 39: 5945–5946.) Ken Mills saw the gratuitous shotgun blast towards his face come from the person riding where Munoz sat in the Colt, not in the impossible-to-mistake (and nearly impossible-to-execute) position that Munoz described.[270] (Compare RT 33: 5195–5196, 5213; 39: 5929 [car was just to Mills's left, and shot came from passenger seat] with RT 39: 5931–5932 [cars in same position, but Self leaned out of left rear window and fired down from over the top of the car].) Munoz demanded a wallet and vehicle keys from a wounded Jose Aragon, shouted at him for his ATM PIN as he drifted in and out of consciousness, and was, at a minimum, with Self when Self (or Munoz himself) finished off Aragon, while appellant backed away from the whole business. (RT 39: 5986–5987, 5990–5995; 41: 6262; 3SCT 2: 303, 320–321.) Unlike appellant, Munoz was present whenever there was a shooting[271] and rarely involved when there was not.[272] Appellant's lack of a record; Munoz's

---

[270]The jury heard a detective describe Munoz's account as "bullshit." (3SCT 45: 13022–13023.)

[271]Timothy Jones and Joe Mans, Ken Mills and Vicky Ewing, Paulita Williams and Randolph Rankins, John Feltenberger.

[272]Present: the William Meredith robbery. Not present: the robberies of Alfred Steenblock , Jerry Mills and his son, Robert Greer, and Roger (continued...)

criminal activities in San Diego, familiarity with firearms, and involvement in continually obtaining them; and the timing of the Riverside crime spree after Munoz's arrival, moving in with Chavez, and getting to know Self—all of these factors suggested that Munoz was a catalyst for the group's predations. Finally, appellant was immediately forthcoming in his interrogation; Munoz lied and stonewalled for hours. (Cf. 3SCT 2: 275 et seq. with RT 40: 6045–6046, 6057.)

Appellant is not claiming that every juror saw every fact in the manner set forth here, only that some must have. But appellant need not go this far, for it is respondent who must exclude—beyond a reasonable doubt—the possibility that any juror saw what was knowable about appellant's and Munoz's culpability as, at worst, roughly equal. (*Chapman v. California*, *supra*, 386 U.S. 18, 23.)

2. Munoz's Sentence Was a Powerful Mitigating Consideration Regarding Appellant's Sentence

Alternatively, respondent could try to show that the lenient treatment for an equally-culpable Munoz could not possibly have affected a juror who was instructed to consider that factor and heard argument about its importance. But the life-*with*-parole bargain for Munoz would surely have been likely to be seen by one or more jurors as "basis for a sentence less than death" (*Lockett v. Ohio*, *supra*, 438 U.S. 586, 604) for the two reasons discussed above. First, if the District Attorney and the trial court thought it appropriate to spare Munoz's life and possibly permit him eventual freedom, then giving Romero

---

[272](...continued)
Beliveau. As to beekeeper Albert Knoefler, this was a hybrid situation, where appellant handled the robbery alone without harming Knoefler, but Munoz came down at the end—with shotgun—because he was impatient with how long it was taking. He left things as they were in the nearly-complete robbery.

life without parole could be reasonable as well. Second, from one not-irrational point of view—one held by Congress, among others, and recognized as rational by the United States Supreme Court—it would simply be unfair to treat appellant so grossly differently from his partner in crime, even if the rationale of California law permits it, without having a good reason for doing so. Ordering appellant's death while considering that Munoz would be eligible for release when he was in his fifties, 10 or 15 years after appellant's execution, could surely have been too much for one or more jurors. Put differently, these considerations weakened both prongs of the prosecution argument for death, for one suggests that a death sentence was not "necessary," and the other, that it was not "just." (See RT 54: 8026.)

In a way it is misleading—to appellant's own detriment—to argue the point this strongly. Once error is recognized, along with the extreme limits on a reviewing court's ability to find harmlessness in the subjective and unpredictable area of capital sentencing, harmlessness is not even a close question. This is not a technical, insubstantial error, nor one involving clearly cumulative material, clearly effective remedial action, or verdicts which reflect findings that show that the error had no effect. (*Chapman v. California, supra*, 386 U.S. 18, 24; *People v. Brown, supra*, 46 Cal.3d 432, 447–448; *People v. Hamilton, supra*, 60 Cal.2d 105, 136–137; and other cases cited at pp. 82 et seq., above.) Rather, it is easy to imagine—and, more to the point, impossible to rule out—one or more jurors arguing, during the two days (CT 8: 1956–1957; 9: 2025) of deliberations,

> If the D.A. is satisfied giving that shotgun-happy creep only 34 years,[273] and the judge is going along with it, why do we have

---

[273]The jury was told that Munoz's 51-to-life sentence would make him (continued...)

> to have Gene Romero killed? He'll be in prison till he dies, and that's enough. Besides, it's totally unfair to execute one and let the other off with a prison term just because he was caught first.

Even if no one else was persuaded, this powerful additional consideration could have made such a juror or jurors adhere to their initial position, given whatever other factors actually did make them hold out for life for two days.

Clearly the prosecutor would have been free to argue that Munoz's luck did not make appellant less deserving of death. But he understandably wanted to avoid having to do so. (See RT 53: 7983.) It would require unseemly speculation by this Court to send appellant to his death in the belief that no juror would have rejected the prosecutor's argument, in the face of appealing claims that both evenhandedness and the authorities' views of an appropriate sentence for a young man like Munoz meant that the world would be safe enough if appellant received the severe sentence of life without parole. Since seriously disparate treatment could have troubled one who—instructed and urged to consider the matter—might have continued to vote for lifetime incarceration, the death judgment cannot stand.

//

//

---

[273](...continued)
eligible for parole in 34 years. (RT 39: 6035.)

XIII

THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR IN SEVERAL RESPECTS IN ITS INSTRUCTIONS REGARDING UNADJUDICATED CRIMINAL ACTS, INCLUDING DIRECTING A VERDICT ON WHETHER THE CHARGED ACTS OF UNADJUDICATED CRIMINALITY WERE VIOLENT AND FOLLOWING A CALJIC-INITIATED ELIMINATION OF THIS COURT'S FORMER UNANIMITY REQUIREMENT FOR CHARGES OF UNADJUDICATED CRIMINALITY[274]

A. Introduction

Evidence of crimes for which a defendant is not on trial has a long-recognized potent role in persuading jurors to vote for death, and in theory it has therefore been subject to special reliability safeguards. Many were not followed here.

The trial court instructed appellant's jury, in the language of CALJIC No. 8.87 (1989 revision), on proof of the aggravating circumstance defined by Penal Code section 190.3, factor (b):

> Evidence has been introduced for the purpose of showing that the defendant Romero has committed the following criminal acts or activity: Assault, battery, robbery, attempted escape by force or violence, and possession of a deadly weapon in jail, which involved the express or implied use of force or violence or the threat of force or violence.
>
> Before a juror may consider any of such criminal acts or activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant

---

[274]As will appear shortly, although this argument raises claims that have been rejected by this Court, appellant vigorously advocates their reconsideration, based on additional information and reasoning. With the exception of part F, pertaining to the reasonable doubt instruction, they are not "generic" claims presented primarily to preserve them for federal review. (Cf. *People v. Schmeck* (2005) 37 Cal.4th 240, 303–304.)

> Romero did in fact commit such criminal acts or activity. A juror may not consider any evidence of any other criminal acts or activity as an aggravating circumstance.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a fact in aggravation.
>
> If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(RT 54: 8065–8066; see also CT 9: 1991.) Appellant had asked for the following instruction, which was refused as duplicative. (RT 53: 7990–7991.)

> You may not consider as aggravation any evidence of unadjudicated acts allegedly committed by defendant unless you first determine beyond a reasonable doubt that (1) the defendant committed the acts; (2) the acts involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence; (3) the acts were criminal.

(CT 9: 2024.)

The pattern instruction was full of errors, many of which would have been cured by the requested instruction. It began by taking away from the jury the factual question of whether the alleged acts involved the use of, or a threat to use, force or violence. In the course of doing so, it scrambled the statutory language, transmuting "use or attempted use of force or violence or the express or implied threat to use force or violence" into "the express or implied use of force or violence or the threat of force or violence" (Compare § 190.3, factor

(b) with RT 54: 8065 and CALJIC No. 8.87). That error added a statutorily unauthorized aggravating circumstance: acts which involved "the threat *of* force or violence," as opposed to the "threat *to use* force or violence," thus including acts which may have created a risk that violence would occur, wholly apart from appellant's intent, instead of requiring that at least an implied threat be directed to a victim. It also added a concocted category of aggravation: criminal activity "which involved the . . . implied use of force or violence." The same non-statutory language stated that at a minimum there was a threat of violence, when the minimum could have been a less serious implied threat. The general considerations requiring unanimity on aggravating factors (see Argument XXI.D, below) apply with special force to other-crimes evidence, but the instruction specifically states that unanimity is not required. Finally, the instruction defined the key term *reasonable doubt* in the same inadequate manner as revised CALJIC No. 2.90 does, i.e., by telling the jurors at a crucial point that their being convinced of the truth of the charge must abide, but without saying *how* convinced they must be. (See Argument XVIII, below.)

Most of these problems have been raised in other cases. In addressing them individually appellant will address this Court's prior holdings concerning them, as well as considerations that apparently were not brought to the Court's attention when those cases were briefed and which call for the re-examination of their conclusions. In addition, appellant will highlight a very disturbing pattern that has not been discussed when these complaints were made individually: except for the *reasonable doubt* definition, every complaint made here deals with a CALJIC-initiated change in the law. Each questioned aspect of the instruction deviated either from prior law as established by this Court or from the language of section 190.3 itself. Then, in most cases, the

change was later ratified by this Court, generally without acknowledging that the CALJIC committee had made an innovation. This method of law-making itself raises serious problems of state and federal due process.

The prosecutor relied heavily on the other-crimes evidence, all of which was based on appellant's conduct while in custody on this case. Having first argued that a death sentence was "just," based on the circumstances of the offense and the victim-impact evidence, he concluded his plea for death by arguing that appellant's post-arrest conduct showed that it was also "necessary" to protect society from appellant. Thus, even if all of the factor (b) evidence were admissible, the instructional errors regarding its use rendered the penalty verdict invalid.

B. The Instruction Erroneously Withdrew from the Jury the Question of Whether Appellant's Acts Involved Violence

Penal Code section 190.3, factor (b), allows a jury to consider as an aggravating factor any criminal activity that involves the "use or attempted use of force or violence or the express or implied threat to use force or violence." As shown below, the issue of whether the incidents charged as aggravation amounted to force or violence is for the jury to decide. Here, the trial court took the issue out of the jurors' hands. The instruction flatly stated that the acts sought to be proved by the prosecution were, if shown, "criminal acts or activity . . . which involved the express or implied use of force or violence or the threat of force or violence." It then specified that the sole question before the jury was whether appellant "did in fact commit such acts or activity." (CT 9: 1991; RT 54: 8065.) Appellant's requested instruction would have required the jury to determine the question of force or violence. (CT 9: 2024, refused at RT 53: 7990–7991.)

What is most striking is that, in the proceedings below, at most *the prosecutor* had found that the alleged acts involved force or violence. The trial court made no such finding. It simply used a pattern jury instruction so poorly drafted that it essentially directs a verdict on that issue. Neither its Use Note nor extant case law suggested that the court hear the evidence and make a finding prior to telling the jury that the conduct involved force, violence, or a threat thereof.

This instruction improperly decided against appellant the issue of whether or not his actions constituted a crime of violence within section 190.3, factor (b), removing the state's burden of proof and depriving him of a determination of whether or not this evidence was properly to be considered as aggravation at all, in violation of his right to present a defense and his jury-trial, penalty-reliability, and due-process rights under the Sixth, Eighth, and Fourteenth Amendments.

1. Questions of Fact Are for the Jury

Under the plain language of factor (b), the evidence of other criminal activity is aggravation only if the acts involved threatened or actual force or violence. This is a question of fact rather than law: "[W]hether a particular instance of criminal activity 'involved . . . the express or implied threat to use force or violence' (§ 190.3, subd. (b)) can only be determined by looking to the facts of the particular case." (*People v. Mason* (1991) 52 Cal.3d 909, 955.) This Court made that statement in the course of explaining that some escape attempts involve force or violence and some do not, and that the issue is not the abstract nature of the statutory crime. (*Id.* at pp. 954–956.) This is precisely one of the questions that was taken away from appellant's jury—i.e., whether his involvement with a cellmate in sawing prison bars, which the prosecution contended implemented a plan that would have involved the use

of force down the road (RT 54: 8026–8027, 8030), had in fact ripened into a crime of attempted or threatened force or violence. Yet it has long been understood that "the defendant has a constitutional right to have the jury determine every material issue presented by the evidence." (*People v. Flood* (1998) 18 Cal.4th 470, 480, quoting *People v. Modesto* (1963) 59 Cal.2d 722, 730.) That being the rule, it necessarily applies to the penalty phase, under a long-established principle that, in a penalty trial, a defendant is entitled to the same safeguards as are accorded during the guilt phase. (*People v. Stanworth* (1969) 71 Cal.2d 820, 840.)

Moreover, this Court has long justified submitting, to the jury, misconduct evidence that was highly equivocal on the force-or-violence element, precisely because it was up to the jury to decide whether the element was proven. (*People v. Mason*, *supra*, 52 Cal.3d at pp. 956-957; *People v. Tuilaepa* (1992) 4 Cal.4th 459, 589.) To then deny the jury the opportunity to decide that question is not only illogical, but fundamentally unfair, and it undermines the rationale for placing such highly prejudicial testimony before the fact-finder in the first instance. (U.S. Const., 8th &14th Amends.)

2. Precedents Upholding the Challenged Language Were Mistaken

a. *People v. Ochoa*

Nothing in the language of section 190.3 takes the force-or-violence question away from the jury. Until the CALJIC drafters' language was challenged in *People v. Ochoa* (2001) 26 Cal.4th 398, there apparently had been no authority for instructing the jury that its duty was only to determine whether the defendant committed the charged acts and that the element of

force and violence had already been decided.[275] Like the switch from "use or attempted use . . . or the express or implied threat to use" (§ 190.3) to "the express or implied use . . . or the threat of," CALJIC's withdrawal of the issue from the jury was evidently a drafting error, not a drafting choice.[276] In any case, in *Ochoa* the defendant argued that *Apprendi v. New Jersey* (2000) 530 U.S. 466 required the question to be submitted to the jury under the Sixth Amendment. This Court pointed out that the contention was foreclosed by *Walton v. Arizona* (1990) 497 U.S. 639, and that *Apprendi*, rather than overruling *Walton*, had held that its reasoning did not reach judicial findings of aggravating factors after a jury found death eligibility. (*People v. Ochoa*,

---

[275]*Ochoa* stated that CALJIC No. 8.87 had been "upheld" by the Court in the past, citing *People v. Millwee* (1998) 18 Cal.4th 96, 162, fn. 33. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 453.) In fact, *Millwee* did not consider any challenge to the withdrawal of the violence issue from the jury. The cited footnote merely quoted the instruction.

[276]Failure to submit the force/violence issue to the jury has never been mentioned or justified in any of the Use Notes or Comments to No. 8.87 in the various editions of CALJIC (as of May, 2006)). The bare-bones pattern instruction reads, "Evidence has been introduced for the purpose of showing that the defendant _____ has committed the following criminal [act[s]] [activity]: _____ which involved [the express or implied use of force or violence] [or] [the threat of force or violence]." The "which involved" clause may have been intended to be part of the summary of the allegations. But when the blanks are filled in with a series of offenses (see p. 452, above), the instruction *describes* the offenses as involving force or violence. This is confirmed in the second paragraph, which tells the jury that the only question for them is whether the defendant "did in fact commit such criminal acts."

No one hearing the instruction, as given and for the first time, would possibly think that the jury is to decide both whether the acts occurred and whether they involved force or violence. This Court has always understood the instruction to submit only the first question to the jury. (See, e.g., *People v. Ochoa*, *supra*, 26 Cal.4th 398, 453; *People v. Monterroso* (2004) 34 Cal.4th 743, 793; *People v. Nakahara* (2003) 30 Cal.4th 705, 720.)

supra, 26 Cal.4th at pp. 452–454.) But *Ring v. Arizona* (2002) 536 U.S. 584, soon disavowed *Apprendi's* attempt to distinguish *Walton* on this point and instead overruled *Walton*. (536 U.S. at pp. 603–604, 609.) *Ochoa's* reasoning on why CALJIC No. 8.87 could withstand the particular attack mounted on it may have been based on good law at the time, but it became bad law 10 months later.[277] Under *Ring*, the Sixth Amendment forbids *Ochoa's* conclusion. Moreover, the *Ochoa* defendant did not raise the more basic challenge presented here: in a sentencing scheme that—unlike Arizona's pre-*Ring* statute—does require aggravating factors to be submitted to a jury and (in the case of factor (b)) found beyond a reasonable doubt, the force or violence issue may not be arbitrarily withdrawn from them.

b. *People v. Nakahara*

People v. Nakahara, supra, 30 Cal.4th 705 reached the question of why the issue should be withdrawn from the jury, answering it in a single sentence:

> The question whether the acts occurred is certainly a factual matter for the jury, but the *characterization* of those acts as involving an express or implied use of force or violence, or the threat thereof, would be a legal matter properly decided by the court.

(*Id.* at p. 720.) *People v. Monterroso, supra*, 34 Cal.4th 743 rejected a similar defense contention, both on the authority of *Nakahara* and because there the jury had been instructed on the elements of each alleged crime and possible defenses.[278] (*Id.* at p. 793; cf. *People v. Sapp* (2003) 31 Cal.4th 240, 314 [no

---

[277]In *People v. Panah* (2005) 35 Cal.4th 395 the Court summarily rejected a contention that *Ring* and *Apprendi* required the violence issue to go to the jury, citing *Ochoa*. (*Id.* at p. 499.) But, as stated, *Ochoa* predated *Ring* and did not, therefore, take it into account.

[278]The latter point is puzzling, unless, in *Monterroso*, the elements of (continued...)

error where 8.87 supplemented with instruction regarding need to find force or violence].)

But *Nakahara* cites no authority for the assertion that determining whether acts involved force or violence is a legal decision for the court. Given that *Ring* has eliminated any basis for treating a circumstance in aggravation differently from elements of an offense, *Nakahara* was mistaken. Rather, this Court was correct when it held in *People v. Mason*, *supra*, 52 Cal.3d 909, that "whether a particular instance of criminal activity" involved a threat of force "can only be determined by looking to the facts of the particular case." (*Id.* at p. 955 [citing violent and non-violent escape attempts].) The Court also emphasized in both that case (*id.* at p. 957) and in *People v. Tuilaepa*, *supra*, 4 Cal.4th. 569, 589, that the jury, as trier of fact, may consider any innocent explanation for weapons possession that would negate an implied threat of force or violence. Thus, as millions of honest firearms owners can attest, weapons can be possessed with a purely defensive intent in an environment perceived as dangerous. (See *Barney v. State* (Tex.Cr.App. 1985) 698 S.W.2d 114, 130 (dis. opn. of Teague, J.) [willingness to take judicial notice of fact—well propagated through the mass media—that prisoners act on a perceived need to arm themselves for self-defense].) And there can be

---

[278](...continued)
every offense charged happened to include the attempted or actual use of force or violence or threat thereof, within the meaning of section 190.3, a point not entirely clear from the opinion. Otherwise, telling the jury how to decide if crimes were committed is not equivalent to telling it that it must determine if they involved force or violence. In any event, here there were instructions on robbery and on assault. (CT 9: 2001–2005.) The latter required only a threat to commit a technical battery (CT 9: 2001), and there were no instructions even arguably connecting a requirement of violence to the charges of attempted escape and shank possessions.

nonviolent escapes. (*People v. Boyd* (1985) 38 Cal.3d 762, 776–777; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1231–1232 [assuming without deciding that escape was nonviolent]; *People v. Lopez* (1971) 6 Cal.3d 45, 52 & fn. 9 [escape not an inherently dangerous felony; escape statute distinguished between violent and non-violent escapes].)

c. Controlling Authority Overlooked by *Nakahara*

A more detailed analysis of how to analyze when a question is one for the jury can be found in this Court's opinions in *People v. Figueroa* (1986) 41 Cal.3d 714, and *People v. Hedgecock* (1990) 51 Cal.3d 395. In *Figueroa*, an instruction stated that certain papers were securities within the meaning of a penal statute. An argument that the instruction was appropriate because it resolved a purely legal determination was rejected because of clear law on the federal rights to due process and to a jury trial, which forbade directed verdicts on elements of an offense, and their functional equivalent, mandatory presumptions. (*Id.* at 724–734, citing, inter alia, *Sandstrom v. Montana* (1979) 442 U.S. 510; *Connecticut v. Johnson* (1983) 460 U.S. 73; and *In re Winship* (1970) 397 U.S. 358; see also *People v. Flood*, *supra*, 18 Cal.4th 470, 491–492.) *Figueroa* quoted authorities explaining "why the 'law' and 'fact' distinction misses the mark in criminal trials." (*Id.* at p. 730, quoting *United States v. Johnson* (5th Cir. 1983) 718 F.2d 1317, 1321 (en banc).)

> ". . . There is no categorical distinction between 'legal' and 'factual' questions, for in every case application of a legal principle turns on the presence of particular facts.
>
> . . . '. . . Juries are always judges of the law in the sense that juries must pass on the manner and the extent in which the law expounded by the judge fits the facts brought out in the evidence. This process requires juries to perform the legal function of interpretation and application. . . . [H]owever, juries are not judges of the law in determining what principle of law

> is applicable to the evidence.' [Citation.] . . . . Hence, although attempting to separate 'fact' from 'law' may sometimes be useful, particularly when a statute or a federal rule turns on the differentiation, it is not the issue here. The issue is the role of the jury in the trial guaranteed to the accused." ([*United States v. Johnson*, *supra*,] 718 F.2d at p. 1321 . . . .)

(*People v. Figueroa*, *supra*, 41 Cal.3d at pp. 730–731, emphasis omitted.) In *Figueroa*, this Court concluded that the *definition* of a security was a matter of law, and that the trial court should therefore instruct the jury as to how a security is identified. "Whether a particular piece of paper meets that definition, however, is for the jury to decide." (*Id.* at pp. 733–734, quoting *Johnson*, *supra*, 718 F.2d at p. 1321, fn. 13.) The Court also noted the factual questions that needed to be resolved in order to make such a determination. It found the existence of such factual questions to be an additional reason why the issue on which they bore needed to be submitted to the trier of fact, i.e., the jury. (41 Cal.3d at p. 740.)

The Court revisited the law/fact distinction in *People v. Hedgecock*, *supra*, 51 Cal.3d 395. The defendant had been convicted of perjury, under a CALJIC instruction which had treated the question of materiality of a misstatement as one for the trial court, not the jury. (*Id.* at pp. 403–404.) *Hedgecock* noted that *Figueroa* had been based on "more modern concepts of due process and the right to a jury trial" than earlier cases with contrary holdings. (*Id.* at p. 407, quoting *Figueroa*, *supra*, 41 Cal.3d at p. 731.) The Court stated that "*Figueroa* did not abrogate the question-of-law/question-of-fact distinction," but that it "did suggest, however, that this distinction plays a relatively limited role in view of a defendant's constitutional right to have a jury determine the existence of all elements of the offense charged." (51

Cal.3d at p. 407.) The "critical question," then, was whether materiality "is an element of the offense." (*Ibid.*)

The Attorney General, while conceding that materiality was an element, disagreed that this settled the question, arguing that it fell into a narrow category of legal questions best decided by the trial court. This Court rejected the contention:

> In a prosecution under the Act, the determination of materiality is not simply a question of law. Rather, it involves an evaluation of the significance of the defendant's statements or omissions, in the circumstances in which they were made. This is a task appropriately entrusted to the jury.

(*People v. Hedgecock*, *supra*, 51 Cal.3d at p. 408.) The Court also noted a number of other contexts in which questions of materiality were already submitted to juries. (*Ibid.*)

These principles control here, not the *Nakahara* comment, which summarily asserted, without citation or analysis, that whether crimes involved force or violence was a legal question. (30 Cal.4th at p. 720.) "An 'element' is a fact that is considered 'essential' to the definition of the charged offense . . . ." (*Dillard v. Roe* (9th Cir. 2001) 244 F.3d 758, 772; see also Black's Law Dict. (7th ed. 1999) p. 538.) In this sense, an act's being a crime of actual or threatened force or violence is clearly an "element" of a factor (b) aggravating circumstance—the allegation of an aggravating circumstance is false if the act committed did not involve force or violence. Since whether the issue is an element to be proved is "the critical question" on the distinction between questions for the court and questions for the jury (*People v. Hedgecock*, *supra*, 51 Cal.3d at p. 407), this in itself requires the force issue to be decided by the jury.

Second, as noted above, both *Figueroa* and *Hedgecock* found their conclusions partly dictated by the existence of factual issues that needed resolution, in order to determine whether the prosecution could prevail on the ultimate legal issue. (*People v. Figueroa*, *supra*, 41 Cal.3d at p. 740; *People v. Hedgecock*, *supra*, 51 Cal.3d at p. 408.) In the factor (b) context, as this Court has recognized, the force or violence issue may depend on such factors as the defendant's intent in possessing a weapon or the manner in which he or she intended to carry out an escape. (*People v. Tuilaepa*, *supra*, 4 Cal.4th. 569, 589) [weapon]; *People v. Mason*, *supra*, 52 Cal.3d 909, 954–956 [escape].) Here, there were similar factual issues, and they were highly disputable. For example, the proof that appellant intended a violent escape when he and a county-jail cellmate removed bars from a door was weak. To begin with, he may not have been the initiator of the scheme or that serious about it: the cellmate had already made a previous escape attempt. (RT 42: 6482.) Moreover, this Court has previously refused to countenance an assumption that "defendant was actually serious about going through with the elaborately constructed scheme" he had concocted, where a jury was not told to determine whether that fact was established beyond a reasonable doubt. (*People v. Phillips* (1985) 41 Cal.3d 29, 84 [regarding alleged solicitation of murder of prosecution witnesses].) Here, a rational juror could have doubted that, even if appellant's actions had ripened into some kind of attempt, he had attempted a crime of violence or made a threat. As to the weapons possessions, there was no evidence that they were other than defensive. Thus, in each case, the force issue was a question of fact.

Third, in *Hedgecock*, the fact that in other contexts "materiality is frequently a question for the jury" was considered significant, although the Court acknowledged counter-examples as well. (51 Cal.3d at p. 408–409.)

Here there is no such split. The specific question of whether an act involves force, violence, or the threat thereof—far from being traditionally seen as a purely legal question—is one entrusted to criminal juries in countless contexts.[279] Moreover, the issue is more concretely factual, and involves less legal technicality, than issues that were once thought to be for the judge but are now submitted to juries under modern conceptions of the jury-trial right, such as whether a paper is a security (*Figueroa*) or a misstatement is material (*Hedgecock*), as well as whether a murdered police officer was lawfully performing official duties (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1217, and CALJIC No. 8.81.8 (6th ed. 1996)); whether exigent circumstances justified a warrantless entry and thus made resistance unlawful (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 777); and whether a peace officer who suffered a battery was making a lawful arrest (CALJIC No. 9.24), making a

---

[279]See, e.g., *People v. Griffin* (2004) 33 Cal.4th 1015 [force in rape]; *People v. Valdez* (2004) 32 Cal.4th 73, 112, fn. 11 [force or fear in robbery]; *People v. Dominguez* (Aug. 28, 2006, No. S130860) __ Cal.4th __, __ – __ [slip opn., pp. 10–13] and former CALJIC No. 9.52.1 (6th ed. 1996) [force or fear in kidnap]; *People v. Valentine* (2001) 93 Cal.App.4th 1241, 1248 [direct or implied threat of force or violence in forcible sex crimes]; *id.* at p. 1246 [menace in forcible sex crimes]; *People v. Lipscomb* (1993) 17 Cal.App.4th 564, 570 and CALJIC No. 9.00.1 [threat of force or violence, in assault via conditional threat]; *People v. Senior* (1992) 3 Cal.App.4th 765, 774 [force in sex crimes]; *People v. Hallock* (1989) 208 Cal.App.3d 595, 606 [intimidating witness by force or by express or implied threat of force or violence]; CALJIC No. 9.22 [using force or violence upon a peace officer]; see also *People v. Dellinger* (1989) 49 Cal.3d 1212, 1222 [whether act is dangerous to life, amounting to implied malice]; *People v. Baker* (1999) 74 Cal.App.4th 243, 252, and CALJIC No. 9.02 [whether force likely to cause great bodily injury was used]; *People v. Carron* (1995) 37 Cal.App.4th 1230 and CALJIC No. 9.16.1 [whether a verbal or written threat, or one implied by a pattern of conduct, was made with the intent to cause fear, for purposes of stalking statute]; CALJIC No. 9.21 [exhibiting firearm in threatening manner].

lawful detention (CALJIC No. 9.27), or using reasonable or excessive force (CALJIC Nos. 9.26, 9.28). All that is required for a jury to handle any of these questions, and the factor-(b) violence issue as well, is that terms be appropriately defined. (See *People v. Figueroa*, *supra*, 41 Cal.3d at pp. 733–734.)

Determining whether there was an *implied* threat of force is routinely submitted to jurors as well. (See, e.g., *People v. Valentine*, *supra*, 93 Cal.App.4th 1241, 1248, and CALJIC 10.00 [implied threat of force or violence in forcible sex crimes]; *People v. Hallock*, *supra*, 208 Cal.App.3d 595, 606 [intimidating witness by implied threat of force or violence]; *People v. Carron*, *supra*, 37 Cal.App.4th 1230, 1239, and CALJIC No. 9.16.1 [whether a threat implied by a pattern of conduct was made with the intent to cause fear, for purposes of stalking statute].) Indeed, in the past this Court has noted, without comment or question, the submission to a capital jury of the question at issue here, the factor (b) element of force, violence, or express or implied threats. (*People v. Jennings* (1988) 46 Cal.3d 963, 985.)

Thus, even under pre-*Ring* law, *Nakahara's* single-sentence disposition of the contention being made here overlooked the primary criterion for whether an issue must be submitted to a jury, i.e., whether or not it is an element of the crime or circumstance to be proven. The opinion also overlooked the secondary criteria of whether disputable facts must be resolved in order to decide the issue and whether the issue is one that already is submitted to juries in other contexts. (Compare *Nakahara*, *supra*, 30 Cal.4th at p. 720, with *People v. Figueroa*, *supra*, 41 Cal.3d at pp. 726, 733, 740, and *People v. Hedgecock*, *supra*, 51 Cal.3d at pp. 407, 408.) It further overlooked prior statements by this Court that a defendant may contest the force element

of factor (b) before the jury. (See *People v. Tuilaepa*, *supra*, 4 Cal.4th. 569, 589; *People v. Mason*, *supra*, 52 Cal.3d 909, 957.)

Under modern constitutional law, the issues that are decided by a judge in a criminal jury trial are exceedingly rare and narrow. For example, after painstaking analysis, the court in *People v. Moore* (1997) 59 Cal.App.4th 168, 178–179, 187, was able to find that where a specific water district's status as a state district was established by statute, instructing the jury that it was legally a state district was appropriate. Evaluating the violent or non-violent character of a particular way of committing an offense was not in the same ballpark as that kind of determination. It was in the jury's ballpark. The most that was required of the trial judge would have been a *definition* of force or violence for the purposes of factor (b), and then only if—under familiar principles—there is a legal definition different from the everyday uses of the term.

Apart from these more complex considerations, the bottom line has become quite simple in light of recent United States Supreme Court jurisprudence. As noted previously, where a death sentence can be imposed only if one or more aggravating circumstances exist, the Sixth Amendment guarantee of a jury trial requires that the existence of such circumstances must be determined by a jury, under the reasonable doubt standard, unless the jury trial right is waived. (*Ring v. Arizona*, *supra*, 536 U.S. 584, 602, 609.) That rule does not permit splitting off some elements of the aggravating circumstance for judicial determination.[280]

---

[280]Appellant acknowledges that, in *People v. Prieto* (2003) 30 Cal.4th 226, the Court held that differences between Arizona's and California's sentencing schemes rendered *Ring* inapplicable here. (*Id.* at pp. 262–263.) Appellant submits that *Prieto's* attempt to distinguish *Ring* was in error. His detailed analysis of why this is the case is below, at page 506, where the point
(continued...)

d. Retroactive Removal of the Violence Element from What the Jury Must Find to Use the Evidence as Aggravation Would Violate Due Process

The ex post facto clauses prohibit retroactive application of legislative action which expands the circumstances in which a punishment may be imposed or lightens the evidentiary burden for imposing a punishment. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9; *Calder v. Bull* (1798) 3 U.S. (3 Dall.) 386, 390.) The due process clauses impose comparable restrictions on judicial action. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15; *Bouie v. City of Columbia* (1964) 378 U.S. 347; *People v. Davis* (1994) 7 Cal.4th 797, 811–813.) As shown above, until the 2001 decision in *People v. Ochoa*, this Court, unsurprisingly, interpreted section 190.3 to place the force-or-violence issue, like all other penalty-phase fact questions, in the hands of a jury. Upholding appellant's sentence for 1992 crimes based on *Ochoa's* change in the law—or, more precisely, based on a first-time holding in this case that not even a trial judge need find the force-or-violence element[281]—would therefore violate due process by retroactively lightening the burden of the party seeking a death sentence. (*Carmell v. Texas* (2000) 529 U.S. 513.)

3. No Neutral Fact-finder Evaluated the Violence Issue

Besides being based on a constitutionally invalid premise, any claim that characterizing conduct as involving force or violence was for the trial court would be inapplicable to the facts of appellant's situation. It was not the trial court, but *the prosecutor*, who determined that the crime involved force

---

[280](...continued)
is more critical to a different contention. Here, as shown above, appellant's claim is supported even by pre-*Apprendi* and *Ring* law.

[281]See the discussion in the next subheading.

or violence or—more precisely—that there may have been a basis to allege that it involved force or violence. CALJIC No. 8.87 is a pattern instruction intended to be used in all cases where factor (b) evidence is admitted, regardless of the strength of such evidence. Unlike, say, the Comment to the perjury instruction invalidated in *People v. Hedgecock*, *supra*, 51 Cal.3d 395,[282] nothing in the 8.87 Use Note or Comment called for a judicial determination of the force or violence issue. (See Use Note and Comment to CALJIC No. 8.87 (5th ed. 1988) pp. 414–415; Comment to CALJIC No. 8.87 (1989 rev.) (July, 1995, Supp. to Vol. 1) p. 184.) The most that a judge decides is whether or not other-crimes evidence *tends* to show force or violence and is therefore admissible. (See, e.g., *People v. Boyd*, *supra*, 38 Cal.3d 762, 776–777.) Here, admissibility of most of the incidents was not challenged on that ground, so even such a limited finding was absent.[283] (See RT 48: 7176–7213.) What the trial court did here was simply read a pattern jury instruction that happens to be drafted as if a finding had been made but which does not—in its explanatory material—call upon the judge to make a finding. No finding on the crucial force-or-violence question was made by judge or jury, so there is nothing for this Court to uphold. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

---

[282]See Comment to CALJIC No. 7.21 (4th ed. 1979), page 236, cross-referencing Comment to CALJIC No. 7.20, page 234 ("Materiality of the alleged perjured statements is a question of law which the trial judge must determine as a matter of law [Citations]").

[283]The one exception concerned the offer of proof regarding harassment of Tyreid Hodges. The court ruled that the proffered evidence was admissible as tending to show assaultive behavior. (RT 51: 7500–7501.) There was no ruling on whether the testimony, once given, did prove violent crimes.

In sum, under the state and federal due process and jury-trial rights, the question of force or violence is to be determined (a) by a jury, and (b) under the reasonable-doubt standard, but neither happened here. Appellant also had a due process right to the protections of California's statutory requirement that the jury determine the applicable aggravating and mitigating factors (see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vansickel v. White* (9th Cir. 1999) 166 F.3d 953, 957; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300), and equal protection requires the same (U.S. Const., 14th Amend.). And surely, under the due process clauses, his Eighth Amendment rights, and his right to present a defense, he was entitled to have *somebody*, other than the prosecutor, make that determination.

4. The Error Could Have Permitted the Jury To Consider the Other-Crimes Evidence To Be Aggravating

a. Standard of Review

Respondent could theoretically try to show harmlessness on either of two levels. One would be to argue that the error could not have influenced a juror's determination of whether an act alleged as aggravation was in fact available to be weighed as aggravation. The second would be to claim that the ultimate penalty verdict could not have been affected by considering the alleged conduct to qualify as an aggravating circumstance. Appellant shows here that the instant error must be treated as per se "reversible," but he uses that expression only in the sense that this Court may not consider harmlessness at the first level of analysis. Whether use of invalid aggravators could have affected the penalty verdict will be addressed separately.

Instructing the jury that the actions charged were crimes of force or violence might have been subject to harmless-error review had the trial judge heard evidence on the issue and made a finding. (See *Neder v. United States*

(1999) 527 U.S. 1; *People v. Flood, supra*, 18 Cal.4th 470; *State v. Ring* (Ariz. 2003) 65 P.3d 915, ¶¶ 44 et seq. (on remand from *Ring v. Arizona, supra*, 536 U.S. 584).) In each case just cited, there were such findings. (527 U.S. at p. 6; 18 Cal.4th at pp. 476–478; 65 P.3d at ¶ 2.) Here, the issue was never tried to any fact-finder. No one heard the evidence with the force-or violence-question in mind and decided the issue. Thus, there is no lower-court finding which this Court could first find to be supported by substantial evidence, and then hold could not have possibly been found the other way by a reasonable juror. (Cf. *Neder, supra*, 527 U.S. at p. 19; *Sullivan v. Louisiana, supra*, 508 U.S. at p. 280.) This Court, reading from a cold transcript instead of hearing the witnesses, would have to make crucial factual findings, on disputable issues, in the first instance.[284]

Fact-finding by an appellate court is rarely appropriate. (See *People v. Mabry* (1969) 71 Cal.2d 430, 454, fn. 2 (dis. opn. of Peters, J.).) Here, to even engage in a harmlessness analysis, this Court would have to decide whether the prosecution proved—not only beyond a reasonable doubt to the Court's satisfaction, but so that no rational juror could have such a doubt—disputable facts about whether all the jail incidents involved force or violence. These were facts upon which were predicated the propriety of the jurors going on to consider the other-offenses evidence to be critical aggravation in a capital case. For this Court to embark on such an enterprise, when there are no holdings of a trial-level fact-finder to sustain, would be a gross violation of the jury trial

---

[284]The record from which it could do so does not exist. Trial counsel may have chosen not to contest the force element because the jury was not permitted to decide it in appellant's favor. Thus the error created an appellate record that cannot be known to supply the facts which appellate fact-finding would have to evaluate. For this reason, too, the error is "structural."

right. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280; U.S. Const., 6th & 14th Amends.; Cal. Const., art. 1, § 16). Moreover, since such facts cannot be reliably determined without seeing and hearing the witnesses,[285] considering a claim of harmlessness in this procedural posture would also violate due process and appellant's Eighth Amendment right to a reliable penalty determination and fair appellate review. (*Townsend v. Burke* (1948) 334 U.S. 736, 741; *Murray v. Giarratano* (1989) 492 U.S. 1, 8–9 (plur. opn.).)

b. Effect on Outcome

If the Court were to embark on such a course nonetheless, respondent's burden of showing harmlessness—at the level of whether jurors could have found the force-or-violence element lacking in some crimes—would be determined by the presence of federal due process, jury trial, sentencing reliability, and right-to-defend violations[286] in instructing the jury that the actions charged were crimes of force or violence. Respondent would, therefore, have to show harmlessness beyond a reasonable doubt, with due regard for the fact that it is a death sentence that is being reviewed. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *People v. Robertson* (1982) 33 Cal.3d 21, 54.) Moreover, harmlessness in failure to obtain a jury finding on an essential fact is particularly hard to show under this standard, even in a case lacking the high stakes and indeterminacy of a death verdict. (See *People v. Flood*, *supra*, 18 Cal.4th 470, 484–490, 507 [abrogating prior rule that failure

---

[285]See *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal. 4th 394, 414; *Hurtado v. Statewide Home Loan Co.* (1985) 167 Cal. App. 3d 1019, 1024.

[286]*Ring v. Arizona*, *supra*, 536 U.S. 584; *Murray v. Giarratano*, *supra*, 492 U.S. 1, 8–9 (plur. opn.); *Johnson v. Mississippi* (1988) 486 U.S. 578, 584–585.)

to submit element of offense is generally reversible per se and finding harmlessness in instructing that peace officers were peace officers, an element that was "a peripheral issue that was never actually in dispute at trial and on which the evidence was totally uncontradicted"]; see also *Neder v. United States*, *supra*, 527 U.S. 1, 18, 19] [element was whether $5,000,000 underreporting of income was "material" misinformation on tax return; harmlessness would not be shown in a case where "the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element"].)

Were the error subject to harmlessness analysis, respondent could not exclude a reasonable doubt as to whether a properly-instructed jury would have found most of the other-crimes evidence to qualify as aggravation. Alternatively, there is a reasonable possibility that the errors affected the death verdict. Only 2 of the 14 incidents charged were indisputably crimes of threatened or actual force or violence. One was appellant's participation, with a group of other inmates, in the beating of Rodney Medeiros to force his sharing of his commissary items when Medeiros got commissary on a day when no one else in the tier did. (See RT 50: 7375–7396.) While nothing to be proud of, it was an incident of a type that was not uncommon in the jail, and it was not serious enough to cause any of those involved to be disciplined. (RT 50: 7386, 7397–7398.) The other incident was the battery, without injury, against Walter Jutras, when jailers, negligently or as an intentional provocation (see RT 50: 7412), moved Jutras, in a trustee's green jumpsuit, to non-trustee housing. (RT 50: 7400–7412.)

Whether any of the other incidents qualified as aggravation at all could have been hotly debated by a properly-instructed jury. These were not indisputable issues like the materiality element of a $5,000,000 understatement

of income (*Neder v. United States*, *supra*, 527 U.S. 1) or whether peace officers were peace officers (*People v. Flood*, *supra*, 18 Cal.4th 470). For example, while this Court has held that possession of a shank *may* be found to involve an implied threat under factor (b) (*People v. Martinez* (2003) 31 Cal.4th 673, 693–694), it is not the case that it must be. Two different officers testified that possession of shanks was extremely common in the Riverside County Jail. (RT 50: 7423–7424; 51: 7492.) Appellant was caught with them four times, but there was no evidence that he ever used one, displayed one, left his cell with one (except for the time when he came out with his possessions to be moved to another cell), or even mentioned having one, despite his aggressive actions towards certain other inmates. (RT 42: 6425, 6455–6459; 50: 7416–7426, RT 51: 7484–7495, RT 51: 7495–7499.) In these circumstances, staying armed could have been a matter of self-defense. (See *Barney v. State*, *supra*, 698 S.W.2d 114, 130 (dis. opn. of Teague, J.) [news media have publicized fact that prisoners act on a perceived need to arm themselves for self-defense].) Thus, it was highly questionable whether these acts of possession were proved, beyond a reasonable doubt, to be activity threatening force or violence. But it is a question which neither appellant's judge nor his jury was ever asked.

Similarly, finding even an inchoate threat to use force or violence—under the overbroad definition of what that is—in the escape preparations would have required a chain of assumptions and inferences: (1) that appellant would have tried to execute the apparent plan if the preparations had not been discovered, (2) that he would have had to confront a guard to do so, and (3) that he would have gone forward with threatening or using force at that point. There was evidence (testimony that leaving the jail would require one passing through other locked doors or gates) to support the second proposition. The

first and third, however, were speculative and certainly cannot be seen as so incontrovertible that no rational juror, permitted to consider the issue, could have found a failure of proof beyond a reasonable doubt. (*Neder v. United States*, *supra*, 527 U.S. 1, 19.)

Tyreid Hodges, facing charges that led to convictions on 26 counts of child molestation, was harassed by all the inmates around him. The harassment by appellant, he testified, consisted of flooding his cell with water by plugging up the shower, squirting feces under his cell door and squirting urine at him, and flinging a hairbrush, shampoo bottle, and perhaps a bar of soap at his feet from the gap under appellant's cell door. Hodges discussed six such incidents. (RT 51: 7501–7516.) These were clearly simple batteries or attempted batteries, since "[i]t has long been established that 'the least touching' may constitute battery." (1 Witkin & Epstein, Cal. Criminal Law (3rd ed. 2000) Crimes Against the Person, § 12, p. 645.) The question, however, was whether they involved the use or attempted use of force or violence in the sense that they should help determine whether a man should live or die. (See *People v. Balderas* (1985) 41 Cal.3d 144, 202–203.) This was a question for appellant's jury,[287] and had it not been given the equivalent of a directed verdict on it, it could have easily answered that question in the negative. As jailhouse "violence" goes, squirting urine and sliding a hairbrush under a door are marginal at best.

To some jurors, the most disturbing incident would have been the assault on Olen Thibedeau, a child molester moved to the pod on a different occasion. However, as explained in detail above, many jurors could have

---

[287]But see Argument VII, above, contending that the evidence of violence was insufficient as a matter of law.

easily seen appellant's unpunished action not as a deadly attempt to "spear" Thibedeau, but as harassment and grandstanding, since its failure to injure him[288] was a natural and probable consequence of the means which appellant chose. (See p. 125, above.) As with the other incidents, a finding of harmlessness would require the logical equivalent of what in mathematics would be certainty beyond a reasonable doubt "squared": this Court could have no such doubts, as to whether a *juror* might have had a doubt, that the offense involved the violence contemplated by the statute. Instead, the incident was officially labeled relevant to the penalty choice. And this was not just a label. Jurors likely understood the court's apparent finding that the act was violent, within the meaning of the statute, as a resolution of any factual questions they may have had about its qualifying seriousness.

Whether respondent can show that wrongly considering those offenses in aggravation could not possibly have affected the penalty verdict is dealt with below, after the other errors that could have made the jury wrongly take into account much of the other-crimes evidence are analyzed.

C. The Instruction Improperly Heightened the Seriousness of the Incidents by Characterizing Them as at Least Actual, Express Threats and by Creating the Supposed Aggravating Circumstance of "Implied Use" of Force or Violence

Besides taking the force-or-violence question away from the jury, the instruction characterized appellant's conduct in exaggerated terms. It did this by describing the evidence as involving either "the express or implied use . . . or the threat of use" of force or violence.[289] (CT 9: 1991; CALJIC No. 8.87.)

---

[288]There was a mark on his skin, variously described as a blood blister, a red mark, or a superficial scratch. (RT 50: 7432, 7452, 7458)

[289]The entire instruction as given is quoted on page 452, above.

Appellant's requested instruction used the statutory language, "use or attempted use . . . or the express or implied threat to use . . . ." (§ 190.3, factor (b); CT 9: 2024.) The altered language used by the trial court raised the floor of the range of potential culpability within which it said the conduct fell, by eliminating the possibility that threats were just implied.[290] Moreover, it added liability for the new category of "implied use" of force or violence. Given the fundamental unfairness of characterizing most of the offenses as more serious than they were, doing so violated appellant's rights to due process of law and trial by a properly-instructed jury (U.S. Const., 6th & 14th Amends. 6, 14; Cal. Const., art. I, §§ 7, 15) and compromised the reliability of the penalty verdict, in violation of the Eighth Amendment.

There is a considerable difference between an express threat and an implied one. For example, this Court has "often held that possession of weapons while incarcerated satisfies the statutory requirement of an implied threat." (*People v. Martinez* (2003) 31 Cal.4th 673, 693.) Such a "threat," to the extent that it is one at all, is less immediate, less dangerous, less clearly a true threat, than an express threat. Moreover, it is entirely ambiguous as to whether the intention was offensive or defensive. An implied threat—particularly under California's broad definition of the concept—is therefore correspondingly less aggravated than an express one, but appellant's jury was

---

[290]If the force-or-violence question had been submitted to the jury, leaving out liability for threats that were merely implied would have benefited appellant. Because of the directed verdict described in section B, however, the court's instructions *characterized* the range of culpability in which appellant's conduct fell, rather than delineating the range it would have to be within, in order to qualify as aggravation. Raising the lower end of the range affected how seriously the court was telling the jury it saw the conduct.

not given the option of considering the threat to be only implied, and, therefore, less weighty as aggravation.

Four of the factor (b) aggravating circumstances charged against appellant were simple possessions of shanks. (RT 42: 6425, 6455–6459; 50: 7416–7426; 51: 7484–7495, 7495–7499.) Similarly, the escape preparations that were characterized as an attempt involved neither the actual use of force or violence, an attempt to use either, an express threat, or even—in the usual sense where a threat is "[a] communicated intent to inflict harm or loss on another" (Black's Law Dict. (7th ed. 1999) p. 1489), an implied one. (See RT 42: 6418–6483.) At the most, with both the shank possessions and the escape preparations, one could infer an inchoate, undefined threat of future force or violence that qualifies under this Court's expansive definition of an implied "threat."[291] No crime of violence occurred or was attempted, and no explicit threat was made. So implied-threat theories were the only basis for admissibility of the shank and escape-plan evidence. Yet the jury was told that if appellant committed these acts, the law itself considered them to be at least actual threats. If they were officially determined to be actual threats, obviously they were as culpable and serious as actual threats.

From the jury's perspective, the only alternative was the CALJIC committee's concocted creature, "implied use" of force or violence, which was even worse. This label, too, escalated the seriousness which the law attached

---

[291]In the next section, appellant points out that the statute only authorizes treating communicated threats as aggravation, but, as this Court has recognized, the instruction authorizes treating acts which only create a risk of resultant violence as "threatening violence." Here, appellant assumes arguendo that the broader interpretation is proper.

to each of the incidents named above. One thing that the jurors could see for themselves was that the acts did not involve the actual use of force or violence. Because they were told that one of three categories applied, it had to be one of the other two: a threat of violence or the implied use of violence. But a theory that appellant's actions were either of these would have been opaque at best. Therefore, some jurors likely thought the characterization of "implied use" was the one which the trial court thought appropriate. For them, CALJIC's novel concept elevated what were at best inchoate and somewhat attenuated threats—with a speculative, unclear possibility of being communicated, much less carried out—into what were authoritatively labeled as equivalent to the use of violence. This was so because jurors who accepted the "implied use" characterization were made to understand that the law labeled the acts as a type of use of violence, albeit "implied."[292]

For example, the instruction increased the aggravating weight of the escape-plan evidence by telling the jury that cutting bars and having access to a shank were an actual threat, or an implied use, of force or violence—during an escape that not only never occurred, but was never actually attempted. Similarly, the other shank possessions were at best implied threats—assuming arguendo the correctness of this Court's rejection of the usual concept that a threat is a communication to another person. But they were characterized as actual threats or "implied uses" of force.

---

[292]If this Court were to reverse itself and somehow hold that the instructions do direct the jury to determine the force or violence issue (cf. p. 458, fn. 276,above), the trial court's adding this new category of qualifying conduct would be an unconstitutional addition of non-statutory aggravators. (U.S. Const., 8th & 14th Amends.)

In sum, the jury was not given the option, provided in section 190.3, subdivision (b), of considering appellant's conduct as simply involving an implied threat to use force or violence. Instead, the CALJIC instruction required the jury to consider the alleged criminal acts to be actual threats, or implied use, of force or violence, thereby identifying them as being more serious than the evidence warranted.[293] As shown in the next section, the error also exacerbated the effect of the use of terminology which eliminated the need for there to be a communicated threat.

The error violated the Sixth, Eighth, and Fourteenth Amendments. Moreover, as later judicial action making the prosecution's burden lighter than it was under any reasonable reading of the statute in place when the crimes for which appellant was being sentenced took place, it further violated due process in the ex-post-facto-like manner discussed at page 468, above. It can be held harmless only if there is no reasonable doubt that it could have affected the

---

[293]The pattern instruction's deviation from the statutory language was brought to the Court's attention in *People v. Prieto*, *supra*, 30 Cal.4th 226. The Court's summary finding of no error—"we see no practical difference between the instruction's and statute's language" (*id.* at p. 265)—provides no basis for believing that the effects explained here were raised by the defendant and considered by the Court in *Prieto*. Rather, the defendant there relied on a different theory. (See *ibid.* [distinguishing *People v. Anzalone* (1999) 19 Cal.4th 1074].)

The Court also observed, "[T]he instruction's language is arguably narrower than the statute's language because it may not encompass the attempted use of force or violence," although section 190.3 does. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 265.) This might have benefitted the *Prieto* defendant, for whom the CALJIC instruction had been modified to require the jury to decide the force/violence issue. (*Ibid.*) Narrowing the range of qualifying behaviors could have reduced the defendant's liability. It did not help appellant, because his jury was instructed that the acts did involve force or violence.

penalty verdict. Again, the burden of showing harmlessness is on respondent. (*Chapman v. California, supra*, 386 U.S. 18 at p. 24.) Its effect will be considered below, along with those of the other errors in the instruction.

D. Only Crimes Involving at Least a "Threat to Use" Force or Violence Are Aggravating under Section 190.3, but the Instruction Required Jurors to Weigh Crimes That Merely Created a Risk of Force Being Employed or Triggered

Section 190.3, factor (b), authorizes admission of evidence of criminal activity which involved the express or implied threat "to use force or violence." It also requires the jury to weigh such activity in deciding penalty. Appellant's requested Instruction #16, which was denied as duplicative, used the statutory language. (CT 9: 2024, quoted at p. 453, above; RT 53: 7990–7991.) In contrast, appellant's jury was instructed, in the words of CALJIC No. 8.87, to consider activity which involved "the threat *of* force or violence." (RT 54: 8065; CT 9: 1991; emphasis added.) Outside of the current context, case law universally treats expressions referring to a threat *to do* something in their everyday sense. In that sense, even an implied threat is made intentionally and involves a person who receives it. In contrast, as this Court has held, activity which involves a "threat *of* violence" extends to actions which create a risk that violence might result. Here, appellant did not threaten to use force or violence when he possessed shanks or engaged in escape preparations. (See RT 48: 7203 [prosecutor explains that no threat was directed to a person, but that appellant had an "intent or plan . . . that . . . would inevitably involve a violent confrontation"].) The instruction's infirm description of the law converted these acts into candidates for factor (b) consideration, since they could be seen as involving a risk, albeit highly speculative, that violence might at some point be used or triggered. Instructing the jury to use extra-legal aggravating factors violated the statute and

appellant's constitutional rights to a verdict by a properly-instructed jury; to a reliable, fair, and non-arbitrary penalty determination; to the protections of a life-and-liberty interest created by state law; to the having the state required to meet its burden, not a lighter one; and to due process of law in the additional and very literal sense of being sentenced according to law created by the legislative process, rather than a substitute version created by the CALJIC committee. (§ 190.3; U.S. Const., 6th, 8th, & 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17.)

1. A Threat "To Do" Something Requires One Who Threatens, One Who Receives the Threat, and the Intent to Communicate It

The noun *threat* can be used in either of the senses described above, i.e., as a communication of intent to do harm or as a free-standing condition of risk. (*People v. Jackson, supra*, 13 Cal.4th 1164, 1256 (conc. opn. of Mosk, J.).) Which one is meant depends on whether the word is followed by an infinitive (as in a threat *to do* something) or the word *of* and a noun (i.e., a threat *of* something happening). Thus, Webster's Third New International Dictionary (1976 ed.) gives the example "[they] quieted at once on the teacher's [threat] to keep them in after school" to illustrate the definition, "an expression of an intention to inflict evil, injury, or damage on another usu. as retribution or punishment for something done or left undone . . . ." (*Id.* at p. 2382.) In contrast, "the air held a [threat] of rain" exemplifies "an indication of something impending and usu. undesirable or unpleasant . . . ." (*Ibid.*) Following *threat* with prepositions other than *of* also connotes a static risk.[294]

---

[294]Thus, another definition in Webster's is "something that by its very nature or relation to another threatens the welfare of the latter . . . ." The example for this use of the term is "the crumbling cliff was a constant [threat] (continued...)

A threat "to use" violence thus involves the expression, to another, of a menacing intention, although the communication may be either explicit and verbal or implicit, conveyed by conduct. In contrast, a threat "of" violence can exist independently of a communicative action or a receiver of the threat.[295] (See *People v. Jackson*, *supra*, 13 Cal.4th at p. 1256 (conc. opn. of Mosk, J.).)

Because threatening to do something involves directing a communication to another person, it requires intent to make such a communication; there are no accidental threats, in this sense. (See, e.g., *In re Ryan D.* (2002) 100 Cal.App.4th 854, 861, 863; *United States v. Hanna* (9th Cir. 2002) 293 F.3d 1080, 1084; *Planned Parenthood v. Amer. Coalition of Life* (9th Cir. 2002) 290 F.3d 1058, 1075.) Holding one strictly accountable for creating a risk of violence, or accountable for recklessly or negligently creating such a risk, could be permissible, in some circumstances, where the

---

[294](...continued)
to the village below . . . ." (Webster's, *supra*, at p. 2382.)

Black's Law Dictionary (7th ed. 1999) employs different terms but essentially the same usages and meanings. In those that do not involve a communication, no infinitive follows *threat*, nor could one be inserted. (*Id.* at pp. 1489–1490.)

[295]There are ways that referring to a "threat of" something can substitute for the threat "to do" something, such as "threats of future kidnapping, false imprisonment," or other harm to obtain compliance with unlawful demands. (*People v. Linwood* (2003) 105 Cal.App.4th 59, 70.) Similarly, the infinitive is sometimes understood, not explicit. (See example for the definition, "*expression of an intention* to inflict loss or harm on another" [Webster's, *supra*, at p. 2382, emphasis added]: "[Threat]s inducing fear of bodily harm are often cause for legal action even in the absence of overt violence . . . ." (*Ibid.*) This would be equivalent to, "Threats *to inflict* bodily harm, which induce fear of such harm, are often cause . . . .") Such expressions only show that the absence of an infinitive following *threat* does not necessarily negate a communication. They are not exceptions to the principle that the presence of one always implies a communication.

legislative decision to do so is clear. (See *People v. Valdez* (2002) 27 Cal.4th 778, 781; *People v. Jackson, supra*, 13 Cal.4th 1164, 1258–1259 (conc. opn. of Baxter, J.).) But one is not held criminally accountable for negligently allowing others to be frightened by overhearing a rant about what one would like to do to them, for example. (See § 422 [willful criminal threat].)

These different uses of *threat* are so obvious as to be discerned in normal discourse without conscious effort or analysis. It is easy to collect cases[296] and statutes[297] employing the phrase *threat to use* (force, or a weapon) in contexts involving an identifiable victim to whom a message is intentionally communicated, by speech or conduct. In contrast, in the course of locating the authorities cited in the footnotes to the preceding sentence, appellant found no

---

[296]E.g., *People v. Lewis* (2001) 25 Cal.4th 610, 659 ("Defendant's threat to use a possibly nonexistent gun" was a statement to the victim); *People v. Reeves* (2001) 91 Cal.App.4th 14, 22–23 ("the intruder's threat to use a knife on" the victim was communicated); *People v. Granado* (1996) 49 Cal.App.4th 317, 323–325 (treating contention concerning "threat to use" a firearm as dealing with a threat communicated to victim); *People v. Dominguez* (1995) 38 Cal.App.4th 410, 421–422 ("threat to use" a firearm has to have an effect on the victim); *People v. Jacobs* (1987) 193 Cal.App.3d 375, 381 ("threat to use" a firearm involved "words threatening . . . use"); *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1463–1464 (discussing whether assault can take place absent attempt or "threat to use" item as bludgeon against victim), disapproved on another ground in *People v. Rodriguez* (1995) 20 Cal.4th 1, 13–14. See also *United States v. Hanna* (9th Cir. 2002) 293 F.3d 1080, 1084 & fn. 2, 1086 ("any threat to take the life of, to kidnap, or to inflict bodily harm upon the President" treated as involving a statement and a recipient of the statement); *Roy v. United States* (9th Cir. 1969) 416 F.2d 874, 877 (same).

[297]E.g., section 261, subdivisions (a)(6), (a)(7) (obtaining compliance with sexual demand by "threatening to retaliate in the future" or "threatening to use the authority of a public official" to bring about various adverse consequences); section 139 (penalizing one who "communicates to a witness . . . a credible threat to use force or violence").

use of the expression to mean the mere creation of a risk of such use, against some as-yet-indeterminate victim whom circumstances might put in harm's way.

Significantly, in the shank-possession context, when this Court states its rule permitting the use of such conduct, without more, as factor (b) aggravation, it typically uses CALJIC's "threat of violence" language, rather than trying to explain how a defendant's mere possession of a shank is a "threat to use violence." (E.g., *People v. Martinez*, *supra*, 31 Cal.4th at pp. 693, 694; *People v. Smithey* (1999) 20 Cal.4th 936, 1002–1003; *People v. Tuilaepa*, *supra*, 4 Cal.4th 569, 589; but see *People v. Ramirez* (1990) 50 Cal.3d 1158, 1186–1187.) The conclusion that possession alone can qualify is, in fact, justifiable only by using the broader "threat of" language, with its connotation of risk-creation. Similarly, in *People v. Jackson*, *supra*, 13 Cal.4th 1164, in a concurring opinion which addressed whether a non-violent escape by an unarmed prisoner was within factor (b), Justice Baxter generally described the issue by using CALJIC's language, i.e., as whether a "threat of violence" had been created. (*Id.* at pp. 1258–1264.) That phrasing permitted the conclusion that it was sufficient that the defendant "created a situation where the inherent potential for violent confrontation was high" or engaged in conduct where "the specific likelihood of violence arose." (*Id.* at pp. 1258–1259.) In this sense, "the 'threat' of violence was present." (*Id.* at p. 1263.) In contrast, Justice Mosk, who, in a separate concurrence, used the statutory phrasing, found that evidence of the escape did not fit factor (b)

because there was no "expression of a menacing intention."[298] (*Id.* at pp. 1256 [quotation], 1256–1258.)

Moreover, the effect of switching to the "threat-of-violence" language in the instruction challenged here was exacerbated by the error discussed in the previous section. Deleting "express or implied" from the statutory "express or implied threat to use force or violence" (CT 9: 1991) removed a further cue that "threat" meant the communicated type of threat, for only communications can be express or implied. A threat in Justice Baxter's sense of "the inherent potential for violent confrontation" (*Jackson*, *supra*, 13 Cal.4th at pp. 1258–1259 (conc. opn. of Baxter, J.)) is neither express nor implied; it is just an extant risk. The two errors together took a statutory phrase that clearly speaks of "threat" in its communicated sense and turned it into the sense that involves creating a possibility of violence occurring.

Creation of a "threat of" violence encompasses much more conduct than does making an express or implied "threat to use" violence, and it lacks the intent requirement that is implicit in the type of threat covered by the statute. CALJIC's arbitrary rewording of the statutory test is therefore overbroad.

2. Implied Threats Are Also Intentionally Communicated to a Victim

In *People v. Martinez*, *supra*, 31 Cal.4th 673, the defendant argued that shank possession, without more, did not amount to a "threat of" force or violence. He contended that there could be no implied threat unless there was a threatening communication—using words or actions—directed towards a person or persons. The Court rejected the argument, because factor (b)

---

[298]The majority, having held that any error was harmless, did not reach the issue. (*Id.* at p. 1232.)

includes implied threats, "and a communicated threat would constitute an *express* one." (*Id.* at p. 694.) But the *Martinez* pronouncement is puzzlingly at odds with the meanings of the terms *express* and *implied*, and it should be reconsidered.

Express means "[c]learly and unmistakably communicated; directly stated." (Black's Law Dictionary (7th ed. 1999) p. 601.) *Implied* does not mean uncommunicated; it means communicated by implication: "Not *directly* expressed . . . ." (*Id.* at p. 757, emphasis added; see also *id.* at p. 758 [imply: "To express . . . indirectly"].) The California codes are replete with references to implied threats communicated to particular recipients.[299] So are this Court's

---

[299]Section 76, subdivision (c)(5) ("a threat implied by a pattern of conduct . . . made . . . so as to cause the person who is the target of the threat to reasonably fear"); section 136.1, subd. (c)(1)(dissuading a witness where the act of dissuasion "is accompanied by force or by an express or implied threat of force or violence, upon a . . . person or the property of any . . . person"); section 261, subdivision (b) ("'duress' means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person"); section 262, subdivision (c) (same); section 523 ("delivers to any person any letter . . . expressing or implying . . . any threat"); section 646.9, subdivision (g) ("threat implied by a pattern of conduct . . . made with the intent to place the person that is the target of the threat in reasonable fear . . ."); section 832.9, subdivision (d) ("verbal or written statement or a threat implied by a pattern of conduct . . . so as to cause the person who is the target of the threat to reasonably fear"); Bus. & Prof. Code section 18404 ("Any threat, express or implied, made to a retailer by a manufacturer "); Bus. & Prof. Code section 18405 (same); Civ. Code section 1708.7 ("verbal or written threat . . . or a threat implied by a pattern of conduct . . . so as to cause the person who is the target of the threat to reasonably fear"); Elec. Code section 18542 (use of pay envelopes "upon which or in which there is written or printed . . . any political mottoes, devices, or arguments containing threats, express or implied, intended or calculated to influence the political opinions or actions of the employees"); Welf. & Inst.Code section 5326.5 (obtaining a patient's consent to treatment by using

(continued...)

opinions.[300] Indeed, in *People v. Anzalone*, *supra*, 19 Cal.4th 1074, the Court described a note to a bank teller stating, "This is a robbery," as an implied threat of force and then went on to list section 190.3 as an example of a statutes referring to such implied threats. (*Id.* at pp. 1080–1081.) The Court was correct in *Anzalone*, and it was mistaken in adopting, in *Martinez*, a premise that all communicated threats are express.

Because a threat "to do" something is always an intentional communication, but an action involving a threat "of" something can just mean creating a risk of its occurrence, and doing so regardless of intent, an instruction requiring the prosecution to prove only that the defendant has created a threat "of" violence, rather than that he or she has threatened "to use" violence, broadens conduct usable as aggravation significantly beyond what the death-penalty statute provides.

Even if the *Martinez* holding, issued in 2003, were correct, the retroactive application, to appellant, of its major expansion of the applicability

---

[299](...continued)
"any reward or threat, express or implied").

[300]E.g., *People v. Holloway* (2004) 33 Cal.4th 96, 115 ("whether the detectives' mention of a possible death penalty and suggestions that defendant would benefit from giving a truthful, mitigated version of the crimes . . . constituted implied threats"); *People v. Robertson* (1989) 48 Cal.3d 18, 38 (quoting trial court, "In making your decision to waive your rights . . . , has anyone made any direct or implied threats to you?"); *People v. Siripongs* (1998) 45 Cal.3d 548, 579 (discussing contention that attorney made "an implied threat to the two witnesses"); *Arden v. State Bar* (1987) 43 Cal.3d 713, 717 ("Petitioner then made statements to the mother amounting to an implied threat to initiate prosecution against her"); see also *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1242–1243; *People v. Thompson* (1990) 50 Cal.3d 134, 169.

of a statutory aggravating factor would violate due process. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15; and cases cited at p. 468, above.)

3. The Error Permitted the Jury To Consider the Other-Crimes Evidence To Be Aggravating

Because the error involved violations of the Sixth, Eighth, and Fourteenth Amendments, it can be held harmless only if respondent shows that there is no reasonable doubt that it could have affected the penalty verdict. (*Chapman v. California*, *supra*, 386 U.S. 18 at p. 24.)

Absent the directed-verdict problem described previously, substitution of a "threat of" force or violence for a "threat to use" force or violence would almost certainly have elevated the escape preparations and the four shank possessions into factor (b) aggravation. In none of the incidents did appellant issue a threat, even one that could be implied from the circumstances or his conduct, to use force or violence. There was no communication; there were no victims or other recipients of a threat. A jury following correct instructions would have disregarded the evidence as aggravation. Appellant's jury, however, most likely considered it to be aggravation, just as this Court does when it holds that shank possession, without more, is admissible evidence of crime involving an implied threat "of" violence. (*People v. Martinez*, *supra*, 31 Cal.4th at pp. 693, 694; *People v. Smithey*, *supra*, 20 Cal.4th 936, 1002–1003; *People v. Tuilaepa*, *supra*, 4 Cal.4th 569, 589.)

The error does not stand alone, however. Much of the damage which it caused was effected more completely by the superseding error of directing a verdict on the force/violence question. Making it easier for jurors to conclude that the conduct qualified under the force/violence proviso did less harm than it would have if they had been given the task of *deciding* whether it qualified. On the other hand, they were expected to make their own

judgments concerning the weight to give each incident submitted to them as an aggravating circumstance. (CT 9: 2011 [CALJIC No. 8.88]; *People v. Smith* (2005) 35 Cal.4th 334, 371.) Even having been told that all of the incidents were, if proven, activity that involved use of force or violence or the express or implied threat to use force or violence, it is likely that they would have given little weight to those that—on the facts before them—clearly involved neither force nor a threat to use it. In other words, there is a reasonable possibility that, by describing the acts in terms that arguably applied to them instead of in terms that clearly did not, the infirm instruction increased the seriousness with which the directed verdict was taken and the weight which the incidents in question received. Respondent cannot exclude all reasonable doubts that this occurred.

As with the other errors in this instruction, the prejudicial impact of the error—at the level of how much the jury's use of the other-crimes evidence may have mattered to the outcome—is described below.

E. The Instruction Failed to Require Unanimity on Findings of Truth of Other-Crimes Allegations

Appellant contends that juror unanimity is required on findings of the existence of aggravating factors in general. (See Argument XXI.D, below.) Even if this Court adheres to its view that the California statute does, and may, treat most aggravating circumstances as comprising only the reasons underlying the conclusion on which jurors must be unanimous, the situation is different with factor (b) allegations, for reasons which the Court has not previously addressed.

Other-crimes allegations are qualitatively different—in two key dimensions—from matters such as the circumstances of the crime and the age of the defendant. First, the latter normally involve little fact-finding in

comparison to the normative questions regarding what the factors mean to the final decision. But other-crimes allegations require the same kind of fact-finding as the allegations in an ordinary non-capital criminal trial, with the same burden of proof applicable to such allegations. (See *United States v. Kee* (D.N.Y. 2000) 2000 U.S. Dist. LEXIS 8785, *21–22.) The second difference is in the special impact of other-crimes evidence. For these reasons, arguments for jury unanimity apply with particular force in the context of other-crimes allegations. Appellant's jurors, however, were specifically instructed that they were to determine individually whether factor (b) crimes had been proven, and to individually use or not use the evidence based on their findings. (CT 9: 1991.)

1. This Court Envisioned Juror Unanimity When it Imposed a Reasonable-doubt Requirement

There has been a dramatic but unacknowledged evolution of this Court's jurisprudence on unanimity regarding other crimes. The history of that evolution shows that current law rests on a weak foundation.

a. Prior Law

This Court has consistently required evidence of unadjudicated offenses to be proved beyond a reasonable doubt, going back to well before the 1977 death penalty statute. (*People v. Robertson* (1982) 33 Cal.3d 21, 54; *People v. McClellan* (1969) 71 Cal.2d 793, 806.) The rule began with recognition that other-crimes evidence "may have a particularly damaging impact on the jury's determination whether the defendant should be executed." (*People v. Polk* (1965) 63 Cal.2d 443, 450; see also *Robertson, supra*, 33 Cal.3d at p. 54 ["adoption of the reasonable doubt standard" in the use of other crimes is based on "the overriding importance of 'other crimes' evidence to the jury's life-or-death determination"]; *Johnson v. Mississippi* (1988) 486 U.S. 578,

586 [even without prosecution reliance in argument, "there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive" in the 'choice between a life sentence and a death sentence'"].) As a result, "in the penalty trial the same safeguards [in proof of other crimes] should be accorded a defendant as those which protect him in the trial in which guilt is established." (*People v. Terry* (1964) 61 Cal.2d 137, 149, fn. 8; accord, *People v. Stanworth*, *supra*, 71 Cal.2d 820, 840.) Among these was the reasonable-doubt standard. (*Ibid.* [both cases]; see also *People v. Ashmus* (1991) 54 Cal.3d 932, 1000 ["undue prejudice is threatened by evidence of violent criminal activity, and sufficient probativeness is assured without a previous conviction only through the requirement of proof beyond a reasonable doubt"].) Requiring it for penalty-phase other-crimes evidence was an exception to the preponderance-of-the evidence standard applicable both to certain guilt-phase uses of such evidence and to proof of other penalty-phase facts. (*Polk*, *supra*, 63 Cal.2d at pp. 450–451; see also *McClellan*, *supra*, 71 Cal.2d at pp. 804–806.)

This special practice of applying "the same safeguards" as are applied in the guilt phase (*People v. Stanworth*, *supra*, 71 Cal.2d at p. 840) to determining guilt of unadjudicated crimes at penalty would necessarily include juror unanimity. And in this Court's pre-*Furman* jurisprudence, there was never a suggestion that trying a fact to a jury under the reasonable-doubt standard could be divorced from its historic complement[301] of having the jury as a whole decide the issue. On the contrary, when discussing the reasonable-doubt requirement, this Court consistently and clearly contemplated its

---

[301]See *Blakely v. Washington* (2004) 542 U.S. 296, 301; *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, 477–478, 490, 496.

application by a jury deliberating in an attempt to see if it could unanimously accept the other-crimes allegations. (See *People v. Polk*, *supra*, 63 Cal.2d at pp. 450–451 ["even though at the trial on the issue of guilt *the jury* must only be convinced that it is more probable than not that the defendant committed other crimes before *it* may consider them . . . , at the trial on the issue of penalty *they* must be convinced beyond a reasonable doubt," emphasis added]; see also *People v. Phillips*, *supra*, 41 Cal. 3d 29, 82–83["the trial court's failure to instruct the jury that *it* could not consider evidence of other criminal activity under former section 190.3, subdivision (b), unless *it* found that such activity had been proven beyond a reasonable doubt"]; *People v. Robertson*, *supra*, 33 Cal.3d at p. 53–54 [accepting contention that "the trial court committed prejudicial error in failing to instruct the jury . . . that . . . *it* could not properly consider the 'other crimes' evidence as aggravating circumstances unless *it* first found that these crimes had been proven beyond a reasonable doubt," emphasis added]; *People v. Stanworth*, *supra*, 71 Cal.2d at p. 840 ["a defendant during the penalty phase of a trial is entitled to an instruction to the effect that *the jury* may consider evidence of other crimes only when the commission of such other crimes is proved beyond a reasonable doubt," emphasis added]; *id.* at p. 841 ["Instructions on how *the jury* may utilize such evidence, including an instruction that *it* may consider only those crimes proved beyond a reasonable doubt, are therefore vital," emphasis added]; *People v. Terry*, *supra*, 61 Cal.2d at p. 149, fn. 8 ["in the penalty trial the same safeguards should be accorded a defendant as those which protect him in the trial in which guilt is established. . . . [D]efendant should not be subject to *a finding of a jury* that he committed prior crimes unless his commission of such prior crimes has been proven beyond a reasonable doubt," emphasis added] (dictum).)

In the foregoing cases, even the consistent references to crimes simply being "proven beyond a reasonable doubt" reflect an understanding that the burden would be met the usual way, by convincing the entire jury. In the context of our jury system, saying that a fact is to be proven, without saying that it need be proven only to the satisfaction of the juror who intends to use it, is to say that it must be proven to the jury. Conveying the permissibility of non-unanimity would have required language like that used in the current CALJIC instruction: "Before *a juror* may consider any of such criminal acts or activity as an aggravating circumstance in this case, *a juror* must first be satisfied beyond a reasonable doubt . . . ." (CALJIC No. 8.87, emphasis added.) But this Court never used such language until it the CALJIC committee came up with an instruction that did not make the need for unanimity plain, and this Court approved it.

b. Evolution of Current Law

Originally, the CALJIC committee responded to this court's initial reasonable-doubt holding with an instruction which—like the opinions cited above—treated unanimity as understood, by a jury that already knew what it meant to prove something to it.[302]

---

[302]"Evidence of other crimes alleged to have been committed by the defendant[s] may not be considered as evidence in aggravation unless proved beyond a reasonable doubt. Reasonable doubt is defined as follows: . . . It is that state of the case which . . . leaves *the minds of the jurors* in that condition that *they* cannot say *they* feel an abiding conviction . . . ." (CALJIC No. 8.81 (3rd ed. 1970), emphasis added.) This was the same language used in the general reasonable doubt instruction, which, of course, was addressed to a jury that had to reach a unanimous verdict. (CALJIC No. 2.90 (3rd ed. 1970).)

Nothing in the other penalty instructions would have cast doubt on this interpretation in the jurors' minds. (See CALJIC Nos. 8.80, 8.82–8.83 (3rd ed. 1970).)

Without explanation, the CALJIC committee took the initiative to drop the reasonable-doubt standard entirely after the 1977 reinstatement of the death penalty.[303] When this Court reaffirmed that standard,[304] the committee evidently produced an instruction—again without explanation—that eliminated prior references to "the jurors," collectively, as the decision-makers.[305]

The new instruction was then challenged for its failure to specify a need for unanimity. This Court summarily rejected the contention, in the first death-penalty case it decided after its reconstitution following the 1986 retention

---

[303]See CALJIC Nos. 8.84–8.84.2 (4th ed. 1979).

[304]In *People v. Robertson*, *supra*, 33 Cal.3d 21, 54.

[305]The reasonable-doubt standard was reaffirmed in 1982. (*People v. Robertson*, *supra*, 33 Cal.3d 21, 54.) Appellant has been unable to locate post-*Robertson* pocket parts to the 1979 edition of CALJIC. The next version which he has been able to locate contained the following: ". . . Before you may consider any of such criminal [act[s]] [activity] as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant [_____] did in fact commit such criminal [act[s]] [activity]." (CALJIC No. 8.87 (5th ed. 1988).) The language which had formerly contemplated a group decision (see fn. 302, above) was eliminated.

In all probability, this was essentially the post-*Robertson* instruction. The defendant in *People v. Ghent* (1987) 43 Cal.3d 739 received a reasonable-doubt instruction, complained of the lack of a unanimity instruction, but did not complain of a non-unanimity instruction. (*Id.* at p. 773.) It seems likely, therefore, that the 1988 version was the same, or similar, to the version introduced in response to *Robertson*. Moreover, the Use Note and Comment in the 1988 edition cite *Robertson*, along with a 1985 case, on the need for proof beyond a reasonable doubt but do not yet mention the 1987 cases, discussed below, which authorized non-unanimity. (CALJIC No. 8.87 (5th ed. 1988), pp. 414–415.)

election. It did so as if it were writing on a clean slate and as if it were the defendant, rather than respondent and the CALJIC committee, that were presenting an innovation:

> [A unanimity] requirement would immerse the jurors in lengthy and complicated discussions of matters wholly collateral to the penalty determination which confronts them. Moreover, we see nothing improper in permitting each juror individually to decide whether uncharged criminal activity has been proven beyond a reasonable doubt and, if so, what weight that activity should be given in deciding the penalty.

(*People v. Ghent*, *supra*, 43 Cal.3d 739, 773–774.) Shortly afterwards, the Court elaborated somewhat:

> To impose a penalty of death, each juror must evaluate the evidence and then unanimously determine that the aggravating factors outweigh the mitigating factors. There is no requirement that the jury agree on which factors were used to reach the decision. It is therefore unnecessary that the entire jury find the prosecutor met his burden of proof on the "other crimes" evidence before a single juror may consider this evidence.
>
> Moreover, . . . the *Robertson* rule is statutorily based and serves a foundational purpose. Generally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding.

(*People v. Miranda* (1987) 44 Cal.3d 57, 99.) The CALJIC instruction was then reworded to affirmatively instruct the jurors that theirs was an individual decision, rather than a collective one. It did so by referring to when "a juror" may consider factor (b) aggravation, and an explicit non-unanimity instruction was added. (Compare CALJIC No. 8.87 (5th ed. 1988) with CALJIC No. 8.87 (1989 rev.) (5th ed. 1988).)

Appellant recognizes that this Court has often reaffirmed the holdings of *Ghent* and *Miranda*. (See, e.g., *People v. Brown* (2004) 33 Cal.4th 382, 402.) Their reasoning addresses neither the history of the issue nor the

contentions raised in the discussion that follows, however, and the Court should reconsider whether the innovation initiated by the CALJIC drafters' was appropriate, given the ways that this "special class of evidence—evidence of other crimes" (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54, fn. 18) is different from all other evidence in aggravation.

2. Other-crimes Allegations Trigger Normal Criminal Fact-finding Before Normative Weighing Begins

As it had two decades earlier, this Court explicitly recognized the uniquely weighty consequences of "true" findings on unadjudicated-crimes accusations when it reaffirmed the requirement that they be proved beyond a reasonable doubt under the new death-penalty statute. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54.) It also implicitly recognized the unique nature of the fact-finding involved, since most other factors in aggravation are not even true-or-false questions of fact to which, in the Court's view, a standard of proof could apply. (See, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43, 79; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777, 779.)

Thus, other-crimes allegations created a trial-within-a-trial in appellant's case, as they usually do. The truth of some of these allegations was not necessarily proved to the requisite degree of certainty for all jurors. There were real questions whether the escape preparations amounted to an actual interrupted attempt (since they did not[306]), whether appellant battered Rodney Medeiros (who repeatedly indicated uncertainty about what he remembered[307] and who believed that appellant hit him only because of appellant's position

---

[306]See Argument VI.B and C, pp. 347–350, above.

[307]See generally RT 50: 7375–7389.

in the group that went after his candy[308]), and whether the acts of harassment alleged in the vague, uncorroborated testimony of Tyreid Hodges all happened and were perpetrated by appellant.[309] Moreover, as explained in the section on prejudice, below, had the jurors been considering which acts were proved to be crimes of violence, they would have faced very serious questions regarding the shank possessions, the escape preparations, and most of the Hodges incidents (like flooding his cell or sliding a hairbrush rapidly under a cell door).

These are all typical of the kinds of questions that, in every other criminal context, are resolved by unanimous juries. Indeed, had the authorities elected to prosecute the other alleged crimes when they were committed, the attempt to prove them would have taken place in an ordinary trial, where a unanimous verdict would have been required.[310] Thus, the questions facing, or that should have faced, appellant's jury are squarely on the fact-based end of the fact-determination/normative-judgment continuum. No normative weighing begins until guilt or innocence of the allegations is decided. Therefore nothing in the nature of the penalty-determination process is inconsistent with deciding the truth of an other-crime charge in the manner in which it would have been decided if tried earlier and separately. Just as—even

---

[308]RT 50: 7384.

[309]See RT 51: 7501–7516 and p. 60, above

[310]Factor (b) represents a judgment that the lack of previous adjudication of other crimes should not prevent their use at penalty, if they were violent. (See generally *People v. Boyd* (1985) 38 Cal.3d 762, 774.) However, nothing in its text or history shows an intent to make the adjudication dramatically easier, contrary to this Court's historic practice of employing normal guilt-trial safeguards in the penalty-phase use of such evidence.

in a process where every juror does his or her own weighing of multiple factors—jurors can be told not to use a factor (b) allegation at all if not proven beyond a reasonable doubt, they can be told not to use any not proven to the satisfaction of all jurors.

3. The Unreliability of Single-juror Fact-finding and its Elimination of a Need To Deliberate with Other Jurors Is Unacceptable with Evidence Uniquely Likely To Affect a Penalty Verdict

Given the considerable weight of such other-crimes allegations if found true, it is unacceptable to jettison the protection of unanimity, which not only requires an entire jury to be convinced but which necessitates the interactive deliberations needed to produce that result, deliberations which produce much higher-quality decision-making.

a. Unanimity and the Deliberative Process

Even with unanimity requirements intact, in determining the truth of charges of crime,

> progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts.

(*Ballew v. Georgia* (1978) 435 U.S. 223, 232.) Clearly, with single individuals deciding if guilt of violent crimes has been proved, with no need to even discuss the matter with colleagues, the decline will be precipitous. (See *id.* at pp. 231–239 [canvassing empirical evidence that group decision-making is more accurate—particularly in avoiding convicting the innocent—than individual decision-making and that the deliberations required for a group to make a decision help overcome individual biases]; *McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.) ["Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs

in the jury room "]; *Brown v. Louisiana* (1980) 447 U.S. 323, 333; *Allen v. United States* (1896) 164 U.S. 492, 501.)

Ironically, this Court recognized the capacity of the unanimity requirement to produce the exchange of viewpoints involved in a more complete deliberative process when it decided that unanimity was not required. However, it focused on the downside of deliberating: upholding the unanimity requirement "would immerse the jurors in lengthy and complicated discussions of matters wholly collateral to the penalty determination which confronts them." (*People v. Ghent, supra*, 43 Cal.3d 739, 773–774.) Parenthetically, the characterization of whether guilt of other-offenses allegations was proved as "wholly collateral" was aberrational. This view—the linchpin of the Court's rejection of a need for unanimity—was out of step with this Court's otherwise consistent acknowledgment of the likely "overriding importance . . . to the jury's life-or-death determination"[311] and "the particularly damaging impact" which other-crimes evidence may have "on the jury's determination whether the defendant should be executed."[312] (See also *Johnson v. Mississippi, supra*, 486 U.S. 578, 586 [conviction of a prior felony can be "decisive" on penalty choice].) Certainly appellant's prosecutor, who told appellant's jury that the other-offenses evidence showed that appellant's execution was "necessary," did not think that the issue was "collateral." (See RT 48: 7271; 54: 8026, 8030.)

---

[311]E.g., *People v. Anderson* (2001) 25 Cal.4th 543, 589; *People v. Miranda, supra*, 44 Cal.3d 57, 98; *People v. Robertson, supra*, 33 Cal.3d 21, 54.

[312]E.g. *People v. Heishman* (1988) 45 Cal.3d 147, 181; *People v. McClellan, supra*, 71 Cal.2d 793, 805; *People v. Polk, supra*, 63 Cal.2d 443, 450; *People v. Varnum* (1967) 66 Cal.2d 808, 814.

As noted above, soon after *Ghent*, this Court added that the (unacknowledged) non-unanimity innovation was also appropriate because whether guilt of a factor (b) crime was proved was "foundational," and "unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding." (*People v. Miranda, supra*, 44 Cal.3d 57, 99.) This assertion was as puzzling as the claim that the truth or falsity of factor (b) allegations is collateral. A jury deciding guilt of a criminal charge cannot achieve unanimity on a final verdict without agreement on the truth of each *element* of the offense. (See *Harris v. United States* (2002)536 U.S. 545, 549; *State v. Johnson* (Wis. 2001) 627 N.W.2d 455, 459.) Reliance on a supposed general principle that juries do not have to agree on answers to the constituent questions on which their verdicts rests was misplaced. There is no such principle; at best there are exceptions to the normal requirement of unanimity, such as when jurors need only agree that a penal statute was violated but not as to the "theory" under which the violation occurred. (See, e.g., *People v. Benavides* (2005) 35 Cal. 4th 69, 101.)

The rule requiring the use of the reasonable-doubt standard for factor (b) allegations is supposed to ensure that "the People may not obtain the death penalty on the basis of uncharged criminal activity proved by a standard less stringent than would be required to convict the defendant of the uncharged crime." (*People v. Rodriguez* (1986) 42 Cal. 3d 730, 791–792.) The introduction of single-juror fact-finding after those words were written undermined that principle: one juror's finding of proof beyond a reasonable doubt is far easier to obtain than such a finding established in deliberations by 12 people. The existence, therefore, of the same formal "standard" cannot produce anywhere near an equally stringent and reliable test of a prosecutorial charge, when it need be proved only to one or another juror's satisfaction.

Finally, single-juror beyond-a-reasonable-doubt fact-finding is oxymoronic. If one juror was convinced beyond a reasonable doubt that the escape preparations attributed to appellant constituted an attempt, and eleven were unconvinced, it would be impossible to claim that the prosecution met its burden without also claiming that 11 of 12 jurors were being unreasonable. "[T]he rule requiring unanimous verdicts developed in the common law as a *means* to ensure that the government had met its constitutional duty to prove the defendant's guilt beyond a reasonable doubt." (*Commonwealth v. Hunter* (Mass. 1998) 695 N.E.2d 653, 658, emphasis added.) The means cannot be abandoned without losing the result.

b. Anomalous Nature of Non-Unanimity Rule

Appellant was entitled to a unanimous verdict on the various allegations that a principal was armed in the commission of each offense, each of which could add only a year to his determinate sentence. (§§ 1170.1, subd. (e); 12022, subd. (a)(1).) Similarly, as noted above, if whether he committed attempted escape and assaultive crimes against other inmates were being decided in the context of whether to convict him of such offenses and expose him to a term of imprisonment for them, the need for a unanimous verdict would have been clear. Yet the safeguards were drastically diminished where the issue may well have been whether evidence of such offenses provided the final impetus for a death verdict by convincing the jury that, as the prosecutor argued, death was not only "just" but "necessary" (RT 54: 8026, 8030). This differential is unconstitutional. (See *Monge v. California* (1998) 524 U.S. 721, 732 ["we have recognized an acute need for reliability in capital sentencing proceedings"]; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994 [lead opn. of Scalia, J.] ["we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides"]; *Myers v. Ylst* (9th

Cir. 1990) 897 F.2d 417, 421 [federal equal protection clause bars disparate extension of jury trial rights to similarly-situated defendants].) Indeed, the current state of the law produces a totally paradoxical situation. Had the prosecution alleged the incidents as criminal counts in the information but been unable to satisfactorily prove them to the jury, the trial court could not have used them in computing the determinate sentence, but individual jurors could still have relied on them to sentence appellant to death.

This Court has rejected this argument in its equal-protection form by pointing out that other-crimes evidence in the penalty phase of a capital trial serves a different purpose than enhancement allegations. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 136.) Ending the analysis there, as *Bacigalupo* did, avoids confronting the sheer irrationality of providing far greater safeguards in contexts where the stakes are much lower. It also omits acknowledgment that the state, in providing those safeguards where it does, implicitly recognizes how unanimity is required to ensure reliability. Appellant recognizes, by that conceptualizing the penalty-determination process as one involving 12 jurors who need to agree only on the outcome, this Court provides a formal justification for omitting the unanimity requirement, a justification inapplicable in the enhancement context. But it is wrong to stop there. The Court must also consider whether there is a need for strict adherence to such a conceptualization, a need that outweighs introducing the unreliability involved in determining other-crimes guilt juror by juror. This is an unreliability that this Court, following constitutional dictates, rejects in every *less* serious context. And there is no need to accept it here: California's overall scheme for deciding penalty would not change or be harmed if jurors were told that they were (individually) barred from considering the other-

crimes evidence in their weighing process unless the jury unanimously agreed on guilt of such crimes.[313]

Well before the United States Supreme Court developed its modern death-penalty jurisprudence, this Court determined that the procedural safeguards applicable to a trial on guilt of a criminal offense should apply to attempts to show such guilt of unadjudicated offenses during the penalty phase of a capital trial. (*People v. Terry*, *supra*, 61 Cal.2d 137, 149, fn. 8.) This was the basis for imposing the reasonable-doubt standard and numerous other protections that are not required in other sentencing contexts or with other uses of other-crimes evidence. (*People v. Robertson*, *supra*, 33 Cal.3d 21, 54 [reasonable doubt]; *People v. Purvis* (1961) 56 Cal.2d 93, 97–98 [hearsay rule]; *People v. Hamilton*, *supra*, 60 Cal.2d 105, 129–131 [corpus delicti rule]; *People v. Varnum*, *supra*, 66 Cal.2d 808, 815 [accomplice corroboration].) To impose all these and make an exception for unanimity, a bedrock due process requirement—so that evidence of other crimes can

---

[313]*Bacigalupo* also addressed a defense contention that Eighth-Amendment reliability requires unanimity on the truth of an other-offense charge before a juror may consider it in aggravation. The Court disposed of the claim as follows:

> Although we did not mention the Eighth Amendment when we discussed this instruction in *Ghent*[, *supra*, 43 Cal.3d at p. 773], we impliedly rejected the argument defendant makes here when we concluded that the instruction was sufficient "under existing law."

(*People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 135.) It is illogical to assert that use of broad language in rejecting one challenge is an implicit rejection of all future challenges, even those not yet conceived of. What makes sense is, rather, the settled rule that "an appellate court's opinion is not authority for propositions the court did not consider or on questions it never decided." (*People v. Braxton* (2004) 34 Cal.4th 798, 819.) This Court should consider the argument made above on its merits.

produce, for example, three votes for death even if nine people were unconvinced of either the truth of the allegations or that violence was involved—is irrational and deprives appellant and society of the reliability, due process, and equal protection to which both are entitled. (U.S. Const, 8th and 14th Amends.; Cal. Const., art. 1, §§ 7, 15, 17.)

4. The Sixth Amendment Requires Unanimity Prior to Use of Factor (b) Evidence, and State Precedent to the Contrary Should Be Reconsidered

Failing to require jury unanimity also violates the federal jury-trial right itself, as the United State Supreme Court's decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, and *Ring v. Arizona*, *supra*, make clear. *Ring* concludes:

> 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 [as in *Apprendi*], but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.

(*Ring*, *supra*, 536 U.S. at p. 609; see also *id.* at p. 610 (conc. opn. of Scalia, J.) [characterizing the holding as that "a unanimous jury" must find aggravating factors beyond a reasonable doubt].) The high court's pronouncements clearly establish the need for typical collective jury fact-finding, not an innovative divorce of the jury-trial right from the traditional functioning of a jury.[314] Thus, the Court discussed

---

[314]In non-capital cases, departures to the point of allowing a conviction by a 9-3 vote have been permitted. (*Johnson v. Louisiana* (1972) 406 U.S. 356.) But there has never been a suggestion that one juror can fulfil the functions of determining the factual matters that must be submitted to a jury. (Cf. *Burch v. Louisiana* (1979) 441 U.S. 130, 137 [regarding minimal jury-size (continued...)

> the rule we expressed in *Apprendi* . . . : "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence[, one of which is] that the "truth of every accusation" against a defendant "should afterwards be confirmed *by the unanimous suffrage of twelve of his equals* and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) . . . .

Blakely v. Washington, supra, 542 U.S. 296, 301, emphasis added.)

In *People v. Prieto* (2003) 30 Cal.4th 226, this Court rejected a claim that *Ring* required unanimity on the force/violence aspect of other-offenses aggravation. In doing so, the Court cited its more general discussion of why it saw *Ring* as inapplicable to California penalty-phase deliberations. (*Id.* at p. 265, citing discussion at pp. 262–263.) The Arizona scheme considered in *Ring* required a factual finding of an aggravating factor's existence before a death sentence was authorized, making it effectively an element of a greater offense. This Court held that in California death is already the authorized maximum once a special circumstance has been found. An aggravating factor is simply among the considerations weighed by the sentencer, rather than a single determinant of the sentence. (*Id.* at pp. 262–263.)

It is true that Arizona's scheme was somewhat different from California's. Most of the Arizona factors in aggravation were what are considered special circumstances here. (*Ring v. Arizona, supra*, 536 U.S. at

---

[314](...continued)
requirements, "reducing a jury to five persons . . . raised sufficiently substantial doubts as to the fairness of the proceeding and proper functioning of the jury to warrant drawing the line at six"].)

p. 592, fn. 1.) But in Arizona, too, death was formally the authorized statutory maximum after the guilt-phase verdict. (*Id.* at p. 592 ["The State's first-degree murder statute prescribes that the offense 'is punishable by death or life imprisonment'"].) And *Prieto's* reasoning fails to consider that, in California as in Arizona, that authorization is not enough for actual imposition of a death sentence. Here, we have the statutory command that a death sentence is to be imposed only "if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances." (§ 190.3.) Such a finding is impossible without a finding of the existence of at least one aggravating circumstance. Therefore, until such an aggravating circumstance has been found, a death sentence is not yet truly authorized, any more than it was after a first-degree murder verdict in Arizona. The question is whether all findings of fact necessary to reach the point of authorizing a discretionary penalty decision concerning a defendant have been made, or whether "the factfinding necessary to put him to death" remains to be completed. (*Ring*, *supra*, at p. 609.)

The opinion in *Prieto* boils down to an attempt to resurrect a state's power to determine the extent of jury-trial rights based on whether it classifies a fact as an element of the offense or a "sentencing factor." *Apprendi v. New Jersey*, rejected the existence of any such power, in a holding confirmed in *Ring*. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 602 [discussing *Apprendi*]; *id.* at pp. 604–605.) "Put simply, if the existence of any fact . . . increases the maximum punishment that may be imposed on a defendant, that fact—no matter how the State labels it—constitutes an element, and must be found by a jury beyond a reasonable doubt." (*Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 112 (plur. opn.).) Arizona tried to justify its scheme precisely as this Court did California's in *Prieto*. But the differences between Arizona's and

California's law do not prevent the answer from being the same: the formally death-eligible defendant cannot be sentenced to death without an additional finding of fact regarding the existence of aggravation, and the full panoply of rights associated with trial by jury then applies. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 602.)

It appears that this Court finds such reasoning unpersuasive with vaguer, more normative "facts," such as whether the circumstances of the crime show an aggravated offense. However, *Ring* cannot be distinguished on that basis when it comes to the determination of whether specific crimes of violence have been proven, which is the prototypical yes-or-no factual question submitted to criminal juries. As noted previously, *Prieto* handled the unanimity-re-other-crimes issue by a simple reference to its general discussion of *Ring's* inapplicability to California's sentencing structure. (30 Cal.4th at p. 265.) The opinion did not consider how other-crimes evidence is distinctive, in the classic nature of the facts to be proven. Nor did it discuss the other way which this Court has long recognized such evidence as *sui generis* among aggravating circumstances in California, its distinctive pro-death force. (See *People v. Polk*, *supra*, 63 Cal.2d 443, 450–451.) Assuming the correctness of the Court's general view that most of California's sentencing factors are not the type of facts to which the jury-trial right applies under *Ring* and *Apprendi*, facts alleged under factor (b) are different .

5. The Unanimity Requirement Should Be Restored

It is anomalous to provide one of the two primary protections against grave error which a jury trial gives criminal defendants, but not its historic complement. As explained above, this is not what this Court had in mind in 1965 when it established the high burden of proof. (See *People v. Polk*, *supra*, 63 Cal.2d at pp. 450–451; *People v. Stanworth*, *supra*, 71 Cal.2d 820, 840,

841; *People v. Terry*, *supra*, 61 Cal.2d 137, 149, fn. 8.) In any event, since *Ring v. Arizona*, it has been clear that the Sixth Amendment prohibits a state from empowering a lone juror to find a basis for a death sentence in allegations about other crimes, allegations that fellow jurors may have rejected.

Moreover, to apply the requirement to an enhancement finding that adds a year to a prison term, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763–764; accord, *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 586) would, by its inequity, violate the equal-protection clause and, by its irrationality, violate both the due-process and cruel-and-unusual-punishment provisions of the state and federal constitutions. It also fails to provide the reliability required by the Eighth Amendment.

6. The Error Must Be Deemed To Have Affected the Jury's Consideration of the Factor (b) Allegations

As shown above, the error violated the Sixth, Eighth, and Fourteenth Amendments, so *Chapman* would apply to the question of whether the error could have contributed to the penalty verdicts if there were whole-jury findings that could be upheld. However, there were no such findings. This Court can hypothesize whether an error may have contributed to a jury's actual decision, but it cannot create a jury finding by hypothesizing what a jury would have decided if it had been asked to confront the question. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279–281; see also *Burch v. Louisiana*, *supra*, 441 U.S. 130, 140 (conc. opn. of Brennan, J.) [understanding reversal for trial by non-unanimous six-person jury to require new trial]; *State v. Wrestle, Inc.* (La. 1979) 371 So.2d 1165 [*Burch* on remand: no attempt to consider harmlessness]; *Ballew v. Georgia*, *supra*, 435 U.S. 223, 246 (conc. opn. of

Brennan, J.) [understanding reversal for trial by fewer than six jurors to require new trial]; *Ballew v. State* (Ga. App. 1978) 145 Ga.App. 829 [so holding on remand; no attempt to consider harmlessness].) Alternatively, the state of the evidence would have permitted a juror to doubt the force-or-violence component in most of the alleged factor (b) allegations[315] and to doubt appellant's guilt of attempted escape,[316] battery of Rodney Madeiros,[317]and many of the Hodges harassment incidents.[318] It is not only reasonably possible, but likely, that some or all of these charges would have failed to surmount a unanimity barrier to their availability for weighing in the jurors' penalty scales.

F. The Instruction, Like the Guilt-Phase Reasonable-Doubt Definition, Failed To Tell the Jury the Degree of Certainty Required

After telling the jury that other-crimes evidence could be treated as an aggravating circumstance only if proved beyond a reasonable doubt, as required by, e.g., *People v. Robertson*, *supra*, 33 Cal.3d 21, the trial court explained,

> Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of the

---

[315]See pages 473–476, above.

[316]See Argument VI, pp. 347–350, above.

[317]See page 497, above.

[318]The child molester who identified himself as "Reverend" Hodges testified that he was harassed by all the inmates. Much of his testimony pointing to appellant was vague; some involved situations where Hodges could only surmise who his assailant was, such as when fluid was squirted towards his jump suit from a cell somewhere behind him; and all of it was uncorroborated. (See RT 51: 7501–7516 and summary at p. 60, above.)

> evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(RT 54: 8065; CT 9: 1991.) Like the guilt-phase language on the same topic, the instruction stated that proof beyond a reasonable doubt is required, then emphasized that reasonable doubt is not just any possible doubt. While the traditional instruction was careful to avoid a tilt to the prosecution by then circling back to the degree of certainty required, a recent revision never quite reached the issue. To summarize the argument fully briefed at pp. 543–546, below, concerning the guilt-phase reasonable-doubt instruction, the concluding portion of the instruction tells jurors that they must be convinced (i.e., have a conviction) of the truth of the charge and that the state of being convinced must abide. It does not, however, tell them how convinced they must be. This portion of the instruction therefore prevented it from fulfilling its intended function of assuring that other-crimes evidence, known to be likely to "have a particularly damaging impact on the jury's determination whether the defendant should be executed" (*Robertson*, *supra*, 33 Cal.3d at p. 54, quoting *People v. Polk*, *supra*, 63 Cal.2d at p. 450), would be allowed that effect only to the extent that other violent crimes were proved beyond a reasonable doubt. Moreover, even if the instruction were valid, the retroactive application of its revision to appellant, whose offenses were committed before the revision, would violate due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15; and cases discussed at p. 468, above.)

This Court has questioned whether harmless-error analysis based on strength of the evidence of other crimes can apply to failure to give a reasonable-doubt instruction regarding other-crimes evidence, given United States Supreme Court authority that an infirm instruction on reasonable doubt

can never be harmless in the guilt phase. (*People v. Phillips* (1985) 41 Cal.3d 29, 84 & fn. 34.) The reason for the high court's conclusion in the guilt context is that there is no valid jury verdict (of guilt proven beyond a reasonable doubt) as to which a court can consider the question of whether it was unaffected by the error. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 279–281.) That reasoning applies at the penalty phase, as well, as this Court appeared to recognize in *Phillips*.

Again, however, the error's being structural only applies to harmlessness at the level of its impact on the jurors' findings of factor (b) aggravation. Respondent would still be free to try to show that sustaining the allegations of violent prior crimes could have not have contributed to the death verdict. As the next section demonstrates, such a showing cannot be made.

G. Respondent Cannot Show That No Jurors' Decisions Could Have Been Affected by Unauthorized Use or Mischaracterization of the Other-Crimes Evidence

It has already been shown that each error in the factor (b) instruction is federal constitutional error. As such, each compels reversal unless misinstructed jurors' use of the other-crimes evidence could not have "possibly influenced [them] adversely." (*Chapman v. California*, *supra*, 386 U.S. 18, 23.). If any error were not subject to the *Chapman* test, it would be subject to the equivalent reasonable-possibility standard of *People v. Brown* (1988) 46 Cal.3d 432, 447–448. (See also *People v. Ashmus*, *supra*, 54 Cal.3d 932, 965.) As appellant has explained in preceding arguments, the penalty verdict was not

a foregone conclusion.[319] As appellant has also explained,[320] because of the unknowability of jurors' subjective weighing processes and other limits of the appellate process, a finding that error could not have contributed to a juror's decision generally requires the error to have been trivial or to have produced results that were either undeniably cumulative or, conversely, undeniably undone by some other action. (*Chapman v. California*, *supra*, 386 U.S. 18, 24; *People v. Brown*, *supra*, 46 Cal.3d 432, 448; *People v. Hamilton* (1963) 60 Cal.2d 105, 136–137; and other cases cited at pp. 82 et seq., above)

Far from being a trivial matter, of course, other-crimes evidence has traditionally been recognized as a powerful influence on juries. (E.g., *People v. Robertson*, *supra*, 33 Cal.3d 21, 54, quoting *People v. Polk*, *supra*, 63 Cal.2d 443, 450.)

Moreover, the United States Supreme Court has found emphasis in a prosecutor's argument alone enough to necessitate rejecting the possibility of penalty-phase harmlessness. (*Clemons v. Mississippi*, *supra*, 494 U.S. 738, 753–754; *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 586, 590 & fn. 8; see also *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *People v. Roder* (1983) 33 Cal. 3d 491, 505; cf. *People v. Hinton* (2006) 37 Cal. 4th 839, 868.) Here, in his penalty-phase opening statement, the prosecutor argued that the other-crimes evidence showed appellant's future dangerousness, then devoted the final four pages of his penalty summation to it. (RT 48: 7268–7271; 54: 8026–8030.) The summation was recapitulated in detail at pp. 409–410, above, in appellant's argument that it was prosecutorial error to argue future

---

[319]See the summary beginning on p. 281, above, and the detailed treatment at pp. 107–128, above.

[320]Pages 82 et seq., above.

dangerousness as a reason to impose death. In brief, the prosecutor stated that there were but two kinds of aggravation in the case: the circumstances of the crimes of which the defendant had been convicted, and the other-crimes evidence. (RT 54: 8005.) He introduced his discussion of the latter by reminding the jurors that in jury selection they had talked about the possibility of having to "decide what is the just and necessary verdict." (RT 54: 8026.) "Just," he added, "is when the penalty, the punishment fits the crime," and that was what he had just finished arguing. (*Ibid.*) Continuing, he used the other-crimes evidence as the clincher:

> And necessary. Necessary is what needs to be done. And what needs to be done is that Mr. Romero needs to be executed.
>
> Romero made your job, your verdict, very clear. I'm not saying easy, but clear. He has shown in jail since his arrest that he is not done hurting people, that he still wants to kill and rob and terrorize and hurt.

(*Ibid.*) He reminded the jury of each unadjudicated incident; commented, "You don't need a crystal ball to know what to expect from Mr. Romero in the future" (RT 54: 8028); labeled "LWOP . . . [as] an American Express card for violence" (RT 54: 8029); argued that appellant would encounter and hurt many other people in prison and that the purported escape attempt showed that he will try to get out of custody, at the risk of others' lives (RT 54: 8029–8030); and concluded that the other-offenses evidence showed that "[a] future victim will pay the price for the mercy that you would extend to the defendant" (RT 54: 8030). Thus ended the extremely effective one-two punch described previously. First the prosecutor emphasized the gravity of the crimes, to show that death was "just." Then he used the other-crimes evidence to argue that death was "necessary": without it the jury would be responsible for appellant's next few decades of victims.

This use of such evidence is one of the reasons that this Court long ago recognized its "particularly damaging impact" on a jury's penalty deliberations. (*People v. Robertson, supra*, 33 Cal.3d at p. 54; *People v. Polk, supra*, 53 Cal.2d at p. 450.) Similarly, the United States Supreme Court has acknowledged that whether "the offender [is] a danger to the community . . . [is] nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point," and even where future dangerousness is not a statutory aggravator. (*Deck v. Missouri* (2005) 544 U.S. 622, 633.) For that reason, the high court has also held that, where "the prosecutor . . . planned to use details of the prior crime as powerful evidence that [defendant] was a dangerous man for whom the death penalty would be both appropriate punishment and a necessary means of incapacitation," dealing with the allegation would have been of "high importance to" competent defense counsel. (*Rompilla v. Beard* (2005) 545 U.S. 374, __ 162 L. Ed. 2d 360, 380; 125 S.Ct. 2456, 2470] (conc. opn. of O'Connor, J.) [describing court's holding].) Finally, appellant's prosecutor himself opined, outside the presence of the jury, that the Thibedeau assault alone "is a very significant item. This is—in the great scheme of things . . . certainly going to be relevant in determining the penalty. I don't think this is insignificant." (RT 51: 7481.)

Here, the prosecutor's use of other-crimes evidence was exceedingly powerful. Even if it was legitimate under current law,[321] the faulty pattern instruction gave him a free ride in proving its evidentiary foundation. It did so by removing real questions as to whether many of the incidents should be considered in aggravation at all, by upgrading the seriousness of most of

---

[321]But see Argument IX, above, regarding the non-statutory aggravator of future dangerousness.

them,[322] by lowering the standard of proof regarding them, and by creating the sole situation in our justice system where a single juror is entrusted to determine if the defendant committed a crime and to determine a critical fact regarding the crime's character. Under section 190.3 and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the jury should have been told to determine those questions and given the proper standards for doing so. Had it been properly instructed, it presumably would have sifted the evidence on each separate incident—as it did earlier when it found appellant not guilty on Counts XIII and XIV—and perhaps found itself with as little as two or three, relatively minor, uncharged crimes of force or violence to use as the predicates for the prosecutor's theory. There was a reasonable possibility that the jurors' normative weighing of the evidence before them was affected by erroneously considering what the prosecutor himself obviously considered to be some of the most powerful evidence in his arsenal. This Court cannot exclude any reasonable doubts as to whether the outcome was so affected. The death judgment must therefore be reversed.

//

//

---

[322]Regarding the effect of authoritative characterizations of the seriousness of a defendant's conduct, see *Sanders v. Woodford* (9th Cir. 2004) 373 F.3d 1054, 1067, reversed on another ground sub nom. *Brown v. Sanders* (2006) __ U.S. __ [163 L.Ed. 2d 723; 126 S. Ct. 884]; see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 753; *Zant v. Stephens* (1983) 462 U.S. 862, 888.)

XIV

THE TRIAL COURT SHOULD NOT HAVE PERMITTED EVIDENCE OF THE ESCAPE PREPARATIONS AND SHANK POSSESSIONS TO BE INTRODUCED AND CONSIDERED IN AGGRAVATION, BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT THEY WERE CRIMES OF FORCE OR VIOLENCE

Section 190.3, factor (b), permits unadjudicated prior-misconduct evidence to be weighed in aggravation only if it involves a crime in which the defendant used or threatened to use force or violence. Moreover, section 190.3 also provides, "[N]o evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." The provision means what it says, and trial courts are to exclude evidence of unadjudicated misconduct which did not involve force, violence, or a threat to use one or the other. (*People v. Boyd* (1985) 38 Cal.3d 762, 776–778.)

In part D of the preceding contention, appellant showed that, to qualify as a threat "to use" force or violence, the conduct in question must involve a communication, express or implied, to a recipient. There was no evidence that any of the four shank possessions or the escape preparations involved such a threat. At most they involved a "threat of" violence, in the sense of creating a risk of future violence. None of these victimless incidents, therefore, qualified as crimes of violence, and evidence of them should have been excluded altogether.

Appellant did not object to the testimony on this basis. Objection, however, would have been futile, given this Court's extension of liability, beyond the statutory language, to actions that can present a risk "of" violence. (See, e.g., *People v. Tuilaepa* (1992) 4 Cal. 4th 569, 589 ["It is settled that a

defendant's knowing possession of a potentially dangerous weapon in custody is admissible under factor (b)"]; *People v. Mason* (1991) 52 Cal. 3d 909, 955–956 [escape attempt admissible where carrying the plan to its conclusion would have involved confrontation with a guard]; *People v. Boyde* (1988) 46 Cal. 3d 212, 249–250 [same].) Indeed, as to the shank possessions, defense counsel stated that he was not claiming that they did not qualify as aggravation, "given the state of the law." (RT 48: 7206.)

Admission of the testimony, besides violating the statute, also violated appellant's right to a fair trial under due process, his due process right not to have state-law protections arbitrarily withdrawn, and his rights to a fair, reliable, and non-arbitrary penalty determination. (U.S. Const., Amends. 8 & 14; *Hewitt v. Helms* (1983) 459 U.S. 460, 471–472; *California v. Ramos* (1983) 463 U.S. 992, 999; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *People v. Horton* (1995) 11 Cal.4th 1068, 1134; *Vansickel v. White* (9th Cir. 1999) 166 F.3d 953, 957; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.)

Appellant fully analyzed the prejudicial effect of permitting jury consideration of these incidents in section G of the preceding argument, in showing the effect of instructional errors which left the jury unable to determine that they did not qualify as aggravation. He incorporates that prejudice analysis here. Beyond that, it is important to recognize that these were five of the six incidents involving prison-made weapons. Without them, the only factor (b) incident coming even close to supporting the specter of serious prison violence, which the prosecutor invoked so powerfully as the

reason why death was "necessary,"[323] would have been the assault on Olen Thibedeau. But that assault, as noted previously, was ineffective, perhaps purposely so (see p. 125, above), and the evidence was even equivocal on whether the channel-changer's toothbrush-handle tip was sharpened or just broken off. (RT 50: 7431, 7453, 7459.) Under either the standard for federal constitutional error or the equivalent California standard for state-law error affecting penalty, it cannot be said that no juror was affected by being supplied a far stronger factual basis for the prosecutor's portrayal of appellant as armed and dangerous in prison, such that "A future victim will pay the price for the mercy that you would extend to the defendant." (RT 54: 8030.) The death judgment must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

//

//

[323]See RT 54: 8026–8030.

XV

THE PROSECUTION RECEIVED AN ILLEGITIMATE ADVANTAGE BY FILING DUPLICATIVE MULTIPLE-MURDER ALLEGATIONS, AND IT IS TIME FOR THIS COURT TO PUT A STOP TO THE PRACTICE

A. Prosecutorial Over-Charging of the Multiple-Murder Special Circumstance Led to its Being Repeated 36 Times to Appellant's Jury

In a case where a multiple-murder special circumstance may apply, it is improper to allege it more than once. (*People v. Harris* (1984) 36 Cal. 3d 36, 62, 67.) "[S]such duplicative use of multiple-murder special circumstances 'artificially inflates the seriousness of the defendant's conduct.'" (*People v. Danks* (2004) 32 Cal. 4th 269, 315.) This often-breached rule was violated here, and in a more significant way than usual.

Typically, a multiple-murder allegation simply recites that the defendant has been convicted of more than one offense of murder. (See, e.g., *People v. Turner* (2004) 34 Cal. 4th 406, 423.) Here, however, Count I of the amended information charged appellant with the murder of Joey Mans and alleged three special circumstances: (1) robbery-murder, (2) appellant's also having murdered Timothy Jones, and (3) his also having murdered Jose Aragon. Count II charged the murder of Timothy Jones and alleged three special circumstances, including the murders of Joey Mans and Jose Aragon. Count III charged the murder of Jose Aragon and alleged three special circumstances, including the murders of Joey Mans and Timothy Jones. (CT 4: 821–824.) There were, therefore, six multiple-murder allegations. Moreover, given the form of these allegations, it was repeated three times that appellant was charged with murdering each of the three victims. The trial court read a slightly edited version of this document to the jury when it pre-instructed it. This included the duplicative language. (RT 31: 4799–4801.)

It is evidently the practice in Riverside County to give the jury a "charging instruction" at the close of the case (see RT 6875; 46: 7077, 7095), so the duplicative—or, rather, triplicative—allegations were next repeated then. (RT 46: 7096–7099.) Following that, the court read all the verdict forms to the jury. These repeated the allegations yet again. In this iteration, they were doubled after being multiplied by six, because each allegation was fully stated in the form that it was true and restated in the form reflecting a not-true finding. (RT 46: 7116–7120.) For each of the three murder counts, the jury had to go over, and return, a signed verdict form stating guilt of the murder and two more signed forms stating the truth of the allegations of committing the other two murders, each specified by their victim, for a total of nine verdict forms regarding the killings. (CT 8: 1786, 1788, 1789, 1791, 1793, 1794,1796, 1798, 1799.) The clerk then read each of these verdicts aloud in open court. (RT 47: 7149–7153.) This was, then, the sixth time that the jurors were exposed to the entire series of allegations.

Fortunately, the standard introductory CALJIC instruction for the penalty-phase only states in general terms that one or more special-circumstances were found true, or the drumbeat of murder and multiple-murder findings would undoubtedly have been repeated yet again. (See CT 9: 1964 [CALJIC No. 8.84].) As it was, the jury was exposed to 36 repetitions (6 allegations times 6 readings or other exposures) of appellant's having been guilty of multiple murders. Through these and the 18 repetitions of the murder allegations themselves (3 victims times 6), the jury received a total of 54 official reminders of his having committed one or another of the three murders. It should also be noted that, since each count of murder had two multiple-murder special circumstances attached to it, each murder was separately labeled aggravated by virtue of the existence of the other two.

B. In the Extreme Form Which It Reached Here, the Error Was Prejudicial, and in Any Event the Court Should Emphasize Its Impact in Considering the Cumulative-Prejudice Claim

It may be too late in the day to tell this Court that, under its precedents, appellant is entitled to relief on the over-charging basis alone, although he respectfully submits that he should be. The Court has stated numerous times that the practice of duplicate charging of multiple-murder special circumstances is error, but the problem has continued to come up,[324] apparently because the Court has made it plain that it will hold such error harmless.[325] Appellant also acknowledges that the United States Supreme Court has held that, in general, when the jury is permitted to find an invalid special circumstance, and special circumstances are weighed in aggravation, as they are in California, the harmlessness inquiry may be begun—and often ended—by considering whether the same facts that underlay the invalid factor were properly before the jury in connection with another special circumstance.

---

[324]See, e.g., *People v. Avila* (2006) 38 Cal. 4th 491, 504; *People v. Vieira* (2005) 35 Cal. 4th 264, 273; *In re Hamilton* (1999) 20 Cal.4th 273, 279; *People v. Guzman* (2005) 2005 Cal. App. Unpub. Lexis 1669, *1–*2; *People v. Shahidzadeh* (2005) 2005 Cal. App. Unpub. Lexis 619, *11; *People v. Torres* (2003) 2003 Cal. App. Unpub. Lexis 2557, *16.

The last three opinions are unpublished, but they are cited "for reasons other than reliance upon" their legal holdings. (*Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 443, fn. 2; see also *In re I.G.* (2005) 133 Cal. App. 4th 1246, 1255; *Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, 219.)

[325]See *People v. Pinholster* (1992) 1 Cal. 4th 865, 955 (Cal. 1992) ["'We have consistently found that an error of this nature is harmless'"]; *People v. Jones* (1991) 53 Cal. 3d 1115, 1149 [same]; *People v. Gallego* (1990) 52 Cal.3d 115, 201 ["as in . . . every other case in which this issue has arisen, we find the error harmless"].)

(*Brown v. Sanders* (2006) __ U.S. __, __ [163 L. Ed. 2d 723, 733; 126 S. Ct. 884, 891].) Moreover, it appears that here the error was not preserved for review by any action of trial counsel.

Nevertheless, something is wrong with this picture. This Court should correct it by exercising its discretionary power to waive its own forfeiture policy,[326] find error here one more time, and—at a minimum—should it reach appellant's claim of cumulatively prejudicial errors and other rulings, specifically include the effects of the over-charging error as part of the basis for reversal.

When this Court first told prosecutors to stop the practice, the problem on which it focused was that "alleging two special circumstances for a double murder improperly inflates the risk that the jury will arbitrarily impose the death penalty, a result also inconsistent with the constitutional requirement that the capital sentencing procedure guide and focus the jury's objective consideration of the particularized circumstances of the offense and the individual offender. [Citation.]" (*People v. Harris*, *supra*, 36 Cal. 3d 36, 67.) This is the case because, under California's capital sentencing scheme, "particular special circumstances found to be true in the guilt phase become aggravating factors in the penalty phase." (*Id.* at p. 62.) Thus, "as a special circumstance, multiple murder is singled out as a factor which the state

---

[326]See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *People v. Hill* (1992) 3 Cal.4th 959, 1017, fn. 1 (conc. opn. of Mosk, J.); see also *People v. Hines* (1997) 15 Cal.4th 997, 1061 (appealability of pure question of law on undisputed facts).

Apparently this Court has consistently avoided requiring preservation of the error by objection at trial. Appellant has seen no reported case where a trial court is said to have overruled a defendant's motion to strike the improper allegations from the pleading, and it seems unlikely that a court would make such an error.

identifies as having particular relevance to the penalty decision" (*People v. Williams* (1988) 44 Cal.3d 883, 950.) "[T]he constitutionally mandated objective," therefore, "of focusing on the particularized circumstances of the crime and the defendant is undercut when the defendant's conduct is artificially inflated by the multiple charging of overlapping special circumstances." (*People v. Harris*, *supra*, 36 Cal. 3d 36, 62; accord, *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1213–1214.)

This Court has, however, made it plain that, in the grand scheme of things in a capital trial, it believes that there are many stronger influences on the jury than any problems introduced by this procedure. Be that as it may, some prosecutors, who are closer to the realities of jury behavior than appellate counsel for either side or this Court, seem to have their own reasons for continuing the practice. Apart from the fact that it is undignified for the Court to tolerate this continued disobedience, the conduct suggests that the practice must have some utility for them. And the extremity to which the practice went in this case suggests what it may be. Perhaps juries can be trusted to figure out that three murders are three murders. (See *People v. Crandell* (1988) 46 Cal. 3d 833, 885.) That is the jury's rational process. But this Court should not underestimate, any more than some prosecutors do, the subliminal effect of 54 official repetitions of murder charges or verdicts, 36 of which were contained in repetitions of the multiple-murder special circumstance, by the trial court or its clerk or in the verdict forms it supplies.

In addition, the pleading of the special circumstance as an enhancing allegation under each murder count surely conveyed the impression that the state, through both the prosecutor and the trial court, considered each of three murders separately aggravated because of the existence of the other two. In other words, there were not "just" three murders, but each seemed, in legal

effect, to be a particularly aggravated one. This is greater aggravation than the simple fact of being guilty of more than one murder, which is the statutory culpability factor identified by the special circumstance. (*People v. Williams*, *supra*, 44 Cal.3d at p. 950.)

These dynamics affected the climate under which appellant's penalty phase began. If this Court reaches the cumulative prejudice claim, their effects should be recognized in granting relief on that claim.

Appellant also respectfully submits that the gross repetition of these allegations was different in kind from the addition of an invalid special circumstance found harmless in *Brown v. Sanders*, *supra*,[327] or in this Court's own precedents. Such repetition—combined with the official branding of *each* of the three murders as aggravated, as opposed to presenting the jury with the lawful circumstance of an aggravated course of conduct—was itself a prejudicial violation of appellant's rights to a fair and reliable assessment of the appropriate penalty. (U.S. Const., 8th & 14th Amends.; *United States v. McCullah* (10th Cir. 1996) 76 F.3d 1087, 1111–1112; see also *Stringer v. Black* (1992) 503 U.S. 222, 232.) As such, it compels reversal apart from any other errors at trial.

---

[327]The appellant in *Sanders* argued that the labeling of certain facts as aggravating circumstances gave them weight in the jury's balance that they would not have had otherwise. The high court agreed in theory but held that any such impact was inconsequential. (163 L. Ed. 2d at pp. 735–736; 126 S. Ct. at p. 894.) There was no claim of amplifying the effect by heavy repetition.

XVI

APPELLANT'S DEATH SENTENCE WAS THE PRODUCT OF A TRIAL FATALLY INFECTED WITH UNFAIRNESS AND UNRELIABLE IN ITS OUTCOME

This Court recognizes that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal. 4th 800, 845.) This recognition is constitutionally required under the Due Process Clause of the Fourteenth Amendment and under the Eighth Amendment requirements of fairness, reliability, non-arbitrariness, and effective appellate review. "'"[E]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair."' [Citations.]" (*Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 883.) "In cases where 'there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant.' [Citation.]" (*Ibid.*)

Some defendants invite this Court to apply these principles in a manner that presupposes that "a cumulative-error claim" depends on the extent to which this Court sustains individual points of error. (See, e.g., *People v. Hernandez* (2003) 30 Cal. 4th 835, 877.) There is, however, no basis for assuming that appellant's right to review is limited in that manner. Appellant is entitled to reversal if his trial was unfair or its result unreliable. (U.S. Const., 8th & 14th Amends.) In this context, actions below as to which the claim of error is *not* sustained, whether because of the scope of a trial judge's discretion or for other reasons, must still be considered in evaluating a cumulative-prejudice contention, if they ended up contributing to a process which overall was unfair or had a result which cannot be relied on.

A. Appellant's Entitlement to Reversal in the Absence of a Reliable and Fundamentally Fair Proceeding is Not Dependent on the Existence of Cognizable Error

This Court has long acknowledged its duty "to make an examination of the complete record of the proceedings . . . to the end that it be ascertained whether defendant was given a fair trial . . . . (*People v. Stanworth* (1969) 71 Cal.2d 820, 833 . . . .; *People v. Bob* (1946) 29 Cal.2d 321, 328 . . . .; *People v. Perry* (1939) 14 Cal.2d 387, 392 . . . .; *People v. Figueroa* (1911) 160 Cal. 80, 81 . . . .)" (*People v. Easley* (1983) 34 Cal. 3d 858, 863–864, first ellipsis in original, quotation marks omitted.) The primary purpose of appellate review is to ensure the fairness of the proceedings below and, in a death case, the reliability of the outcome. (See *Neder v. United States* (1999) 527 U.S. 1, 18; *California v. Ramos*, *supra*, 463 U.S. 992, 998–999; see also *Zant v. Stephens* (1983) 462 U.S. 862, 885; *In re Andrew B.* (1995) 40 Cal. App. 4th 825, 863–864 (conc. & dis. opn. of Sills, P.J.).) The harmless-error rule exists because "[a] defendant is entitled to a fair trial but not a perfect one." (*Lutwak v. United States* (1953) 344 U.S. 604, 619.) If the issue is fairness, the principle cuts both ways: the result of a trial that was unfair overall cannot be upheld because of the absence of demonstrable procedural imperfections.

Put differently, after a trial in which no ruling so exceeded the trial judge's power as to amount to error, but where the cumulative effects of those rulings and other occurrences at trial prevented the trial from being fair, the judgment cannot stand. For due process guarantees fundamental fairness, and the Eighth Amendment guarantees a penalty proceeding such that its outcome can be relied on. (*Spencer v. Texas* (1967) 385 U.S. 554, 563; *Brecht v. Abrahamson* (1993) 507 U.S. 619, 639 (conc. opn. of Stevens, J.); *Monge v. California* (1998) 524 U.S. 721, 732.) Nothing in due-process or Eighth-Amendment jurisprudence depends on there being a judge or prosecutor who

can be *blamed* for actions that make the trial unfair or undermine confidence in the outcome. (Cf. *People v. Crew* (2003) 31 Cal. 4th 822, 839 [prosecutorial error is examined for its effect on the defendant, regardless of prosecutor's good or bad faith].) When a trial judge makes a series of rulings, each within the bounds of his or her discretion, but which together render the proceedings unfair or the outcome unreliable, reversal is required. (See *Kinsella v. United States ex. rel Singleton* (1960) 361 U.S. 234, 246 ["Due process . . . deals neither with power nor with jurisdiction, but with their exercise"]; cf. *Lisenba v. California* (1941) 314 U.S. 219, 236 ["acts" which conform to state law may still deprive a person of a fundamentally fair trial].) Thus, in *Taylor v. Kentucky* (1978) 436 U.S. 478, the court held that various circumstances, none necessarily an error in itself, resulted in denial of fundamental fairness and required reversal under the Due Process Clause. (*Id.* at pp. 487–488, 490.)

Moreover, this Court has long recognized that a *single* ruling—a discretionary denial of a motion to sever—can be defensible when made and yet require reversal because the outcome, as the trial actually unfolded, was a denial of due process. (See, e.g., *People v. Mendoza* (2000) 24 Cal.4th 130, 162; *People v. Arias* (1996) 13 Cal.4th 92, 127;[328] cf. *Pointer v. United States* (1894) 151 U.S. 396, 403–404 [severance should be granted mid-trial if developments show unfairness of original ruling].) The cited cases apply the principle to a severance or joinder ruling, and the rule they state mentions only that situation. However, they supply no reason to consider joinder/severance

---

[328]The cited cases refer to "gross unfairness." However, under the reviewing court's duty to ensure the fairness and reliability of capital verdicts (*Zant v. Stephens* (1983) 462 U.S. 862, 884–885), reversal is required if the death judgment was obtained unfairly—period.

problems to be *sui generis*. And there is no reason why due process and—in capital cases—the Eighth Amendment, could permit the upholding of a judgment based on a trial that was unfair and unreliable for other reasons. On the contrary, the line of decisions culminating in *Mendoza* originates with *People v. Chambers* (1964) 231 Cal.App.2d 23.[329] In *Chambers* a series of trial court actions, including joinder and many others (see *id.* at pp. 27–28), were unremediable, either because there was no error or because the right to review was forfeited. The court nevertheless concluded,

> In reviewing this conviction, we find ourselves in an unusual situation, characterized by a paucity of error technically available for appellate review, but emphatically demanding defendant's retrial under better circumstances. Our examination of the record convinces us that defendant was tried and convicted under conditions which deprived him of a fair trial and denied him due process of law.

(231 Cal.App.2d at p. 27.) The judgment was reversed on due process grounds. (*Id.* at p. 28.) Thus the foundation for the rule cited by this Court in *Mendoza* and *Arias* is the principle that the ultimate test of whether a trial was fair is simply whether it was fair, not whether the judge's decisions were justifiable at the time they were made.

The proceedings in this Court are not an evaluation of the trial judge's performance. The ultimate issues are, rather, whether the trial itself vindicated appellant's right to a fair trial and whether it met society's constitutionally-based imperative that proceedings that may lead to an execution be reliable.

---

[329]To trace the line of cases, see *People v. Mendoza*, *supra*, 24 Cal.4th 130, 162; *People v. Arias*, *supra*, 13 Cal.4th 92, 127; *People v. Johnson* (1988) 47 Cal.3d 576, 590; *People v. Turner* (1984) 37 Cal.3d 302, 313; *People v. Bean* (1988) 46 Cal.3d 919, 940; *People v. Simms* (1970) 10 Cal.App.3d 299, 308–309; *People v. Burns* (1969) 270 Cal.App.2d 238, 252.

(See *Neder v. United States* (1999) 527 U.S. 1, 18; *California v. Ramos* (1983) 463 U.S. 992, 998–999.) This Court, therefore— if it has not found reversible error already—must consider whether all the challenged actions in appellant's trial, taken together, amounted to an undermining of that right or a violation of that imperative. The duty to do so exists irrespective of which such actions individually were legal error, which of them could be upheld as lawful exercises of discretion, and which the Court holds it need not reach at all because of preservation problems.

This Court has observed, "The Legislature of California has taken extraordinary precaution to safeguard the rights of those upon whom the death penalty is imposed by the trial court . . . ." (*People v. Bob* (1946) 29 Cal. 2d 321, 328.) In part because of "this declared policy," this Court held that, in capital cases, it should "take a liberal view of the technical rules applicable to criminal cases generally [citation] and examine the record with the view of determining whether or not in the light of all that transpired at the trial of the case a miscarriage of justice has resulted." (*Ibid.*) It is such an examination of "all that transpired at the trial" which appellant seeks here.

B. Not Only Did Prejudicial Actions Taken at Appellant's Trial Have a Cumulative Effect, But Many Strengthened the Effects of Each Other

Appellant incorporates by reference the explanations contained in the substantive discussion of each claim of error. Similarly, he incorporates his prior discussions of respondent's high burden of showing harmlessness and the difficulty of doing so in appellant's case. A review of the challenged actions will show that each could have, in some measure, helped produce the death verdict, and that their combination certainly cannot be held harmless.

Moreover, the various rulings and other actions likely had synergistic effects that have not been discussed previously. For example, the excesses of

the victim-impact testimony heightened the potency of the prosecutor's extra-statutory future-dangerousness argument, i.e., that appellant needed to be executed so that the jury would not be responsible for permitting him to cause more such suffering in the future.

Erroneous joinder of the Magnolia Interiors offenses permitted the prosecutor's "just-when-you-thought-things-were-okay" theme (because of graffiti that read, "Just when you thought"). And that theme supported his use of the jail-misconduct evidence to portray appellant as someone who would continue to harm others, at his whim, because he enjoyed luring people into a sense of safety and then deciding whether to attack.

There were various errors in the instructions on unadjudicated-crimes evidence, and each either reinforced the others' likelihood of permitting such evidence to be considered as aggravation by jurors or increased their views of how seriously the law took the purported factor (b) offenses to be. And, like the mere fact of erroneous admission of the shank-possession and escape-preparations evidence, they provided most of the foundation for the erroneous future-dangerousness argument, along with the errors in permitting the escape-preparations evidence to be used as aggravation and misdefining attempted escape. Admitting the evidence of the minor Hodges incidents as "violent criminal conduct" pertinent to the penalty decision, even if within the trial court's discretion, still had the impact of greatly skewing the jurors' understanding of how seriously the law expected them to take the other factor (b) offenses. The statement to Stinson about attacking child molesters, along with the evidence of the harassment of Hodges, made what was otherwise an assault on one such person, Olen Thibedeau, during an relatively short period of acting out in jail, into a long-term policy, to be expected of appellant's decades in prison, should the jury choose life.

The prosecutor's argument that the picture of childhood abuse and neglect was fabricated became devastating through the reciprocal effects of two errors. One was the failure to permit the Maria Self rape-incest evidence which would have both helped show that her mental difficulties were long-standing, as opposed to yet another consequence of appellant's criminality, and helped explain—and thereby support—the evidence of her abuse of her sons. The other was the bias in the giving of non-unanimity instructions, which permitted a few jurors' doubts about the truth of that evidence to eliminate the entire mitigation case from the weighing process of the whole jury.

More globally, the failure to permit the rape-incest evidence, the biased non-unanimity instructions, and the refusal to permit the more lenient treatment of Munoz to be considered in mitigation of the sentence, each weakened the case in mitigation. The other errors, or exercises of discretion, including the relentless repetition of the idea that each murder was aggravated by appellant's guilt of the others and the introduction of the horrifying Feltenberger attempted-murder evidence, all facilitated the prosecution's obtaining its desired verdict. Even if they could be held harmless individually, collectively they unconstitutionally biased the proceedings towards death.

C. Other Troubling Occurrences at Trial Contributed to Making the Death Verdict Unreliable

The fairness and reliability of the proceedings were undermined by other occurrences as well. As noted under subheading A, above, a problem with fairness or reliability does not disappear just because it cannot, for one or another reason, be categorized as a cognizable error. A number of occurrences at appellant's trial, in addition to those raised as appellate issues, resulted in a denial of appellant's Eighth Amendment and due process rights, at least

when considered in conjunction with the points raised in Arguments II through XV, above, and XVII through XXV, below. (See *People v. Hernandez* (2003) 30 Cal. 4th 835, 877–878 [in prejudice discussion, Court "note[s] with concern" non-appealable events which showed failures of "the trial court and the attorneys" to fulfil their duties "to proceed with the utmost care and diligence and with the most scrupulous regard for fair and correct procedure"].)

Here, the trial began with a jury-selection phase in which the silence of defense counsel and the trial court permitted the prosecutor to imply to the jurors that, to be legally qualified to serve, they had to be willing to seriously consider giving the death penalty to, e.g., a burglar who accidentally shot a single occupant of a dwelling,[330] in clear violation of case law on both the scope of both voir dire[331] and the felony-murder special circumstance.[332] Such willingness had nothing to do with qualifying jurors to sentence appellant. Since, however, the hypothetical was presented as if a death sentence could be a normal outcome in such an unaggravated case, it immediately placed appellant's conduct on a part of the culpability continuum where his execution was unquestionably called for. This was dramatically the case for jurors who accepted the prosecution theory of appellant's role in the homicides, but it was

---

[330]See, e.g., RT 14: 2525, 2527; 15: 2680–2682, 2743, 2748–2749; 16: 2893–2894; 17: 2958–2959, 2976; 19: 3252.

[331]"The impact the juror's views might have in actual or hypothetical cases that are not before the juror are [*sic*] irrelevant . . . ." (*People v. Visciotti* (1992) 2 Cal. 4th 1, 45.)

[332]"The jury must find that the defendant committed murder 'in order to advance an independent felonious purpose.' (*People v. Green* (1980) 27 Cal.3d 1, 61 . . . .)" *People v. Guerra* (2006) 37 Cal. 4th 1067, 1133.

also true for those who had doubts, while accepting the undisputed evidence that there were three intentional killings.

During the trial itself, the jurors' sensibilities and rationality were assailed with a number of disturbing autopsy photographs, on one of which the jurors may have lifted a flimsy slip of paper, attached by adhesive from a glue stick, meant to cover a portion which the trial court found correctly found to be particularly gruesome.[333]

After Olen Thibedeau testified, the prosecutor asked, "may the record reflect that he could be transported back to his place of origin by D.A. investigators?"[334] Whether such arrangements needed a court order at all, assuming that this is what the prosecutor was asking for, seems problematic. Asking for it in the presence of the jurors could only suggest that the defendants' will and capacity to do retaliatory harm extended so far that the sheriff's deputies or state correctional officers who would normally do the transporting could not be trusted.

The prosecutor introduced a powerful extra-statutory consideration into the jury's deliberations by telling the jurors that their task was only partly about the instructions, and that it was primarily about "how our system

---

[333]See especially Exs. 3-D, 3-N, 3-S, 3-X, and 348, as well as Exs. 1-G, 1-H, 3-T, and 3-U, which are also quite disturbing. So was the sheer volume of post-mortem photographs (Exs. 1-B – 1-H, 1-I, 2-A – 2-Q, 2-S – 2-U, 3-A – 3-D, 3-L – 3-U, 3-X.) Black-and-white photocopies of these exhibits are in the record at SCT — Photos 2: 490–491, 597–600, 3: 601–708. The decisions to admit them are reported at RT 21: 3499 et seq. The potential problem with the attempted redaction of Ex. 3-U is documented at 11/12/2002 RT 540–542.

[334]RT 50: 7445.

responds to this kind of carnage."[335] The prosecutorial argument that Maria Self's testimony "was kept vague for a reason" and that the facts were "deliberately obscured"[336] violated the ban on questioning the integrity of defense counsel and suggesting that counsel fabricated a defense[337] and the rule against arguing as if the district attorney had some extra-record knowledge.[338] Whether it was not objected to because of ineffectiveness, or because an admonition seemed futile, cannot be known on this record. Perhaps the prosecutor was entitled to contend—as he did—that, if the mitigation witnesses had not been exaggerating, their accounts would have been clearer and externally corroborated. But moving from that, to unjustifiably claiming that the whole defense case was a coordinated effort at deceiving the jury, had a grave potential to illegitimately undermine the effort to save appellant's life.

Finally, in a practice which has no reasons to recommend it and which risks misleading the jury, but with a level of risk which this Court does not consider to rise to the level of error, the entire list of statutory mitigating factors was read to appellant's jury during the trial court's instructions. These set up, as examples of what the state considers to be mitigation, a group of extremely mitigating, extremely rare, and—in appellant's case as in most—entirely inapplicable factors. Having thus told the jury that mitigation meant circumstances like the victim's consent to the homicide or the

---

[335]RT 45: 6905–6906.

[336]RT 54: 8021.

[337]*People v. Cash* (2002) 28 Cal. 4th 703, 732.

[338]*People v. Cunningham* (2001) 25 Cal. 4th 926, 1026; *People v. Benson* (1990) 52 Cal. 3d 754, 794–795.

defendant's committing the crime under the influence of extreme mental disturbance, the trial court made factor (k) a general, weak, and belated statement of non-exclusivity, rather than giving it the place in the instructional scheme that the Eighth Amendment requires, a place that factor (a) receives for the prosecution.[339] Even if this Court remains willing to countenance the giving of the instruction, it should recognize its negative impact here, in preventing a fair trial and a reliable penalty determination, when combined with the other problems in appellant's trial.

"Defendants were entitled to a fair trial." (*People v. Lewis and Oliver* (August 24, 2006, No. S033436) __ Cal.4th __, __ [2006 Cal. LEXIS 9974, *203–*204].) Because the cumulative effects of all the actions and omissions challenged in this appeal, along with the additional problems mentioned in the instant argument, prevented appellant from receiving a fair and reliable trial on penalty, his death judgment must be reversed. (U.S. Const., 8th & 14th Amends.)

//

//

[339]See Argument XXIII.B, below.

XVII

CALJIC NO. 3.02 CREATES AN UNCONSTITUTIONAL MANDATORY PRESUMPTION THAT AIDING AND ABETTING A ROBBERY IN WHICH MURDER WAS FORESEEABLE IS EQUIVALENT TO AIDING AND ABETTING MURDER, AND COMPARABLE ERROR INFECTED OTHER INSTRUCTIONS

One who aids and abets another's crime is guilty as a principal. (§ 31.) Thus, knowingly and intentionally soliciting, encouraging, or assisting another's commission of murder makes one guilty of first-degree murder. The trial court instructed appellant's jury on these principles. (RT 46: 7060–7061; CT 7: 1594–1595 [CALJIC Nos. 3.00, 3.01].) But it added that if murder was a natural and probable consequence of a robbery, aiding and abetting the *robbery* made appellant a principal in the *murder*.[340] (RT 46: 7061; CT 7: 1596 [CALJIC No. 3.02].) Thus, the jury was excused from finding—and effectively required to presume—intent to encourage or facilitate a murder, if it found the predicate fact that murder was a natural and probable consequence of a robbery which appellant aided and abetted. Comparable instructions were

---

[340]"One who aid [*sic*] and abets another in the commission of a crime is not only guilty of that crime but is also guilty of any other crime committed by the principal which is a natural and probable consequence of the crimes originally aided and abetted.

"In order to find the defendant guilty of the crime of murder, as charged in Counts I, II, and III[,] as an aider and abettor, you must be satisfied beyond a reasonable doubt:

"One, the crime of robbery or attempt [*sic*] robbery was committed;

"Two, the defendant aided and abetted such crime;

"Three, a co-principal in such crime committed the crime of murder, and,

"Four, the crime of murder was a natural and probable consequence of the commission of the crime of robbery or attempt robbery."

given regarding the other assaultive crimes, as charged in counts V, VI, VIII, IX, X and XIII. (RT 46: 7061—7064; CT 7: 1596–1598.)

Use of the mandatory presumption was a prejudicial violation of state law and the state and federal due-process clauses, as well as the right to have a jury determine each element of an offense. (U.S. Const., 6th and 14th Amends.; *Francis v. Franklin* (1985) 471 U.S. 307, 313–314; *Sandstrom v. Montana* (1979) 442 U.S. 510, 523–524; Cal. Const. art. I, §§ 7, 15.)

A similar contention was recently rejected in *People v. Coffman and Marlow* (2004) 34 Cal.4th 1. (*Id.* at p. 107.) As will become apparent, however, that case is distinguishable.

A. Accessorial Liability Based on a Natural-and-Probable-Consequences Theory Substitutes a Mandatory Presumption for the Statutory Elements of Knowledge of the Perpetrator's Purpose and Intent to Encourage or Aid in That Purpose

"All persons concerned in the commission of a crime . . . [who] aid and abet in its commission . . . are principals in any crime so committed." (§ 31.) An aider and abettor "must 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.'" (*People v. Mendoza* (1998) 18 Cal. 4th 1114, 1123, quoting *People v. Beeman* (1984) 35 Cal. 3d 547, 560.) The rule is statutory. Although "'aid' does not imply guilty knowledge or felonious intent, . . . the definition of the word 'abet' includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime." (*People v. Dole* (1898) 122 Cal. 486, 492.)

To aid and abet a murder, therefore, one must know the perpetrator's purpose to murder and aid or encourage *that* crime. "To be culpable, an aider and abettor must intend not only the act of encouraging and facilitating but

also the additional criminal act the perpetrator commits." (*People v. Mendoza*, *supra*, 18 Cal. 4th at p. 1129.) Nothing in the Penal Code provides otherwise.

To be sure, there is ample case law authorizing submitting a natural-and-probable-consequences theory to the jury. (See *People v. Mendoza*, *supra*, 18 Cal. 4th at p. 1123.) The history of the doctrine, which comes from the common law, was reviewed in *People v. Prettyman* (1996) 14 Cal. 4th 248, 260–262. Appellant can find no case attempting to justify the rule's persistence in the face of the exclusivity of the Penal Code. (See § 6.) "[T]here are no common law crimes in California." (*Keeler v. Superior Court* (1970) 2 Cal. 3d 619, 631.) "[I]n the absence of legislative proscription of conduct, there is no crime." (*People v. Dillon* (1983) 34 Cal.3d 441, 461.)

In the case of accessorial liability for felony murder, therefore, the natural-and-probable-consequences instruction substitutes the equivalent of a mandatory presumption for the statutory elements of (1) knowing the perpetrator's intent to murder and (2) intent to commit, encourage, or facilitate the murder.[341] The presumption is that, if murder was a foreseeable

---

[341]The perpetrator of a felony murder need not have intended murder to be guilty of it. (*People v. Randle* (Cal. 2005) 35 Cal. 4th 987, 995, fn. 3.) But one cannot abet a crime without knowing the perpetrator's intent to commit it. This may mean that there is no statutory liability for "aiding and abetting" an unintended felony murder, since there was no perpetrator's intent for the accomplice to know.

Alternatively, the Penal Code might only require that the *accessory* intended that death result from actions which the accessory encouraged or facilitated. Section 31 could be construed as making the accomplice responsible for the homicide (which the accomplice knowingly encouraged), and the felony-murder rule would make the accomplice's crime first-degree murder. (See *People v. McCoy* (2001) 25 Cal. 4th 1111, 1120 [accomplice's and perpetrator's respective liabilities depend on their own mens rea, not the other's].) The question is not, however, presented in this case.

consequence of the crime actually known about and intended by the accessory, knowledge of and intent to encourage or aid the murder are to be presumed as well.[342] (Cf. *People v. Johnson* (1980) 104 Cal.App. 3d 598, 610–611.)

As noted above, mandatory presumptions that relieve the prosecution from proving an element of an offense are constitutionally barred in criminal fact-finding. They violate both due process and the jury-trial right. (*Francis v. Franklin, supra*, 471 U.S. 307, 313–314; *Sandstrom v. Montana, supra*, 442 U.S. 510, 523–524.) Even permissive presumptions must be rational, which the one at issue is not, since it presumes knowledge and intent from a mere finding of foreseeability. (*Francis v. Franklin, supra*, 471 U.S. 307, 314–315; *Leary v. United States* (1969) 395 U.S. 6, 37.) Familiar gradations in culpability in both criminal and civil law recognize the significant differences between purposeful, knowing conduct and negligent failure to avoid a foreseeable risk. (1 Witkin & Epstein, Cal. Criminal Law (3rd ed. 2000) Elements, §§ 3, 8, 20; 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, §§ 383, 453, 831.)

B. *Coffman and Marlow* Is Distinguishable

In *People v. Coffman and Marlow*, *supra*, 34 Cal. 4th 1, this Court rejected a claim similar to that made here on the following basis:

> Notably, the jury here was also instructed with CALJIC No. 3.01, advising that an aider and abettor must act with the intent of committing, encouraging or facilitating the commission of the target crime, as well as CALJIC No. 8.81.17, which required, for a true finding on the special circumstance allegations, that defendants had the specific intent to kill the victim. These

---

[342]However the natural-and-probable-consequences rule is formulated, "the ultimate factual question is one of foreseeability." (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th 1, 107.)

> concepts fully informed the jury of applicable principles of vicarious liability in this context.

(*Id.* at p. 107.) The version of CALJIC No. 8.81.17 given in appellant's case, however, dealt only with the rule that the robbery must not have been merely incidental to the murder. (CT 7: 1631.) Only one of the two instructions that saved the *Coffman and Marlow* verdict was given here, and the case is therefore not controlling.

C. The Error Was Prejudicial

The federal constitutional error invalidates the verdicts to which it pertained unless it could not have "possibly influenced the jury adversely . . . ." (*Chapman v. California* (1967) 386 U.S. 18, 23.)

The prosecutor relied on the instructions at issue in argument. (RT 45: 6909–6913, 6922, 6942, 6944; 45: 6959.) He had to, because his evidence showed appellant to have fired a gun only at Mans and, perhaps, to have tried to fire one at Randolph Rankins. (Regarding Rankins, see RT 39: 5944; 40: 6180–6181; see also 34: 5261–5262.) That evidence, based on the uncorroborated testimony of an accomplice-informant, was far from conclusive. Thus, even in those instances, the aiding and abetting theory, and the presumption aiding its proof, were important, and the error was prejudicial. (See RT 45: 6905 [prosecutor argues generally, "it does not matter whether this defendant . . . pulled the trigger"].)

Similarly, for a juror who believed Munoz's self-serving account of who played what role, there was evidence from which appellant's knowledge of, and intent to further, the shooter's purpose could be inferred in the killing of Jones and the shooting of Ken Mills. (See above, pp. 17 et seq. and 21 et seq., respectively.) However, this Court cannot know whether that evidence was believed and found sufficient under the reasonable-doubt standard,

because a theory not relying on it was made available to the jury. Reversal is thus required. (*Leary v. United States* (1969) 395 U.S. 6, 31–32.) When an element of the offense is withdrawn from jury consideration, "a conviction may be upheld . . . where there is no 'record . . . evidence that could rationally lead to a contrary finding [i.e., a finding of failure of proof]' with respect to that element. (*Neder v. United States* (1999) 527 U.S. 1, 19 . . . .)" (*People v. Davis* (2005) 36 Cal. 4th 510, 564, second omission in original.) Rational jurors considering the issue could, and likely would, find a failure of proof in the conflicting, uncorroborated, and neither more nor less inherently-credible versions Munoz and appellant gave of the Jones and Mills events.

Finally, with the assaults on Paulita Williams and the shooting of Jose Aragon, the prosecutor had only the presumption which the instructions gave him; there was no evidence that appellant abetted these attacks. The prosecution's evidence showed, at worst, indifference to the killing of Aragon, not an intent to encourage or facilitate it. (See pp. 34 et seq., above.) The same is true of the attempted murder of Williams: no one portrayed appellant as acting with a purpose of encouraging or aiding that crime. (See pp. 23 et seq.)

The convictions on counts I (Mans), II (Jones), III (Aragon), V (K. Mills: attempted murder), VI (K. Mills: mayhem), VIII (shooting at Mills/Ewy vehicle), IX (Williams: attempted murder), and X (Rankins: attempted murder) must be reversed. As to counts III and IX, as the previous paragraph shows, absent the unlawful presumption, the evidence was insufficient to support the verdicts. (*Jackson v. Virginia* (1979) 443 U.S. 307.) Double jeopardy therefore prohibits retrial on those counts. (*People v. Hatch* (2000) 22 Cal. 4th 260, 271–272, citing both *Burks v. United States* (1978) 437 U.S. 1, 18, and the California double jeopardy clause.)

XVIII

CALJIC NO. 2.90 DOES NOT ADEQUATELY DEFINE *REASONABLE DOUBT*

The trial court instructed appellant's jury, pursuant to CALJIC No. 2.90, in part as follows:

> Reasonable doubt . . . is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(CT 7: 1590.) Part of the instruction was repeated in the penalty-phase factor (b) instruction. (CT 9: 1991.) The last clause of the pattern instruction formerly stated that there has to be "an abiding conviction, to a moral certainty, of the truth of the charge." In *Victor v. Nebraska* (1994) 511 U.S. 1, 13–16, the Supreme Court criticized the "moral certainty" language and expressed concern that, as its meaning evolves, it could in the future suggest less than the "near certitude" required. (*Id.* at p. 15.) In dicta in *People v. Freeman* (1994) 8 Cal.4th 450, 504, this Court suggested that the phrase could be safely deleted, a suggestion accepted in the version given to appellant's jury. The result, however, is an instruction that merely tells the jurors that they need to expect to remain convinced of the truth of the charge for a prolonged period ("abiding conviction"), without telling them *how* convinced they must be. In *People v. Brown* (2004) 33 Cal. 4th 382, this Court summarily rejected a contention that the revised instruction was insufficient, relying on dicta in *Victor v. Nebraska*. (*Id.* at p. 392.) It is unclear from the discussion in *Brown* that the contentions made here were presented there, and appellant asks the Court to reconsider.

One problem is that instructing the jurors that they must feel an abiding conviction of the truth of the charge is indistinguishable from the clear and

convincing evidence standard. A conviction is simply a "strong persuasion or belief," and *abiding* means "continuing, enduring." (Webster's Third New International Dictionary (1976 ed.), pp. 499, 3.) But clear and convincing evidence is that which is so strong and enduring "as to leave no substantial doubt" and "to command the unhesitating consent of every reasonable mind." (*Lillian F. v. Superior Court* (1984) 160 CalApp.3d 314, 320. See also *People v. Brigham* (1979) 25 Cal.3d 283, 291["a strong and convincing belief . . . is something short of having been 'reasonably persuaded to a near certainty'"].) Indeed, other jurisdictions define clear and convincing evidence in their standard pattern instructions in terms such as that which creates a "firm belief or conviction," which are hardly distinguishable from California's abiding conviction. (See, e.g., U.S. Fifth Circuit District Judges Assoc., Pattern Jury Instructions (1994) Inst. 2.14, p. 18; Federal Criminal Jury Instructions (2d ed. 1991) No. 70.02; Virginia Model Jury Instructions—Civil (Rep. ed. 1993) No. 3.110.) At least one state, and the United States Supreme Court, have used the term *abiding conviction* in defining clear and convincing evidence. (N.M. Stats. Ann.—Uniform Jury Instructions, No. 13–1009; *Colorado v. New Mexico* (1984) 467 U.S. 310, 316.)

Language first defining the clear and convincing standard, then explaining that *beyond a reasonable doubt* expresses a higher standard, would have made the instruction adequate. So would have use of a phrase such as *reasonably persuaded to a near certainty*. (See *People v. Brigham, supra*, 25 Cal.3d 238, 291.) Telling the jurors that they needed to be convinced, without telling them how convinced, was not enough, even if the unspecified level of conviction must abide.

The problem is accentuated by the structure of the entire instruction. Both the former and current versions began with a firm statement of the

burden of proof: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt." (CALJIC No. 2.90 (5th ed. 1988), CALJIC No. 2.90 (6th ed. 1996).) Perhaps it would be sufficient to end the instruction there.

Both versions, however, continued, with something of a hedge, although in the revised version the italicized language is deleted: "Reasonable doubt is defined 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." (*Ibid.*, italics added.) Then the former version circled back to emphasize the weight of the burden. "It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty,* of the truth of the charge." (CALJIC No. 2.90 (5th ed. 1988), italics added.) The new version circles back as well but, by omitting the italicized language, it stops short of completing the circle. As explained already, telling the jurors that they have to expect to remain convinced that the charge is true, without telling them *how* convinced, is inadequate.

As *Victor v. Nebraska*, *supra*, 511 U.S. 1, explained in detail, the archaic terms *moral evidence* and *moral certainty* have become problematic. But the problem was that language which once meant that the jury must be as certain as one can be, when relying on other than direct observation, might no longer communicate the "near certitude" required. (*Id.* at p. 15.) The solution, especially in an instruction which in its middle section may seem to back off from a strong statement of the burden of proof, is not to give up on saying

anything about certainty. It is to update the language. Since appellant's jury received an instruction that conveyed the concept in neither the traditional language nor an update, the instruction was insufficient.

An inadequate instruction on reasonable doubt is federal constitutional error and is per se reversible. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) All the guilt verdicts and special-circumstances findings must be reversed.

Even if this Court reaffirms that the instruction adequately defines reasonable doubt, the retroactive application of a lower burden of proof than that previously required, to appellant, whose offenses were committed before the revision, would violate due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15; and cases discussed at p. 468, above.)

//

//

XIX

THE SPECIAL CIRCUMSTANCES MUST BE REVERSED BECAUSE THEY WERE NOT BASED ON A VALIDLY-ENACTED STATUTE

A. Introduction

Appellant's jury was told, as authorized by one version of section 190.2, subdivision (d), that he was death eligible if he was guilty of murder as an aider and abettor (or if the jury was unable to decide whether he was the actual killer or an aider and abettor), was a major participant in a robbery resulting in death, and acted with reckless indifference to human life. (CT 7: 1629–1630; RT 46: 7075.) Prior to the purported enactment of Proposition 115, an initiative measure on the ballot in the June, 1990, primary election, the jury would have had to find intent to kill, not just reckless indifference. (See generally, *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978 (*Yoshisato*).)

All the special circumstances findings must be reversed because, in 1992, when the homicide involved in this case occurred, there was no validly-enacted statute permitting death-eligibility on a recklessness finding.[343] Another initiative measure on the ballot in June, 1990, Proposition 114, also amended and reenacted Penal Code section 190.2, but it did not add a subdivision (d). Proposition 114 received significantly more votes than Proposition 115,[344] and therefore it must control.

---

[343]Penal Code section 190.2 was amended and reenacted again in 1996 and several times since then. This argument does not address the validity of instructing under subdivision (d) under subsequent enactments.

[344]Proposition 114 received 3,435,095 "yes" votes, or 71.1 percent of the total votes cast on that measure, whereas Proposition 115 received only 2,690,115 "yes" votes, or 57 percent of the votes. (*Yoshisato v. Superior Court*, *supra*, 2 Cal.3d at p. 992–993 (dis. opn. of Mosk, J.).)

Article II, section 10, subdivision (b) of the California Constitution provides that: "If provisions of two or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail." Appellant has a federal due-process right to be afforded the protections of this provision of state law. (U.S. Const., Amend. 14; *Hewitt v. Helms* (1983) 459 U.S. 460, 471–472; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488.)

A similar argument was rejected by this Court in *Yoshisato v. Superior Court*, *supra*, 2 Cal.4th 978, but *Yoshisato* is not controlling here. Penal Code section 190.2 is no ordinary statute. It is a death penalty statute, and it addresses the crucial issue of who will be eligible for the death penalty in the first instance. However, *Yoshisato* did not discuss any of the constitutional implications arising from the nature of the statute at issue, and it did not cite, much less consider, any of the state or federal cases which impose constitutional limits on death-eligibility provisions. Moreover, it did not recognize the due-process constraints on its dismissive handling of a state constitutional provision (art. IV, § 9), an approach which was crucial to its holding.

B. Factual and Legal Background

Proposition 114, the death penalty measure which received the greater number of votes in the June 1990 Primary Election, expanded the "killing of a peace officer" special circumstance in Penal Code section 190.2, subdivision (a)(7), and made other, mainly nonsubstantive changes to Penal Code section 190.2.

Proposition 115 was a wide-ranging measure that applied to both capital and noncapital cases and made a number of changes to the state Constitution and state statutes. (See *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 342–346.)

As relevant here, it greatly expanded the scope of the death-eligibility provisions of Penal Code section 190.2, including eliminating the intent to kill requirement for aiders and abettors guilty of murder. (*Yoshisato*, *supra*, 2 Cal.4th at pp. 982–987.)

The conflict between the version of Penal Code section 190.2 enacted by Proposition 114 and that purportedly enacted by Proposition 115 was addressed by this Court in *Yoshisato*. *Yoshisato* held that provisions of the two initiatives could be combined to produce a new, blended statute which was different from, and whose provisions for death-eligibility were more expansive than, either of the versions contained in the initiatives passed by the voters.

To reach that conclusion, this Court had to deal with not only Article II, section 10, subdivision (b), but with the Court's recent decision in *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744 (*Taxpayers*). *Taxpayers* had held,

> When the electorate gives an affirmative vote to more than one initiative, each of which seeks to regulate the same subject, but in different or conflicting ways, the "provisions" are in fundamental conflict, and only the "provisions" of the measure receiving the higher affirmative vote prevail. Section 10(b) does not anticipate that the court will create a hybrid regulatory scheme in order to carry into effect some of the provisions of the proposition or propositions that received fewer votes.

(*Id.* at p. 765.) Taxpayers held that, for this purpose, there is a conflict if each version is "directed to the same subject and offered as a competing regulatory scheme." (*Id.* at p. 765.) *Yoshisato* concluded that Proposition 114 did not create such a scheme. (2 Cal.4th at p. 990.)

However, the only basis for that conclusion was the Court's rejection of the specific argument made by the petitioner in *Yoshisato*, who had pointed out that Proposition 114, pursuant to the compulsory reenactment rule of

Article IV, section 9 of the California Constitution, had not merely enacted its intended changes to Penal Code section 190.2 but had instead reenacted Penal Code section 190.2, as amended, in its entirety. Proposition 115, similarly, had purported to reenact its new version of section 190.2. (See *Yoshisato v. Superior Court*, *supra*, 2 Cal.4th at pp. 989–990.)

Yoshisato provided no affirmative explanation of why Penal Code section 190.2 is *not* a comprehensive regulatory scheme; it only rejected one argument for finding that it is. This Court did not consider the fact that one of its own prior decisions had described the death-eligibility provisions of California law as just such an "integrated scheme" (*People v. Melton* (1988) 44 Cal.3d 713, 768). Nor did it consider the constitutional function of death-eligibility statutes which, as explained below, requires that they be construed as comprehensive regulatory schemes.

Thus there are two fundamental problems with *Yoshisato*. Substantively, its reasoning was flawed in such a way that it arrived at the wrong result as a matter of state law. In terms of method, it had to disregard two state constitutional provisions, in violation of appellant's federal due process right to the protections of state law. The death-penalty exceptionalism which resulted also created a violation of the Eighth Amendment, as did the creation of a death-eligibility scheme outside of either of the legislative forums that could reflect a societal consensus in favor of the scheme.

C. *Yoshisato's* Writing the Reenactment Provision out of the State Constitution for Purposes of this Statute Violated Due Process

Before the *Yoshishato* Court could reach more esoteric bases for deciding that the two versions of the statute were not in conflict and that their death-eligibility provisions could be cumulated, it had to deal with the

fundamental problem that "because the propositions reenacted two different versions of section 190.2 (instead of merely amending selected paragraphs or numbered subparts thereof), the voters were in fact faced with two competing 'comprehensive schemes' . . . ." (2 Cal.4th at p. 989.) To do so, it recast the question as whether "whether the voters who enacted Proposition 114 *intended* to adopt a comprehensive scheme . . . ." (*Ibid.*) Next it observed, "Article IV, section 9 of the state Constitution *mandates* that 'a section of a statute may not be amended unless the section is re-enacted as amended.'" (*Ibid.*) It then held that because the voters were acting under constitutional compulsion, an intention to enact a comprehensive scheme could not be inferred. (*Id.* at p. 990.) The Court then inferred a contrary intention from, among other things, its belief that the electorate really wanted only to amend the statute, not reenact a new and complete version. (*Ibid.*)

The problem with this analysis is that it discarded Article IV, section 9, as an inconvenient technicality. Whether or not the voters would have liked to have changed the statute using a means that violated the state constitution is not the issue. The fact that the form of the initiative was a reenactment of the provision, in a version that still contained an intent requirement, is no less a fact because it was constitutionally compelled.

It would appear obvious that two versions of section 190.2, some of which created death eligibility for some conduct and some of which created it for other conduct instead, conflicted for purposes of article II, section 10, subdivision (b)'s rule that only the one with the greatest votes would take effect. (See *Yoshisato*, *supra*, 2 Cal.4th at p. 995 (dis. opn. of Mosk, J.) ["It is axiomatic that two provisions conflict when one authorizes what the other prohibits"].) But the Court held that there were not really two versions. They just happened to have been submitted to the electorate in that "technical"

form. (2 Cal.4th at p. 990.) And this was done under Article IV, section 9's constitutional compulsion, not because anyone wanted it that way. (*Ibid.*) Therefore the separate versions could be ignored. This analysis, unfortunately, renders nugatory Article IV, section 9 itself.

The Court cannot pick and choose which provisions of the state constitution really count and which do not. Doing so violated appellant's federal due process rights. (*Hewitt v. Helms* (1983) 459 U.S. 460, 471–472; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480.) To say this is not merely to recast a state-law error in federal constitutional terms. The essence of due process is regularity, the rule of law. There is no such regularity when a court applies ad hoc adverse determinations, for a special situation (capital defendants), including a new and strained application of one state constitutional provision and the blithe abandonment of another, as a compelled technicality which is not compelled after all.

D. *Yoshisato* Overlooked Constraints on Its Reasoning Compelled by the Death-Penalty Context

There were other problems with the *Yoshisato* opinion. One was that it treated the question of whether different versions of a statute created by separate initiatives could be merged as an abstract one, rather than as constrained by the capital sentencing context. Such a statute must be construed as a comprehensive scheme for two reasons. One is that it functions, under constitutional compulsion, to limit the class of death-eligible murderers. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 244; *Zant v. Stephens* (1983) 462 U.S. 862, 877.) If the list at issue were an ordinary statutory list (a list of the factors that will constitute good cause for a continuance, for example), the Legislature or the electorate could add as many factors to the list

as it saw fit, and the list could be infinitely expanded. Here the list has to be finite. Thus, unsurprisingly, this Court had already declared that California statutes "provide an integrated scheme of 'special circumstances' . . . ." (*People v. Melton* (1988) 44 Cal.3d 713, 768) To presume that the electorate is willing to aggregate, in disparate initiatives, lists that (a) have a constitutional limit which aggregation risks exceeding, and (b) that it does not want to *choose* which limited set of limiting factors it wants, is to stand normal statutory construction on its head. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 867 [presumption that those enacting legislation wish it to be constitutional].)

Death-penalty statutes are *sui generis* in another manner as well. The constitutionally tenuous use of capital punishment at all hinges upon a societal consensus on its propriety, and on when it is proper to use it. (See generally, *Gregg v. Georgia* (1976) 428 U.S. 153; see also *Woodson v. North Carolina* (1976) 428 U.S. 280, 288 (opn. of Stewart, Powell, and Stevens, JJ.) Conversely, "'a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense.'" (*Payne v. Tennessee* (1991) 501 U.S. 808, 824, quoting *McCleskey v. Kemp* (1987) 481 U.S. 279, 305–306; see, e.g., *Atkins v. Virginia* (2002) 536 U.S. 304; *Thompson v. Oklahoma* (1988) 487 U.S. 815.) Here, not one voter saw section 190.2 in its final (post-*Yoshisato*) form. There was no legislative body—whether the legislature itself or the electorate—expressing a societal consensus that Proposition 114 version was wrong, Proposition 115 version was wrong, and this Court's combined, death-eligibility-maximizing version was right. For these reasons—the lack of a formally-expressed consensus and the pro-death bias of the *Yoshisato* outcome—applying its

holding to appellant's case violates not only due process, but the Eighth Amendment.

Appellant also submits that the *Yoshisato* Court's speculations about voter intent were unfounded, for reasons set forth in Justice Mosk's dissent. (2 Cal.4th at p. 997 (dis. opn. of Mosk, J.).) He respectfully urges reconsideration of its holding. Such reconsideration will compel reversal of the special-circumstances findings, and the death judgment, in his case.

//

//

XX

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. The failure to conduct intercase proportionality review in capital cases violates appellant's Eighth Amendment and Fourteenth Amendment rights to equal protection of the laws and to be protected from the arbitrary and capricious imposition of capital punishment.[345]

The Eighth Amendment to the United States Constitution forbids cruel and unusual punishment. The jurisprudence applying that ban to capital cases requires death judgments to be both proportionate and reliable, which are closely related concepts. Part of the requirement of reliability 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* (1983) 463 U.S. 939, 954 (plur. opn., alterations in original), quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 (opn. of Stewart, Powell, and Stevens, JJ.).)

The United States Supreme Court has lauded comparative proportionality review as a means to ensure reliability and proportionality in

---

[345]In *People v. Schmeck* (2005) 37 Cal.4th 240, 303–304, this Court invited what might be called a skeletal presentation of "generic claims" which are raised on appeal primarily to preserve them for federal review. Because appellant cannot be assured that respondent and the federal courts will likewise deem such claims "fully presented," their presentation here is more expansive than suggested by this Court. The discussions are more streamlined than in earlier briefing which appellant's counsel has seen, but, to the extent that the presentation of any such claim in this brief still seems unduly extensive, it is because of this uncertainty.

capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as ensuring that the death penalty will not be imposed on a capriciously-selected group of convicted defendants. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Proffitt v. Florida, supra*, 428 U.S. at p. 258.) Thus, intercase proportionality review is an important tool in ensuring the constitutionality of a state's death penalty scheme.

Despite its recognition of the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily required for a state death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court ruled that California's capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

However, as Justice Blackmun has observed, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme, i.e., that the application of the relevant factors provides jury guidance and lessens the chance that the death penalty will be arbitrarily applied. (*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).) In fact that California's statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) It is because comparative case review is the most rational and effective means by which to ascertain whether a scheme produces arbitrary results that the vast majority of the states that sanction capital punishment require such review.

The capital sentencing scheme in effect at appellant's trial was "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Section 190.2 immunizes very few first degree murderers from death eligibility,[346] and section 190.3 provides little guidance to juries in making the death-sentencing decision. Given, in addition, the legislation's failure to set forth any burden of proof, for either party, on any aspect of the decision (other than factor (b) findings) it is inevitable that two juries hearing the same evidence would often reach different results. California's scheme fails to provide any method for ensuring consistency in capital sentencing verdicts, and consequently defendants with widely-varying degrees of relative culpability are sentenced to death.

The lack of intercase proportionality review violated appellant's Eighth and Fourteenth Amendment rights against the arbitrary and capricious imposition of a death sentence, and requires the reversal of that sentence.

//

//

---

[346]Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283.

XXI

CALIFORNIA'S DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

California's death penalty statute fails to provide any of the safeguards against the arbitrary imposition of death common to nearly every other death penalty sentencing scheme. Juries do not make written findings or achieve unanimity as to aggravating circumstances, and need not find beyond a reasonable doubt that: 1) any aggravating circumstances have been proved; 2) the aggravating factors outweigh the mitigating circumstances; or 3) death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, penalty phase juries are not instructed on any burden of proof. Under the rationale that the decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making applicable to all other parts of the law have been banished from the process of deciding whether to impose death. Those omissions run afoul of the Sixth, Eighth, and Fourteenth Amendments.

A. The Statute and Instructions Fail to Assign the State the Burden of Proving Beyond a Reasonable Doubt That Aggravating Factors Exist and Outweigh the Mitigating Factors, and That Death Is the Appropriate Penalty, in Violation of the Eighth and Fourteenth Amendments

Before a defendant can be sentenced to death in California the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3), and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown*, 479 U.S. 538.) However, under the California scheme neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty needs to be proved

pursuant to any delineated burden of proof. The failure to assign a burden of proof renders California's death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable.

This Court has consistently held 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 . . . ." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842.) However, such reasoning has been rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) 542 U.S. 296.

Those three decisions by the high court effectively dispose of any argument that the federal Constitution allows a defendant to be sentenced to death by a jury which has not found beyond a reasonable doubt that specific aggravating circumstances exist, that those factors outweigh the mitigating evidence presented, and that death is the appropriate penalty. As Justice Scalia said in distilling the holding in *Ring*: "All facts essential to the imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for a conviction of first degree murder with a special circumstance is death, *Apprendi* did not apply to California capital sentencing. After *Ring*, the Court repeated the same analysis. (See e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263.) In light of the United States Supreme Court's decisions, those holdings are untenable because, read

together, the *Apprendi* line of cases renders the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.)

As *Apprendi* states, "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." Under California's sentencing scheme, the death penalty may not be imposed based solely upon a verdict of first degree murder with special circumstances. While it is true that such a verdict carries a maximum sentence of death (Pen. Code, § 190.2), the statute "'authorizes a maximum punishment of death only in a formal sense'." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541 (dis. opn. of O'Connor, J.).) To impose death, the jury must also find at least one aggravating factor, and find that the aggravating factor or factors outweigh any mitigating factors, and death is appropriate. Those additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494), and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) Thus *Blakely-Ring-Apprendi* require that the jury be instructed to find those factors, and determine their weight, beyond a reasonable doubt.

This Court has recognized that fact-finding is one of the sentencer's functions, and that facts must be found before the death penalty may be considered. (See, e.g., *People v. Brown* (1988) 46 Cal.3d 432, 478 [penalty

jury's role includes "find[ing] facts"]; *People v. Johnson* (1993) 6 Cal.4th 1, 48 [finding it appropriate to give CALJIC No. 2.21 to penalty jury in light of "the admissibility of penalty phase testimony on a variety of factual matters . . . ."].) Nonetheless, this Court has held that *Ring* does not apply to capital sentencing in California because the facts found at the penalty phase "bear upon, but do not necessarily determine," which penalty is appropriate. (*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32, citing *People v. Anderson, supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has also sought to distinguish *Ring* by comparing California's capital sentencing process to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto, supra*, 30 Cal.4th at p. 275; *People v. Snow, supra*, 30 Cal.4th at p. 126, fn. 32.)

However, before a California jury can weigh the aggravating and mitigating circumstances it must first decide whether any statutory aggravating circumstances exist.[347] Moreover, even the subsequent weighing process is the functional equivalent of finding an element of death-worthy murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Az. 2003) 65 P.3d 915, 943; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo. 2003) 64 P.3d 256; *Johnson v. State*

---

[347]Arguably, the predicate to a penalty phase—the existence of a special circumstance—puts an aggravating circumstance into the balance. But this is true in a formal sense only. With some such circumstances, such as robbery murder, no juror could rationally conclude that the least adjudicated elements of the special circumstance—which may have involved an accidental killing or been based on very broad accessorial liability—was necessarily aggravating. There is still a finding of some truly aggravating circumstance's existence to be made before weighing can begin.

(Nev. 2002) 59 P.3d 450.)[348] Thus, while the determination whether the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, that determination is no less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. Thus, under *Apprendi*, *Ring*, and *Blakely*, a California jury's determination that the aggravating factors substantially outweigh those in mitigation must be made beyond a reasonable doubt.

This Court has also relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) However, in *Ring* the state also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances based on that "difference," and the high court rebuffed that reasoning. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 606; see also *id.* at p. 589.)

It is certainly true that the decision whether to impose death or life is moral and normative. However, this Court errs in using that fact to eliminate procedural protections which render the decision more rational and reliable, and in allowing the findings that are prerequisites to that decision to be uncertain, undefined, and subject to dispute not only as to their significance, but also their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Eighth Amendment, as well as the jury-trial and due-process rights guaranteed by the Sixth and Fourteenth Amendments.

---

[348]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.

B. The Due Process Clauses of the State and Federal Constitutions Also Require the Jury to Be Instructed That it May Impose a Sentence of Death Only If Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Ones, and That Death Is the Appropriate Penalty

1. There Must Be an Appropriate Burden of Proof for Factual Determinations

The outcome of a judicial proceeding necessarily depends on fair appraisal of the facts. (*Speiser v. Randall* (1958) 357 U.S. 513, 520–521.) The primary procedural safeguard in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof, which in American jurisprudence, is spelled out for every factual decision in civil, criminal, and administrative law, except for this one. In criminal cases, it is rooted in the due process clauses of the Fifth and Fourteenth Amendments. (*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.) Under the Fourteenth and Eighth Amendments, the failure to give the prosecution burden of proof for factual determinations made during the penalty phase must be beyond a reasonable doubt.

2. The Ultimate Choice of Life Imprisonment Without Parole or Death Requires the Highest Burden of Proof

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake, and on the social goal of reducing erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) 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. 745, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

The "private interests affected by the proceeding" in this context are obviously of the highest order. Yet even far less important interests are protected by the requirement of proof beyond a reasonable doubt. (See *In re Winship*, *supra*, 397 U.S. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender].) 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," the United States Supreme Court reasoned:

> 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.]

(*Santosky v. Kramer*, *supra*, 455 U.S. at p. 755, quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423-424, 427.)

Moreover, there is substantial room for error in deciding whether to impose the death penalty, because that decision involves "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kramer*, *supra*, 455 U.S. at p.

763.) A burden of proof beyond a reasonable doubt can effectively reduce that risk of error, since that standard is "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship*, *supra*, 397 U.S. at p. 363.)

Finally, "the countervailing governmental interest supporting use of the challenged procedure" also calls for imposition of a reasonable doubt standard. The use of that standard would not deprive the State of the power to impose capital punishment, it would maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Thus, under the Eighth and Fourteenth Amendments, a death sentence may not be imposed unless the sentencer is convinced beyond a reasonable doubt that not only are the factual bases for its decision are true, but death is the appropriate sentence. (See *Monge v. California*, *supra*, 524 U.S. at p. 732; *State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37.)

C. The Constitution Requires the State to Bear Some Burden of Persuasion at the Penalty Phase

The failure of the penalty phase instructions here to assign *any* standard of proof or burden of persuasion regarding the jury's ultimate penalty phase determinations is separately a violation of appellant's rights to due process, trial by jury, and fair, reliable, and non-arbitrary sentencing under the Sixth, Eighth, and Fourteenth Amendments. Again, procedural protections taken for granted as required for regularity in judicial or quasi-judicial fact-finding are abandoned where they matter most.

Allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at

all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) With no standard of proof or burden of persuasion articulated, it is reasonably likely that different juries will impose different standards of proof in deciding whether to impose death, and that who bears the burden of persuasion as to the sentencing determination will vary from case to case. Such arbitrariness undermines the requirement of a meaningful basis for distinguishing the few cases in which the death penalty is appropriate and is unacceptable under the Eighth and Fourteenth Amendments. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374.)

Further, while California's instructional scheme allocates no burden to the prosecution, the prosecution must obviously have *some* burden to show that the aggravating factors outweigh the mitigating ones, because the jury must impose a sentence of life without possibility of parole if it does not make that finding. (§ 190.3.) Yet without such a burden being made explicit, there exists the possibility that some juries may assume that a death-eligible defendant is presumptively death-worthy. (See Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases* (1983) 58 N.Y.U. L.Rev. 299, 335.) If this were somehow permissible under the Eighth Amendment—and it is not, given the breadth of California's death-eligibility factors—permitting each jury to choose its own approach would not be. Moreover, failure to articulate any burden permits the jury to assume that the defendant must refute the alleged aggravating circumstances or prove that they do not outweigh mitigating circumstances, a burden that could likely seem quite high, given the defendant's death eligibility. And, again, without law as guidance, all this depends on who sits on each defendant's jury.

Moreover, section 190.4, subdivision (e), clearly contemplates that

some sort of "finding" must be proved by the prosecution, since it requires the trial judge to determine "whether the jury's findings and verdicts . . . are contrary to law or the evidence presented." Furthermore, without burdens of persuasion and proof, it is difficult to imagine a situation where the verdicts would be "contrary to law," because of the absence of governing law.

Moreover, in non-capital cases, California imposes on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (Cal. Rules of Court, rule 420(b); Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) In a capital case, *any* aggravating factor relates to wrongdoing—even factors that are not themselves wrongdoing, such as the defendant's age, are deemed to aggravate other wrongdoing by the defendant—and the prosecution must thus bear the burden of proof to establish any such factors. 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.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments. In addition, providing greater protections to noncapital than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.) Even if the Eighth Amendment did not, as an absolute matter, require the allocation of clear and appropriate burdens of proof, because nearly every state does assign such a burden, it is clear that evolving standards of decency under that Amendment do impose such a requirement. (*Roper v. Simmons* (2005) 543 U.S. 551.)

The burdens of persuasion and proof are among the most fundamental concepts in our system of justice, and any error in articulating them is per se reversible. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.)

D. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments by Failing to Require Juror Unanimity on Aggravating Factors

The jury was not instructed that it had to make unanimous findings on aggravating circumstances, or even that a simple majority of them had to agree that any particular aggravating factor or combination of aggravating factors warranted a death sentence. Thus, the jurors were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe the jury imposed the death sentence in this case based on any agreement other than the general one that, based on a comparison of the aggravating and mitigating factors, death was warranted. Thus, in deciding to impose death, each juror may have relied on evidence that only he or she believed existed. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632–633 (plur. opn. of Souter, J.).)

While this Court has held that "there is no constitutional requirement for [a penalty phase] jury to reach unanimous agreement on the circumstances in aggravation that support its verdict" (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749), appellant asserts that failing to require unanimity as to aggravating circumstances encourages jurors to act in an arbitrary, capricious and unreviewable manner, and thus slants the sentencing process in favor of execution. The lack of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and

equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232 234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo*—in particular its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640—should be reconsidered. In *Hildwin*, the Supreme Court held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640 641.) However, that is not the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* undermines the reasoning in *Hildwin*, and thus the constitutional validity of this Court's ruling in *Bacigalupo*.[349]

Under *Ring*, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California* (1998) 524 U.S. 721, 732), the Sixth and Eighth Amendments are not satisfied by anything less than unanimity in the crucial findings of a capital jury.

The failure to require the jury to unanimously find the aggravating factors true also stands in stark contrast to the rules applied in California to noncapital cases. Thus, where a defendant faces special allegations that may

---

[349]Appellant acknowledges that the Court has held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor (*People v. Prieto*, *supra*, 30 Cal.4th at p. 265), but, as shown previously, that holding is mistaken. (See Subsection A, above.)

increase the severity of his sentence the jury must render a separate, unanimous verdict on each such allegation. (See, e.g., Penal Code, § 1158(a).) Since capital defendants are entitled to more rigorous protections than noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to noncapital than to capital defendants would violate the Fourteenth Amendment's equal protection requirement (see e.g., *Myers v. Y1st*, *supra*, 897 F.2d at p. 421), unanimity with regard to aggravating circumstances must be constitutionally required. To apply the requirement to an enhancement finding carrying only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763 764), violates the equal protection, due process and cruel and unusual punishment clauses, and the Sixth Amendment guarantee of a fair jury trial.

Where a death penalty statute permits a wide range of possible aggravators, as California's does, and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously on the existence of each aggravator to be considered there is a grave risk the verdict will cover up wide disagreement among the jurors about just what the defendant did, and that the jurors will fail to focus upon specific factual details, and will simply impose death based on all the evidence. Such an inherently unreliable decision-making process is unacceptable in a capital context. (Cf. *Richardson v. United States* (1999) 526 U.S. 813, 815–816, 819–820.)

E. The Penalty Jury Should Also Have Been Instructed on the Presumption of Life

In noncapital cases, and at the guilt phase of a capital trial, the

presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence.

The trial court's failure to instruct appellant's jury that the law favors life, and presumes life imprisonment without parole to be the appropriate sentence, violated his rights to due process of law, including a fair trial (U.S. Const., 14th Amend.; Cal. Const. art. I, §§ 7 & 15), to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th and 14th Amends.; Cal. Const. art. I, § 17), and to the equal protection of the laws (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.)

This Court has held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," provided the state properly limits death eligibility. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) However, as the other subsections of this argument, along with Arguments XX, above, and XXII–XXIII, below, demonstrate, California's death penalty law is remarkably deficient in the protections required for the consistent and reliable imposition of capital punishment, and a compensatory presumption of life instruction is thus constitutionally required.

F. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

XXII

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

The trial court's concluding penalty-phase instruction in this case was an adapted version of CALJIC No. 8.88. (CT 9: 2011–2012.) That instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed because it did not adequately convey several critical deliberative principles and was misleading and vague in crucial respects. Giving that flawed instruction violated appellant's fundamental rights to due process (U.S. Const., 14th Amend.), a fair trial by jury (U.S. Const., 6th & 14th Amends.), and a reliable penalty determination (U.S. Const., 6th, 8th & 14th Amends.) and requires reversal of his sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383–384.)

Significantly—and appellant may be the first litigant to bring this fact to this Court's attention—the challenged language is identical to that used in *People v. Brown*, *supra*, 40 Cal.3d 512, but was removed from the context in a manner that grossly distorts its meaning. In *Brown*, this Court was construing language in the 1978 death penalty law in order to avoid holding it unconstitutional because of language setting forth circumstances under which the jury "shall" impose the death penalty. As appellant explains in more detail below (see p. 576), in interpreting the statute, the Court emphasized that the evidence has to *justify* a death sentence, in a setting where the only other sentencing option is extremely harsh and already reflects the aggravated nature of special-circumstances murder. (*Id.* at p. 541, fn. 13.) This Court has many times cautioned the CALJIC Committee against lifting language from appellate opinions for use in jury instructions. (See *People v. Colantuono* (1994) 7 Cal.

4th 206, 222, fn. 13 and cases cited.) The language challenged here confirms the wisdom of those warnings.

A. The Instruction Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard Which Did Not Provide Adequate Guidance and Direction

Pursuant to CALJIC No. 8.88, the question of whether to impose a death sentence hinged on whether the jurors were "persuaded that the aggravating circumstances [we]re so substantial in comparison with the mitigating circumstances that it warrant[ed] death instead of life without parole." (CT 9: 2011–2012.) However, the words "so substantial" provided the jurors with no guidance as to "what they ha[d] to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361–362.) Using that phrase violated the federal constitution because it created a vague, directionless, and unquantifiable standard, inviting the sentencer to impose death through the exercise of "the kind of open-ended discretion held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v.*

Stephens (1983) 462 U.S. 862, 867, fn. 5.)[350]

Appellant acknowledges that this Court has stated that, in this context, "the differences between [*Arnold* and California capital cases] are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. Appellant submits that the differences between those cases do not undercut the Georgia Supreme Court's reasoning.

This case has at least one quality in common with *Arnold* and *Breaux*: it featured penalty-phase instructions which did not "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Arnold, supra*, 224 S.E.2d at p. at p. 391.) The instant instruction, like the one in *Breaux*, uses the term "substantial" to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty.

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those identified in *Arnold*, because No. 8.88 governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance. Nothing about CALJIC No. 8.88 "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) Because the instruction rendered the penalty determination unreliable, the death judgment must be reversed.

---

[350] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds in its decision to affirm that state's statutory scheme. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 202.)

B. The Instructions Failed to Inform the Jurors That the Central Determination Is Whether the Death Penalty Is the Appropriate Punishment, Not Simply an Authorized One

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty, as *People v. Brown*, the case which used the "warrants" language in a footnote, makes clear. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Brown, supra*, 40 Cal.3d 512, 541; see also *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307.) However, CALJIC No. 8.88 does not make that standard of appropriateness clear. Telling the jurors they may return a judgment of death if the aggravating evidence "warrants" death does not inform them that the central inquiry is whether death is the appropriate penalty.

A rational juror could find in a particular case that death was warranted but not appropriate, because "warranted" has a considerably broader meaning than "appropriate." Merriam-Webster's Collegiate Dictionary (10th ed. 2001) defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found that such a sentence was permitted, not that it was "especially suitable," fit, and proper, i.e., appropriate. The error of failing to articulate burdens of proof or even persuasion (see Argument XXI.C, above) and the one complained of here thus compound each other. If death is "warranted" in the sense given above, and the jury does not understand that the burden of persuasion is on the prosecution, it can miss the need to decide whether death is appropriate.

Whether death is "warranted" is decided when the jury finds the

existence of a special circumstance authorizing the death penalty. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, even if the jury makes the preliminary determination that death is warranted or authorized it may still decide that penalty is not appropriate.

In contrast, as noted above, in *People v. Brown*, this Court used *warrants* in the sense that the balance of aggravation and mitigation must call for imposition of the weightier penalty of the two which are available. The context—which CALJIC No. 8.88 does not provide to a jury—made that clear. The Court explained that the issue was not a balancing of "the bad" versus "the good" about the defendant, for any death-eligible defendant will typically have more "bad" than "good" in the scale, by virtue of his or her criminal conduct. Because of that, no sentence less than life without parole can be imposed. The jurors' must, therefore, "decide only whether [the defendant] should instead incur the law's single more severe penalty—extinction of life itself." (40 Cal.3d at p. 541, n. 13.) It was in this context that this Court explained that, "to return a death judgment, the jury must be persuaded that the 'bad' evidence is so substantial in comparison with the 'good' that it warrants death instead of life without parole." (*Ibid.*) Continuing its discussion of how section 190.3 should be construed, the Court quoted from authoritative descriptions of a "somewhat analogous" Florida statute, to the effect that jurors must make "a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment . . . ." (*Id.* at pp. 542–543.) This is in fact a presumption of life and a position that imposition of the severer penalty must be justified. This Court's approval of the CALJIC committee's distortion of the Court's own interpretation of the statute should be withdrawn.

The instructional error involved in using the term *warrants* here was not

cured by the trial court's earlier reference to a "justified and appropriate" penalty. (CT 9: 2011.) That reference did not tell the jurors they could only return a death verdict if it was appropriate. At best, it contradicted the final statement of the jury's task, leaving this Court unable to determine which rule the jury applied. (*Francis v. Franklin* (1985) 471 U.S. 307, 322–325 & fn. 8.)

This crucial sentencing instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.) and denies due process. (U.S. Const., 14th Amend.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) That judgment must therefore be reversed.

C. The Instructions Failed To Inform The Jurors That They Were Required To Impose Life Without The Possibility of Parole If They Found That Mitigation Outweighed Aggravation

Section 190.3 directs that after the jury considers the aggravating and mitigating factors it "shall impose" a sentence of imprisonment for life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, §190.3.) The United States Supreme Court has held that this requirement is consistent with the individualized consideration of the defendant's culpability required by the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language was not provided to appellant's jury. Instead, CALJIC No. 8.88, which told it that death may be imposed if the aggravating circumstances are "so substantial" in comparison to the mitigating circumstances that death is warranted. Use of the phrase "so substantial" does not properly convey the "greater than" test mandated by section 190.3. CALJIC No. 8.88 permits the imposition of a death penalty whenever

aggravating circumstances were of substance or considerable, even if outweighed by the mitigating circumstances. Because it fails to conform to the specific mandate of section 190.3, CALJIC No. 8.88 violates the Fourteenth Amendment. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p.346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281 (emphasis original).)

This Court has approved the language of CALJIC No. 8.88 on the basis that since it states that a death verdict requires that aggravation outweigh mitigation, "it [i]s unnecessary to instruct the jury of the converse." (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant respectfully asserts that the Court's conclusion conflicts with numerous opinions disapproving instructions emphasizing the prosecution's theory of a case while minimizing or ignoring the defense theory. (See e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526 529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013 1014; see also *Reagan v. United States* (1895) 157 U.S. 301, 310.)

The law does not rely on jurors to infer one rule from the statement of its opposite, and it recognizes the bias in such reliance. (See *People v. Moore*, *supra*, 43 Cal.2d at pp. 526–527.) Thus, even assuming that the instruction at issue here was a correct statement of law, it stated only the conditions under which a death verdict could be returned, and not those under which a verdict of life was required. Such bias violates the Eighth Amendment. (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

It is well settled that in criminal trials the jury must be instructed on any

defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) Denying that fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) Moreover, CALJIC No. 8.88 is not saved by the fact that it is a sentencing instruction, as opposed to one guiding the determination of guilt or innocence, since reliance on such a distinction would violate equal protection. (See U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216 217.)

Moreover, slighting a defense theory in instructions not only denies due process, but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469 470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028.) Reversal of appellant's death sentence is required.

D. Conclusion

As set forth above, CALJIC No. 8.88, failed to comply with the requirements of the due process clause of the Fourteenth Amendment, and the cruel and unusual punishment clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

//

//

XXIII

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THOSE SENTENCING FACTORS, RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

The jury was instructed on section 190.3, pursuant to CALJIC Nos. 8.85, the standard instruction regarding the statutory sentencing factors, and 8.88, the standard instruction regarding the weighing of those factors. (CT 9: 1989–1990, 2011–2012.) Those instructions rendered appellant's death sentence unconstitutional in several ways. First, the failure to delete inapplicable sentencing factors violated appellant's constitutional rights under the Sixth, Eighth, and Fourteenth Amendments. Second, the application of section 190.3, subdivision (a), resulted in the arbitrary and capricious imposition of the death penalty. Third, the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable, and evenhanded application of the death penalty. Fourth, the restrictive adjectives used in the list of potential mitigating factors unconstitutionally impeded the jurors' consideration of mitigating evidence. Fifth, the failure of the instructions to require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law. Sixth, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. Appellant's death judgment must be reversed.

A. The Instruction on Section 190.3, Subdivision (a), and Application of That Sentencing Factor, Resulted in the Arbitrary and Capricious Imposition of the Death Penalty

Section 190.3, subsection (a), violates the right to a properly instructed jury guaranteed by the Sixth Amendment to the United States Constitution, the Due Process Clause of the Fourteenth Amendment, and the Eighth Amendment because it is applied in such a wanton and freakish manner that almost all features of every murder have been found to be "aggravating" within its meaning, even ones squarely at odds with others deemed aggravating in other cases. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1984) 512 U.S. 967, 975 976), it has been used in ways so arbitrary and contradictory as to violate both due process of law and the Eighth Amendment.

Factor (a) directs the jury to consider as aggravation the "circumstances of the crime." Because this Court has always found that using the broad term "circumstances of the crime" meets constitutional scrutiny, it has never applied a limiting construction to factor (a). Instead, it has allowed an extraordinary expansion of that factor, finding it to be a relevant "circumstance of the crime" that, e.g., the defendant hated religion,[351] sought to conceal evidence after the crime,[352] threatened witnesses,[353] disposed of the victim's body so it could not be recovered,[354] or had a mental condition which compelled him to commit the

---

[351] *People v. Nicholas* (1991) 54 Cal.3d 551, 581 582.

[352] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10.

[353] *People v. Hardy* (1992) 2 Cal.4th 86, 204.

[354] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.

crime.[355]

California prosecutors have argued that almost every conceivable circumstance of a crime should be considered aggravating, even ones starkly opposite to others relied on as aggravation in other cases. (See *Tuilaepa v. California, supra,* 512 U.S. at pp. 986 987 (dis. opn. of Blackmun, J.).) The examples cited by Justice Blackmun in *Tuilaepa* show that because this Court has failed to limit the scope of the term "circumstances of the crime," different prosecutors have urged juries to find squarely conflicting circumstances aggravating under that factor.

In practice, the overbroad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363.) That factor is therefore unconstitutional as applied. (*Ibid.*)

B. The Failure to Delete Inapplicable Sentencing Factors Violated Appellant's Constitutional Rights

Appellant wishes to draw the Court's attention to the fact that the fourth through sixth paragraphs under this heading[356] present what he believes to be new arguments and that, because of them, its prior dispositions of claims about inapplicable factors should be reconsidered in light of the new considerations.

Although most of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case, the trial court did not delete those

---

[355] *People v. Smith* (2005) 35 Cal.4th 334, 352.

[356]Beginning with, "The constitutional violation is much greater . . . ."

inapplicable factors from the instruction. Including those irrelevant factors in the statutory list introduced confusion, capriciousness and unreliability into the capital decision-making process, and violated appellant's rights to a properly-instructed jury and to a fair, reliable, and non-arbitrary penalty determination under the Sixth, Eighth and Fourteenth Amendments. Appellant recognizes that this Court has rejected similar contentions (see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), but requests reconsideration for the reasons given below, and to preserve the issue for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b) and (c) may lawfully be considered in aggravation. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944–945.) But the "whether or not" formulation used in CALJIC No. 8.85 suggests that the jury can consider the inapplicable factors as well. (21 CT 5697–5698.) Instructing jurors on irrelevant matters dilutes their focus, distracts their attention, and introduces confusion into their deliberations. In this context, irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Further, the failure to delete mitigating factors unsupported by the evidence inevitably denigrates the defendant's mitigation evidence. Appellant's jury was effectively invited to sentence him to death because there was evidence in mitigation for "only" one or two factors, while there was either evidence in aggravation or no evidence with respect to the rest. In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out factually unsupported theories, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here undermined the

reliability of the sentencing process and deprived appellant of equal protection of the laws. (U.S. Const., 8th & 14th Amends.)

The constitutional violation is much greater when considered, not abstractly, but in terms of the actual mitigating factors listed. The constitutionally required[357] factor (k) instruction was impermissibly weakened in its effect by the listing of eight specific factors that state law considers mitigation, six of which ((d), (e), (f), (g), (h), and (j)) were highly specific, rare,[358] extremely mitigating if they would ever even arise in a case in which the death penalty is sought, and related to the defendant's conduct, not character or background. While factor (k) told the jury that the list was non-exclusive, it would require an assumption of juror irrationality to believe that jurors were uninfluenced by the lengthy set of examples of factors which the state considers to be mitigation.

The unfairness is thrown into relief if one imagines the shoe to have been on the other foot. Then there would be a mitigation list that began with factor (k) and included two other obvious and fairly common mitigating factors, one of which (like factor (b) here) clearly applied to the defendant. The aggravation list would begin with, for example, a half-dozen fairly extreme-sounding statutory special circumstances that did not apply (murder by lying in wait, murder in the course of rape or sodomy, murder by torture, etc.), or unusual and strongly aggravating circumstances of the crime (the defendant took advantage of a position of trust, the defendant derived pleasure from causing a slow and painful death, etc.). Even if the list concluded with

---

[357]See *People v. Easley* (1983) 34 Cal. 3d 858, 878, fn. 10, quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604 (plur. opn.).

[358]See *People v. Howard* (1992) 1 Cal. 4th 1132, 1194 (evidence of these factors "is typically lacking in murder cases").

"and any other circumstance of the crime that you find to be aggravating," prosecutors' protests that the list of specific and likely inapplicable aggravators distorted the jurors' conceptions of what could count as aggravation would be justified. As it was, in the actual situation at trial, with the pro-prosecution version of the instruction, appellant's prosecutor clearly saw the usefulness of the unedited list: he began his penalty-phase opening statement by reading the entire instruction. (RT 48: 7260–7261.)

The problem is that the statute on which the instruction is based is itself biased, and the attempts to render it constitutional which this Court began in cases such as *People v. Brown*, *supra*, 40 Cal.3d 512, 538–544, and *People v. Easley*, *supra*, 34 Cal. 3d 858, 878, fn. 10, must be continued by crafting instructions that do not pinpoint inapplicable mitigation possibilities. If the statute had not been drawn in such a one-sided way, providing for consideration of such narrow forms of mitigation and originally excluding all mitigation that did not particularly extenuate the gravity of the crime itself (see *People v. Easley*, *supra*, 34 Cal. 3d 858, 877 & fn. 7), factor (a)'s generality would be balanced by the generality of the current factor (k) and nothing else. Alternatively, aggravation would have been similarly spelled out, with equally narrow and unusual specific examples of what might be aggravating under factor (a). As it is, the statutory language is quite biased, but the application of the normal rules about deleting inapplicable material from pattern instructions would solve the problem quite easily.

The inclusion of inapplicable factors also deprived appellant of his right to individualized sentencing based on permissible factors relating to him and the crimes. That error also artificially inflated the weight of the aggravating factors, and violated the constitutional requirement of heightened reliability in the penalty determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414;

Beck v. Alabama (1980) 447 U.S. 625, 637.) Reversal of appellant's death judgment is required.

C. Restrictive Adjectives Used in the List of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (see factors (d) and (g); CT 9: 2057–2058), and "substantial" (see factor (g)), acted as a barrier to the consideration of mitigation, in violation of the Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.) While these factors would not seem to have applied to appellant in any event, they exacerbated the imbalance of specifying, by way of example, what the state considers mitigation, while most aggravation was left open-ended.

D. Failing to Require the Jury to Make Written Findings Regarding the Aggravating Factors Violated Appellant's Constitutional Rights to Meaningful Appellate Review and Equal Protection of the Laws

CALJIC Nos. 8.85 and 8.88 did not require appellant's jurors to make written or other specific findings about the aggravating factors they found and considered in imposing sentence. Failing to require such express findings deprived appellant of his Fourteenth Amendment and Eighth Amendment rights to meaningful appellate review, and his Fourteenth Amendment right to equal protection of the laws. (See *California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Because California juries have total, unguided discretion on how to weigh the statutory sentencing factors (*Tuilaepa v. California, supra*, 512 U.S. at pp. 979–980), there can be no meaningful appellate review unless they make written findings regarding

those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313–316.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. This Court held that parole boards must state their reasons for denying parole because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*In re Sturm* (1974) 11 Cal.3d 258, 267.) The same reasoning must apply to the far graver decision to put someone to death. Further, in noncapital cases California requires the sentencer to state on the record the reasons for its sentence choice. (Pen. Code, § 1170(c).) Under the jury-trial right of the Sixth Amendment, the Eighth Amendment, and the Due-Process Clause of the Fourteenth Amendment, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Accordingly, the sentencer in a capital case must identify for the record the aggravating circumstances upon which its sentence is based. The other difficulties with California's statutory and instructional scheme, discussed earlier, make this safeguard all the more crucial.

The fact that a capital-sentencing decision is "normative" (*People v. Hayes* (1990) 52 Cal.3d 577, 643), and "moral," does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. (See, e.g., Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-

1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); State v. White (Del. 1978) 395 A.2d 1082, 1090.) California's failure to require such findings renders its procedures unconstitutional.

E. Even If The Absence Of The Previously Addressed Procedural Safeguards Does Not Render California's Death Penalty Scheme Constitutionally Inadequate To Ensure Reliable Capital Sentencing, Denying Those Safeguards To Capital Defendants Violates Equal Protection

As noted previously, the United States Supreme Court has repeatedly said that heightened reliability is required in capital cases, and that courts must be vigilant in ensuring procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California* (1998) 524 U.S. 721, 731–732.) However, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to ones charged with noncapital crimes, in violation of the constitutional guarantee of equal protection.

"[P]ersonal 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.) In the case of interests identified as "fundamental," courts "subject[] the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784–785.) A state may not create a classification scheme affecting a fundamental interest without showing both that it is justified by a compelling purpose, and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*, 17 Cal.3d at p. 251; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.) The State cannot meet that burden here, because in capital cases the state and federal equal protection guarantees apply with greater force, and the scrutiny

of the challenged classification is stricter, because the interest at stake is life itself.

The denial of the safeguards of the requirement of written jury findings, unanimous agreement on aggravating factors, and the disparate treatment of capital defendants as set forth in this argument, violated appellant's right to equal protection. The procedural protections outlined in these arguments, but denied capital defendants, are especially important in insuring reliable and accurate fact-finding in capital trials. (*Monge v. California*, *supra*, 524 U.S. at pp. 731 732.)

F. Conclusion

Appellant must, like this Court, analyze the preceding contentions individually. But it is important to consider the cumulative impact of the matters of which they complain in the creation of California's unusually unguided and pro-death death-penalty scheme. Even if the rectification of any one of them is not constitutionally compelled, the existence of one or more of the others makes it infirm under the Eighth Amendment and the jury-trial and fair-trial guarantees of the Sixth and Fourteenth Amendments.

For all the reasons set forth above, appellant's death sentence must be reversed.

//

//

XXIV

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW AND THE EIGHTH AMENDMENT, AS INFORMED BY INTERNATIONAL STANDARDS

The United States is one of the few nations which regularly uses the death penalty as a form of punishment. (See *Ring v. Arizona* (2002) 536 U.S. 584, 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.) As the Canadian Supreme Court recently noted, the death penalty has been essentially abolished in 108 countries, including all the major democracies except the United States, India and Japan. (*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. Imposing a death sentence on appellant after a trial that was unfair because of the reasons set forth above also violates international law. Because the 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's determination of evolving standards of decency and the Fourteenth Amendment's concept of fundamental fairness, appellant raises this claim under those constitutional provisions as well. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J).)

A. International Law

1. Cruel, Inhuman, or Degrading Punishment

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 as "the supreme law of the land. . . ." (*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.)

Appellant's death sentence violates the ICCPR. Because of the improprieties in the capital sentencing process challenged in this appeal, the imposition of the death penalty on appellant would constitute "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. While this Court has previously rejected international law claims directed at the death penalty in California (*People v. Ghent* (1987) 43 Cal.3d 739, 778 779; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511), there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should apply to the United States (see *United States v. Duarte-Acero, supra*, 208 F.3d at p.1284; *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).

2. Over-Use of Capital Punishment

Assuming arguendo that capital punishment itself is not contrary to international norms of human decency, using it as regular punishment for substantial numbers of crimes, rather than as an extraordinary punishment for extraordinary crimes, certainly is. The International Covenant on Civil and Political Rights, article 6(2), states: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious

crimes. . . ." The Human Rights Committee established under this treaty states that this section must be "read restrictively to mean that the death penalty should be a quite exceptional measure." (General comment, International Covenant on Civil and Political Rights. Article 6.) Since the law of nations considers it improper to use capital punishment as regular punishment, it is unconstitutional in this country because international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112.)

3. General Right to Fair Hearing

In addition, under international law, everyone is entitled to a fair hearing. This right encompasses all the procedural and other specific guarantees of a fair trial laid down in international standards, but is wider in scope. It includes compliance with national procedures, provided they are consistent with international standards. Despite fulfilling all national and international procedural guarantees, however, a trial may still not meet the criterion of a fair hearing. (Universal Declaration of Human Rights, art. 10; of the ICCPR, art. 14(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6(1); American Declaration of the Rights and Duties of Man, art. XXVI; American Convention on Human Rights, art. 8.)

In other words, the right to a fair trial is broader than the sum of the individual guarantees, and it depends on the entire conduct of the trial. (See Human Rights Committee General Comment 13, para. 5; Advisory Opinion of the Inter-American Court of Human Rights, OC-11/90, Exceptions to the Exhaustion of Domestic Remedies, 10 August 1990, Annual Report of the Inter-American Court, 1990, OAS/Ser L./V/III.23 doc.12, rev. 1991, at 44, para. 24.) The Inter-American Court on Human Rights has found that states

may impose the death penalty only if they rigorously adhere to the fair trial rights set forth in the ICCPR. (OC-16/99, Inter-Am. Ct. H.R. (October 1, 1999).) Similarly, the Human Rights Committee has held that when a state violates an individual's due process rights under the ICCPR, it may not carry out his execution. (See, e.g., *Johnson v. Jamaica*, No. 588/1994 (1996), H.R. Comm. para. 8.9; *Reid v. Jamaica*, No. 250/1987, H.R. Comm. para. 11.5; Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, para. 12.2, reprinted in 11 Hum. Rts. L.J. 321 (1990).)

Given the absence of a fair trial in appellant's case, as shown in all the preceding arguments, executing the death judgment would violate appellant's general right to a fair trial under international law.

Appellant asks the Court to reconsider its prior rejection of international law claims concerning the death penalty, and to find that his death sentence violates international law.

B. The Eighth Amendment, as Affected by International Standards

As noted above, the abolition of the death penalty, or its limitation to use as a punishment for exceptional crimes such as treason, is uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky*, *supra*, 492 U.S. at p. 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn).) Indeed, *all* the 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 April 2005) at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)

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 as models regarding the laws of civilized nations, and as sources for the meaning of terms in the Constitution. (*Miller v. United States* (1870) 78 U.S. 268, 315 (dis. opn. of Field, J., quoting 1 Kent's Commentaries 1); *Hilton v. Guyot*, *supra*, 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291 292.)

"Cruel and unusual punishment" as defined in the Constitution is not limited to acts which violate the standards of decency existing in 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.) Thus, if the standards of decency as perceived by the civilized nations of Europe have evolved, what the Eighth Amendment requires has evolved with them. The Eighth Amendment thus prohibits forms of punishment that are not recognized by several of our states and the civilized nations of Europe, or that are used by only a handful of countries around the world—including totalitarian regimes with "standards of decency" antithetical to ours. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21 [basing determination that executing mentally retarded persons violates Eighth Amendment in part on the views of "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31.)

No other nation in the Western world still uses or accepts the death penalty, and the Eighth Amendment does not permit our nation to lag so far behind. (See *Hilton v. Guyot*, *supra*, 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery*, *supra*, 59 U.S. 110, 112 [accepting law of nations as a part of every country's own jurisprudence].) California's use of death as a regular

punishment violates the Eighth and Fourteenth Amendments, and appellant's death sentence should therefore be set aside.

//

//

XXV

APPELLANT ROMERO JOINS IN ALL CLAIMS OF ERROR RAISED BY CO-APPELLANT SELF WHICH MAY INURE TO HIS BENEFIT

Appellant Romero joins in all claims not raised in this brief, but raised by co-appellant Self, which may inure to appellant Romero's benefit. Similarly, to the extent that appellant Self briefs a claim also raised in this brief but includes any argument not propounded here in support of that claim, appellant incorporates the argument. (See California Rules of Court, rules 13(a)(5), 36(a); see also *People v. Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5; *People v. Smith* (1970) 4 Cal.App.3d 41, 44.) However, he reserves the right to withdraw, in a later pleading, his joinder as to any particular claim or argument, should such action appear appropriate.

//

//

CONCLUSION

For all of the reasons stated above, the convictions on counts I, II, III, V, VI, VIII, IX, and X must be reversed, the death judgment must be reversed, and retrial is prohibited on counts III and IX.

DATED: September 11, 2006.

Respectfully submitted,

Michael P. Goldstein,
Attorney for Appellant Romero

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(b)(2))

I, Michael P. Goldstein, am the attorney appointed to represent Orlando Gene Romero, Jr., in this automatic appeal. I conducted a word count of this brief, using the word-processing program used to prepare the brief. On the basis of that count, I certify that this brief is 179,386 words in length, excluding the tables and certificates.

Dated: September 11, 2006

_____
Michael P. Goldstein

CERTIFICATE OF SERVICE

Re: People v. Romero and Self No. S055856

I, MICHAEL P. GOLDSTEIN, certify that I am an active member of the California State Bar, and not a party to the within cause; that my business address is Post Office Box 84, Alameda, CA 94501; and that I served a true copy of the attached

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in envelopes addressed respectively as follows:

Ivy Fitzpatrick
Deputy Attorney General
Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

William D. Farber
Attorney at Law
Box 2026
San Rafael, CA 94912-2026

Geraldine Russell
Attorney at Law
P.O. Box 2160
La Mesa, CA 91943-2160

California Appellate Project
101 2nd Street, Suite 600
San Francisco, CA 94105

John R. Grele
Attorney at Law
703 Market St #660
San Francisco, CA 94103

Michael Magnuson
Attorney at Law
13215 Penn St., #205
Whittier, CA 90602

Riverside Superior Court
P.O. Box 431
Riverside, Ca. 92501

Pursuant to Policy 4 of the Supreme Court Policies Regarding Cases Arising from Judgments of Death, I will personally serve

Appellant Orlando Gene Romero, Jr.,

within two weeks of the date of this certificate.

On September 12, 2006, I sealed and deposited each envelope in the United States Mail at Alameda, California,, with the postage fully prepaid.

Signed on September 12, 2006, at Alameda, California.

_____

COPY

AMENDED CERTIFICATE OF SERVICE

Re: People v. Romero and Self No. S055856

I, MICHAEL P. GOLDSTEIN, certify that I am an active member of the California State Bar, and not a party to the within cause; that my business address is Post Office Box 84, Alameda, CA 94501; and that I served a true copy of the

APPELLANT'S OPENING BRIEF

prepared on behalf of Orlando Gene Romero, Jr., and lodged with the California Supreme Court on September 13, 2006, on each of the following, by placing same in envelopes addressed respectively as follows:

Ivy Fitzpatrick
Deputy Attorney General
Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

William D. Farber
Attorney at Law
Box 2026
San Rafael, CA 94912-2026

Geraldine Russell
Attorney at Law
P.O. Box 2160
La Mesa, CA 91943-2160

California Appellate Project
101 2nd Street, Suite 600
San Francisco, CA 94105

John R. Grele
Attorney at Law
703 Market St #660
San Francisco, CA 94103

Michael Magnuson
Attorney at Law
13215 Penn St., #205
Whittier, CA 90602

Riverside Superior Court
P.O. Box 431
Riverside, Ca. 92501

On September 12, 2006, I sealed and deposited each envelope in the United States Mail at Alameda, California, with the postage fully prepaid.

On September 18, 2006, I personally delivered a copy of the brief to appellant Orlando Gene Romero, Jr.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on October 27, 2006, at Alameda, California.