IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JOHN CLYDE ABEL, Defendant and Appellant.	**CRIM. No. S064733** **Automatic Appeal** **(Capital Case)** **Orange County** **Superior Court** **No. 95CF1690**

APPELLANT'S OPENING BRIEF

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

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

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APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This is an automatic appeal, pursuant to Penal Code section 1239,[1] subdivision (b), from a conviction and judgment of death entered against appellant, John Clyde Abel, (hereinafter "appellant"), in Orange County Superior Court, on September 26, 1997. (3 CT 1153; 12 RT 2182.)[2] The appeal is taken from a judgment that finally disposes of all issues between the parties.

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[1] All further code section references are to the Penal Code unless otherwise noted.

[2] "CT" refers to the Clerk's Transcript; "RT" refers to the Reporter's Transcript; "ACT" refers to the Augmented Clerk's Record; and "ART" refers to the Augmented Reporter's Record.

STATEMENT OF THE CASE

By an Information filed December 26, 1995, appellant was charged with one count of murder, in violation of section 187. (1 CT 216-219.) The Information further alleged that appellant committed the murder while engaged in the commission of a robbery, within the meaning of section 190.2, subsection (a)(17)(1), and while lying in wait, within the meaning of section 190.2, subsection (a)(15). (1 CT 216.) Additionally, the offense was alleged as a serious felony within the meaning of section 1192.7, subsection (c)(1), precluding a plea agreement. (1 CT 216.) The offense alleged personal use of a firearm, within the meaning of sections 1203.06, subsection (a)(1)[3] and 12022.5, subsection (a). (1 CT 216.)

Twenty prior convictions were alleged in the Information pursuant to sections 667, subsection (a)(1) and 1192.7, subsection (c). (1 CT 217-219.) Fourteen of the prior convictions were convictions of robbery under section 211, three were convictions of attempted robbery under section 664/211, and three were federal bank robbery convictions under 18 USC 2113(a)(d). (1 CT 217-219.)

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[3] The Information failed to designate the applicable subdivision of Pen. Code, § 1203.06, subsection (a)(1). Section 1203.06, subsection (a)(1)*(b)* applies to "[r]obbery, in violation of Section 211."

On January 21, 1997, the prosecution filed its Concession of Motion to Strike Convictions, which conceded that fifteen of the prior robbery convictions, alleged to have occurred on January 21, 1992, occurred after the present offense and therefore did not qualify as prior convictions. (2 CT 399-400; 2 RT 79.)[4] On January 24, 1997, the prosecution filed its First Amended Information, removing allegations of all "prior" convictions which had occurred after the offense in question. (2 CT 495-496; 2 RT 79.) As amended, the Information alleged five prior robbery convictions, three of which were under the federal bank robbery statute. (2 CT 496.) On May 27, 1997, the trial court granted the prosecution's motion to strike the lying-in-wait special circumstance. (2 RT 79.)[5]

Trial commenced on May 29, 1997. (2 CT 595A; 4 RT 402.) On June 4, 1997, appellant's dual motions for mistrial were both denied. (2 CT 611-612; 6 RT 864.)[6] On June 5, 1997, the trial court denied appellant's section 1181.1 motion. (7 RT 1009-1010.) On June 12, 1997, after the trial

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[4] The present offense occurred on January 4, 1991.

[5] The prosecutor did not file a Second Amended Information to reflect this change. (2 RT 79.)

[6] Appellant moved for mistrials based on Lorraine Ripple's testimony regarding, inter alia, third party threats, and on Detective Rubino's testimony regarding the circumstances of appellant's arrest. (5 RT 640-641, 6 RT 970, 7 RT 1011-1013.)

court conducted an in-chambers review of prosecution witness Lorraine Ripple's psychiatric records, it denied appellant's request for full disclosure of the records. (2 CT 640-641; 10 RT 1580-1581.)[7] The court also denied appellant's motion for a psychiatric examination of Ms. Ripple and to recall her as a witness. (2 CT 641; 11 RT 1964.)

On June 16, 1997, the jury found appellant guilty of murder and the special allegations to be true. (2 CT 787-789; 10 RT 1749-1750.) On June 18, 1997, the penalty phase commenced. (2 CT 790-793; 10 RT 1768.) The court denied appellant's speedy trial motion on June 24, 1997. (3 CT 800-801; 11 RT 1976.)[8] The jury began penalty phase deliberations the morning of June 25, 1997, and returned a penalty verdict of death that afternoon. (3 CT 1039-1040; 12 RT 2140.)

The trial court denied appellant's combined motion for new trial and modification of the verdict on September 26, 1997. (3 CT 1146, 1152; 12 RT 2170, 2182.) Appellant was sentenced to death for murder and ordered to pay $20,000 in restitution pursuant to section 1202.4, subsection (f). (3

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[7] The trial court determined that only a few paragraphs were relevant to the proceedings, which it provided to the parties before sealing the records. (10 RT 1580-1581.)

[8] The trial court delayed ruling on the speedy trial motion until after the commencement of trial at appellant's request. (3 RT 400.)

CT 1153-1155; 12 RT 2182.)[9]

STATEMENT OF THE FACTS

A. Introduction

This case arises out of the shooting death of Armando Miller during the course of a robbery in the parking lot of Sunwest Bank in Tustin, California.

Appellant's conviction resulted from a fundamentally unfair trial by a seriously biased judge. The trial judge interrupted defense counsel's closing argument during the guilt phase to tell jurors that they could disregard whatever a lying attorney said to them. The judge also wanted the defense investigator arrested on trumped-up charges and made numerous other improper remarks and rulings which sabotaged appellant's ability to present a defense.

The prosecution delayed charging charge appellant until four years after the crime, and twenty-one months after police received a tip identifying appellant as the assailant. By the time of trial, evidence supporting appellant's alibi defense could not be located and the memories of defense witnesses had faded.

The evidence against appellant consisted of two witnesses who testified that they saw appellant at or near the crime scene and a convicted felon who said that appellant confessed to her. One witness changed her mind three times as to the identity of the assailant, identifying two other suspects before picking out appellant from a photographic lineup four years after the homicide. The other witness identified two suspects from a

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[9] The clerk's transcript also includes a $200 restitution fine in addition to the $20,000 fine. (3 CT 1155.)

photographic lineup as bearing a resemblance to the assailant before settling upon appellant four years later. Appellant needed a physical lineup to prove his innocence but the trial court denied his request.

The prosecution also introduced evidence that appellant had in his possession numerous weapons, none of which connected him to the current offense, and all of which made him look guilty to jurors.

Lorraine Ripple, appellant's co-defendant in other robberies, testified that he not only confessed to her but that she and her sons, who were also incarcerated, had been threatened or assaulted because of appellant. None of the threats against Ripple and her sons came from appellant. She also testified about appellant's gang involvement. Ripple had outbursts in court and noted psychological problems but the court denied appellant full access to her prison medical records.

At penalty phase the victim's mother testified that appellant killed two of her sons, the victim and his brother. Mrs. Miller testified that because the victim's brother developed fatal heart problems after the homicide, appellant had killed him too. No supporting evidence connected the brother's heart disease to the crime.

B. Guilt Phase

On Friday morning, January 4, 1991, teller Linda Pratt cashed a $20,000 check for Armando Miller at the "merchant's window" of Sunwest Bank in Tustin. (4 RT 482-484; 496-497.)[10] The Miller family owned Alameda Market, a small grocery store in the City of Orange, which also provided a check-cashing service for customers. (5 RT 773, 779, 781.)

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[10] Because several of the parties have the last name of "Miller," Armando, Robert, and America Miller will be referred to by their first names.

Armando or his father, Robert Miller, routinely withdrew large sums of cash (either ten or twenty thousand dollars) around the same time on Fridays for their check-cashing business. (4 RT 496-497, 5 RT 691, 780.)

A few minutes after 10:30 a.m., right after Armando left the bank with the cash, Ms. Pratt heard a "pop" or "bang" noise. (4 RT 488.) She looked outside and saw Armando on the ground. (4 RT 488, 500.) She saw another man who was wearing a navy blue stocking cap flee the scene. (4 RT 489.)

Within minutes, police and paramedics arrived at the scene. (4 RT 505, 512-513.) Officer Pang arrived first on the scene at approximately 10:48 a.m. (4 RT 503-505.)[11] Pang found Armando lying on the ground in the parking lot next to the bank in serious medical distress. (4 RT 508.) He applied pressure to the left side of Armando's forehead to stop the bleeding. (4 RT 509.) The paramedics arrived and took over Armando's care but he was pronounced dead upon arrival at the hospital. (4 RT 516-517.)

According to the forensic pathologist, Dr. Aruna Singhania, Armando died from a laceration of the brain due to a gunshot wound to the head which entered on the left side of his forehead. (5 RT 678, 680.) Forensic specialist, Tamara Jurjis, identified an expended .22 handgun casing found at the crime scene. (4 RT 526, 531.)

Two women, Bettina Redondo and Colleen Heuvelman, saw a suspicious person near the bank at the time of the homicide; neither initially identified appellant as the suspect. (4 RT 577-578, 5 RT 709-710, 6 RT 823.)

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[11] The Tustin Police Department is located only 600 feet from Sunwest Bank. (4 RT 505.)

Redondo had been walking between offices next door to Sunwest Bank around 10:45 a.m. on January 4, 1991 when she heard what sounded like a gunshot coming from the drive-through area of the bank. (4 RT 553-555.) She saw a man with his arm extended and smoke coming from his gun but could not see the victim. (4 RT 556-557.) She observed the gunman from about thirty feet away walk through bushes to the parking lot. (4 RT 557-558.) Afraid, she went into an office and watched from a window as he walked through the parking lot. (4 RT 560.) She observed him for another twenty to thirty seconds from about fifteen feet away. (4 RT 562-563.) She gave a description to the police and worked with a police artist on a composite sketch of the suspect. (4 RT 570-572.)

The same day, homicide Detective Nasario Solis escorted four or five witnesses, including Redondo, to an in-field identification of a man they had stopped in the vicinity matching a description given by witnesses. (5 RT 641, 788.) The police released the suspect, Kenneth Moorehead, after none of the witnesses could identify him. (5 RT 788.)

Several days after the homicide, Redondo picked out Larry Jones (No. 6) from two police "six packs" of photographs of possible suspects, saying she was "90 percent" sure he was the gunman. (4 RT 577-578, 6 RT 823.) She subsequently recanted this identification. (4 RT 579.) A couple of months later, on March 13, 1991, she accompanied Officer Mark Bergquist and Investigator Solis to San Diego for a physical lineup. (8 RT 1231.) She began to shake and wiped away tears in response to observing Larry Jones, but identified Mr. Nettle as the assailant, not Jones. (8 RT 1232-1235.)[12]

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[12] Mr. Nettle's first name was not provided.

On March 6, 1995, approximately four years after the homicide, Redondo picked out appellant from another "six pack" of photographs and this time said that she was eighty percent certain he was the assailant. (4 RT 585, 9 RT 1409-1410.)[13]

Colleen Heuvelman had been working at Sunwest Bank as a teller on the morning of January 4, 1991, but had to leave early that day. (5 RT 690.) She had her young son with her and as she left the bank around 10:30 a.m., she stopped to chat with Armando whom she knew as a regular bank customer. (5 RT 691.) As she walked outside and around a corner in the bank parking area, she almost ran into a person who was standing against a wall wearing something similar to a navy watchman's cap. (5 RT 698.) She kept looking at the man as she and her son got into her car. (5 RT 702.) She described this man to police as a Caucasian male, 46-48 years old, high cheek bones, thin mustache coming down along the side of his mouth (often referred to as a "Fu Man Chu" mustache), three-day beard, gray hair, dark eyes, thin lips, grayish complexion and not wearing glasses. (5 RT 698-701, 705.) A couple of months later, on March 11, 1991, Heuvelman identified two different suspects from a photographic lineup bearing a resemblance to the man she saw; neither photograph was of appellant. (5

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[13] Ms. Redondo said she was eighty percent certain "on the record" and one hundred percent certain "off the record." (4 RT 585.) In March 1995, when Detective Tarpley took over the case from Detective Solis, the case had become "suspended" or inactive. (5 RT 706-708, 794-795.) Detective Tarpley, following up on an anonymous tip which Solis had received on August 3, 1993, showed Ms. Redondo and Ms. Huevelman appellant's photograph. (5 RT 790-792.) The anonymous informant was later identified as Joanne Gano, James Gano's wife. (2 CT 453.)

RT 709-710.)[14]

Four years after the homicide, Heuvelman identified appellant from a six-pack of photographs as the man she had seen in the bank parking lot. (5 RT 712.)

America Miller, Armando's mother, recalled seeing appellant in her market with James Gano and others about a month or a month and one-half prior to the homicide. (5 RT 776-779.) Gano had brokered some loans for her and her husband and often frequented their market. (5 RT 774-775.) America also identified Larry Jones and someone named "Rickard" as having been in her market. (6 RT 824, 8 RT 1225.)

At the time of Detective Tarpley's investigation in 1995, appellant was already serving time in prison on a number of unrelated robberies. (9 RT 1429.) Lorraine Ripple, a co-defendant in some of those robberies, had also been convicted and was serving time at the female "SHU" at Valley State Prison. (6 RT 848, 885, 9 RT 1491.)[15] Tarpley's partner, Investigator Proctor met with Ripple in prison and had on-going communication with her. (6 RT 848, 858, 885.) Ripple provided incriminating evidence against appellant, stating that during the course of her affair with appellant in 1991, appellant confided in her that he had killed someone in Tustin and described it as an "easy score." (6 RT 854-857.) According to Ripple, after the

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[14] She told police that the man in photograph No. 10 had eyes similar to the person she saw. (5 RT 709.) She also circled and put her initials next to photograph No. 6, stating that man bore a facial resemblance to the man she saw. (5 RT 710.)

[15] Detective Rubino of the Los Angeles County Sheriff's Department, who arrested appellant in 1991on other charges, found a medicinal vial with Ripple's name on it in appellant's car along with a photograph of James Gano and assorted weapons. (7 RT 1003-1007, 1009-1010.)

Tustin homicide, appellant gave her the gun he used, which she traded for drugs. (6 RT 856, 896.)

Appellant testified in his own defense and denied the charge. (9 RT 1428-1471.) He first heard about this offense in June or July of 1995, when the Tustin police formally charged him. (9 RT 1429.) Appellant was serving a 44 year 8 month sentence on state charges and a 53 year 8 month and 25 day sentence on federal charges when charged with this new offense. (9 RT 1429.)

In 1991, appellant looked just as he did in his wedding photograph taken the same year; he wore glasses and had a full mustache. (4 RT 589, 656, 6 RT 852, 7 RT 1024-1025.) Mr. Sano, appellant's probation officer, and Susan Maitland, appellant's sister-in-law, confirmed that appellant wore a full, not a "Fu Man Chu" mustache, and that he also wore glasses. (9 RT 1273, 1284, 1310.) Dr. Eric Bass, an optometrist, confirmed that in early 1990, he had provided prescription glasses for appellant. (9 RT 1412-1413.)

Although appellant had no notes or calendars from four years prior, he pieced together certain events related to the day in question. (9 RT 1452.) After getting out of prison in 1990, he initially supported himself by working for various restaurants. (9 RT 1437.) In December of 1990 and January 1991, he worked for Money Lenders, a mortgage business run by James Gano, a friend whom he had met in prison. (9 RT 1444, 1449-1451.)

During his employment with Money Lenders, he met with Elaine Tribble approximately six times at her home in Long Beach to secure a mortgage loan on her behalf. (9 RT 1453-1455.) Appellant felt certain that one of those visits would have been to return loan papers to Tribble on January 4, 1991. (9 RT 1456.)

Elaine Tribble remembered meeting with appellant at her home approximately five times in Long Beach between Christmas 1990 and March of 1991 to obtain a mortgage loan. (8 RT 1143-1145, 1149.) She did not remember the actual dates. (8 RT 1151.) She changed her mind about the loan because she learned some "questionable" facts about appellant's boss, James Gano, and also because her parents offered to help her out. (8 RT 1146, 1154.) She asked for her loan documents back but does not remember if she received them. (8 RT 1146.)

After leaving Tribble's house on January 4, 1991, appellant went to Willmington and then San Pedro that same day to see someone else about a loan. (9 RT 1456-1457.) He called Money Lenders collect from a pay phone in San Pedro that day. (9 RT 1459.)[16] He also stopped in to see his friends Dennis and Debbie Lankford on his way to report back to Gano. (9 RT 1462.) He frequently drove Debbie Lankford to a clinic for her methadone treatment but could not remember if he had driven her on January 4, 1991, or the next day. (9 RT 1464.) According to Debbie Lankford, appellant had been to her house daily the first week of that year although she could not remember the exact times of his visit. (7 RT 1028.)

Appellant married his long-time girlfriend, Victoria Ross, on May 4, 1991. (9 RT 1434.) He denied having any romantic involvement with Lorraine Ripple. (9 RT 1468.) Appellant admitted that he may have "fondled" Debbie Lankford but they never had sex. (9 RT 1463.) Ripple and Lankford were roommates for a time and Lankford never saw any indication of a romantic involvement between appellant and Ripple. (7 RT 1047, 9 RT 1468.) Contrary to Ripple's testimony that she had known

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[16] Appellant attempted unsuccessfully to retrieve the phone records from Money Lenders for that date. (9 RT 1459.)

appellant since the 1960s, appellant testified that he had been in prison most of the 1960s and had only met Ms. Ripple in March or April 1991 when Debbie Lankford introduced them. (9 RT1467.) Appellant also denied telling Ripple about killing anyone in Tustin or any of the other murders she claimed he committed. (9 RT 1469.) He further denied giving her a .22 caliber handgun. (9 RT 1469.) Appellant and Lankford each testified that Ripple acted bizarrely towards appellant, claiming appellant was Ripple's "property." (9 RT 1470-1471, 7 RT 1047-1048.)

Holly Daniels, Armando's girlfriend and mother of his child, worked at the Alameda Market. (8 RT 1166.) She could not identify appellant from either a photographic lineup or in-court, but did identify two other men from photographs which police showed her as frequenting the market. (8 RT 1168-1174.)

Michael June, a probation officer called by the prosecution as a rebuttal witness, noted in appellant's probation report that he admitted using heroin and cocaine daily in 1991. (9 RT 1495-1499.)

C. Penalty Phase

At the penalty phase of the trial, over twenty individuals testified about prior robberies by appellant. (11 RT 1775-1954.) Robert and America Miller, Armando's parents, testified as to the impact their son's death had on their lives. (11 RT 1947-1953; 1954-1959.) America testified that the death of Armando caused the death of their other son, Bobby, who developed heart problems after Armando's death and also died. (11 RT 1954-1959.)

Except to argue lingering doubt, appellant offered no evidence in mitigation. (12 RT 2063-2064.)

* * * * *

I.

THE TRIAL JUDGE'S MISCONDUCT IN MAKING DISPARAGING COMMENTS ABOUT DEFENSE COUNSEL AND ACTING AS A SECOND PROSECUTOR AT APPELLANT'S TRIAL REQUIRES REVERSAL

A. Introduction

Appellant's record is replete with incidents of judicial bias against appellant. Beginning with voir dire, the trial judge let it be known that he favored the prosecution and the death penalty. At trial, the judge, inter alia: made disparaging comments about defense counsel including calling him a liar; interfered with appellant's cross-examination of witnesses while assisting the prosecution with his; threatened to have the defense investigator arrested on trumped-up charges; told jurors that appellant's wife was in custody when there was no evidence she had ever been in trouble with the law; and overall created an untenable, hostile environment for the defense. The trial judge acted as a second prosecutor in this capital trial, denying appellant his constitutional rights to a fair trial and an impartial jury under both the state and federal Constitutions. (U.S. Const., Amends. V, VIII, & XIV; Cal. Const., art I, § 7, 15, 17.) The impartial jury guarantee is also encompassed within the Due Process Clauses of the Fifth and Fourteenth Amendments. (*Smith v. Phillips* (1982) 455 U.S. 209, 217; *In re Carpenter* (1990) 9 Cal.4th 634, 648; accord, *Hughes v. Borg* (9th Cir. 1990) 898 F.2d 695, 700.) The judge's actions also denied appellant his federal and state constitutional right to counsel. (U.S. Const., Amend. VI; Cal. Const., art I, § 15.) And because the trial judge made comments which reflect partisan views favoring the prosecution, appellant's verdict

also does not meet the standard of reliability required by the Eighth Amendment. Appellant's conviction must be reversed.

B. The Trial Judge's Interruption of Defense Counsel's Closing Argument to Tell Jurors to Disregard Whatever a "Lying" Attorney Said to them Violated Appellant's Constitutional Rights to a Fair Trial and Right to Counsel

One of the most egregious acts of judicial misconduct in this case occurred during defense counsel's closing argument at the guilt phase. The trial judge interrupted during the middle of counsel's argument to admonish the jury as follows:

> Ladies and Gentlemen, if either sides's attorney intentionally misrepresents any fact during the course of the trial, including their argument, of course, and you think they're lying to you, you can disregard their whole argument if you want to.

(10 RT 1645.)[17]

The prosecutor, recognizing the judge's action as serious judicial misconduct, requested that the judge read to the jury a lengthy admonition

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[17] Just prior to this "admonition," the prosecution had objected to defense counsel's reference to James Gano as the man behind the robbery. The judge initially made no ruling other than to tell defense counsel that he had to finish his argument that afternoon. (10 RT 1642-1643.) When defense counsel continued his discussion about Gano, the judge said he did not know if Gano's involvement was in evidence and then gave the jury the above-quoted admonition. In fact, the prosecutor, in his opening statement, had himself discussed Gano's involvement as the principal in setting up this crime and introducing appellant to the Millers. (4 RT 403-431.)

which the prosecutor prepared himself. (3 CT 1177; 10 RT 1668.)[18] At a hearing held outside of the jury's presence, the judge denied the prosecution's request outright, stating "[t]he D.A. requested a jury admonition, request denied." (10 RT 1668.) Defense counsel then voiced concern over the court telling jurors to "disregard a lawyers [sic] entire argument" and the judge responded "I told them what is common sense." (10 RT 1668.) The judge summarily dismissed the parties and ordered a recess. (*Ibid.*)

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[18] The admonition refused by the court provided:

> During final summation an objection was raised by one of the parties and in sustaining that objection, the Court replied, "that if you disbelieve what an attorney is saying you may disregard all of what he says." Upon reflection the Court feels that it may not have selected the best possible language in conveying its admonition to you.
>
> To clarify, you may certainly consider the arguments of counsel for both sides, however; I remind you that those remarks are not evidence. In reaching your determination in this matter you may only consider facts that have been proved from the evidence received in this trial and not from any other source.
>
> The Court in its ruling has not intended to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witnesses or attorney. If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion in this matter based solely on the evidence presented and the law upon which you will be instructed.

(3 CT 1177.)

Still worried about the judge's misconduct, the prosecutor brought up the judge's comments in his own closing. He told jurors that although the judge told them that they could disregard what an attorney says, "I ask that you not do that." (10 RT 1672.) He also stated that he personally did not believe that Mr. Freeman was lying to jurors. (*Ibid.*)

Before instructing the jury, the judge made an half-hearted attempt to ameliorate his conduct by telling jurors:

> Sometimes the attorneys get overly sensitive about things that the court says. I just want you folks to know that I think that the three lawyers that have worked in this case are the finest lawyers around. I have worked with them for years. They're honorable people. ¶The court doesn't have any belief that anybody lied to you about anything. I made reference to that at the request of the prosecution.

(10 RT 1709.)

If anything, the judge's comments made things worse. The judge interrupted defense counsel to admonish jurors about "lying" attorneys, not the prosecution, and attempted futilely to minimize his accusation by characterizing the attorneys as "overly sensitive." (10 RT 1709.) Moreover, the judge said that he acted at the request of the prosecution in telling the jurors that he did not believe anyone lied to them, not based on his own desire to do so. Rather than telling jurors that they "should not infer any favoritism or disapproval from his conduct, the trial judge embellished his remarks in a way that undermined the purpose of addressing the jury on the issue of his own conduct." *(People v. Sturm* (2006) 37 Cal.4th 1218, 1242 [reversal where judge's discourteous and disparaging remarks towards defense were prejudicial]; see also *United States v. Bland* (9th Cir. 1990) 908 F.2d 471, 473 [where courtroom

prejudice is particularly egregious, it creates "one of those cases where the prejudice could not be removed by curative instructions"]; accord *United States v. Nazzaro* (2d Cir. 1973) 472 F.2d 302, 312-313].). The court subsequently denied appellant's request for a new trial based on this inflammatory and prejudicial comment to the jury during counsel's closing. (3 CT 1086-1087, 1146.)

1. The Judge Improperly Interfered With Appellant's Closing Argument in Violation of His Sixth Amendment Right to Counsel

The judge interrupted during one of the most, if not the most, critical stages of the defense presentation, closing argument. "[N]o aspect of [trial] advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." (*Herring v. New York* (1975) 422 U.S. 853, 862 [state statute authorizing judges in criminal bench trials to deny parties an opportunity to deliver closing arguments unconstitutional].)

"The presentation of his defense by argument to the jury, by himself or his counsel, is a constitutional right of the defendant which may not be denied him, however clear the evidence may seem to the trial court." (*Herring v. New York, supra,* 422 U.S. at p. 859, quoting 5 R. Anderson, *Wharton's Criminal Law and Procedure* s 2077 (1957).) Closing argument is critical to the defense because it

> serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be

reasonable doubt of the defendant's guilt. [Citation omitted.]

(*Id.* at p. 862.)

The right to counsel therefore "ensures . . . the opportunity to participate fully and fairly in the adversary factfinding process" and a basic element of that adversary process in a criminal trial is the "right to make a closing summation to the jury." (*Id.* at p. 858; U.S. Const., Amends. VI and XIV; Cal. Const., art I, § 15.)

Here, it cannot be questioned that appellant had a right to argue his theory of defense for the jurors to deliberate upon. (*Herring v. New York, supra,* 422 U.S. at p. 859.) Instead of deliberating upon any theory of defense, however, the trial judge directed jurors to deliberate upon the judge's view that counsel lie. And not just any counsel - the judge pointed his accusatory finger at defense counsel, having interrupted defense counsel in order to caution jurors about his nefarious conduct. The jurors were also told that they did not have to consider anything whatsoever presented by the defense and could "*disregard their whole argument*" if they felt like it. (10 RT 1645.) Telling jurors that they could completely disregard appellant's closing argument is the same as denying appellant a right to present any closing argument at all and a constitutional violation of the right to counsel. (*Herring v. New York, supra,* 422 U.S. at pp. 858-859.) In fact, it is worse because the judge told jurors that counsel lied.

The case of *United States v. King* (4th Cir. 1981) 650 F.2d 534, 536, is instructive in this regard. *King* involved a court trial in which defense counsel chose not to make a closing argument. The magistrate gave counsel an opportunity to make a closing argument but at the same time informed him that he had already determined guilt and that counsel's argument would

not change his position. (*Ibid.*) The appellate court rejected the prosecution's contention that the High Court's holding in *Herring* should not apply because unlike the *Herring* facts, in *King,* counsel had been offered an opportunity to present a closing argument. (*Ibid.*) In reversing based on a violation of defendant's Sixth Amendment right to counsel, the appellate court held that even though counsel had "technically" been offered an opportunity to exercise his right to make a closing argument, that it was "not the kind of environment in which a defendant's interests can be effectively advocated." (*Id.* at p. 537.) So too, here, the trial judge's statements about lying attorneys during appellant's closing argument created a hostile environment defeating even the best efforts to advocate appellant's interests. As such, the lower court effectively denied him the opportunity to make a closing argument in violation of his constitutional right to counsel and a fair trial. (*Herring v. New York, supra,* 422 U.S. at pp. 856-857; U.S. Const., Amends. VI and XIV Amends.; Cal. Const., art I, § 15.)

2. The Trial Judge's Misconduct Violated Appellant's Constitutional Rights to a Fair Trial

According to the judicial canons of ethics, "[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity . . ." (Cal. Code Jud. Ethics, canon 3B(4); see also *Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 661-662 [failure to comply with the canons "suggest performance below the minimum level necessary to maintain public confidence in the administration of justice"].) Patient and courteous are not the adjectives which spring to mind upon reviewing the record in this case. Even when trial counsel tires the trial court's patience,

"[a] trial court commits misconduct if it 'persists in making discourteous and disparaging remarks to a defendant's counsel. . .and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge, and in other ways discredits the cause of the defense . . ." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1107 quoting from *People v. Mahoney* (1927) 201 Cal. 618, 627 and also relying upon *People v. Fatone* (1985) 165 Cal.App.3d 1164, 1169, 1176 [defendant's attempted murder conviction of her spouse reversed where trial judge's "demeaning, patronizing attitude" permeated the record and his conduct established a prejudicial" pattern of judicial hostility"]); see also 5 *Witkin & Epstein*, Cal.Criminal Law (3d ed. 2000) Criminal Trial, § 557, p. 795. The prejudice from the judge's disparaging comment about counsel is presumed because

> [t]he jury is ordinarily aware that the judge has participated in numerous trials and dealt with the attorneys in the past and that numerous matters regarding the case have taken place in the presence of the judge but outside the presence of the jury. In these circumstances there is great danger that a jury which may wish to escape its responsibility to determine the facts will give weight to the comment of the judge without considering the evidence and the instructions.

(*People v. Smith* (1968) 267 Cal.App.2d 155, 164; see also *People v. Flores* (1971) 17 Cal.App.3d 579, 584-585 [reversal based on judicial misconduct where case hinged on defendant's credibility]; *Sanguinetti v. Moore Dry Dock Co.* (1951) 36 Cal.2d 812, 822 ["It needs no citation to convince any unbiased observer that a jury has both ears and eyes open for any little word or act of the trial judge from which they may gather enough to read his mind and get his opinion of the merits of the issues under review. ...(citation omitted)"].)

The trial judge in this case is no stranger to judicial misconduct. He was reversed in *People v. Fatone, supra*, for virtually identical conduct where " his treatment of defense counsel" was " indefensible" and the court's intemperance rendered the trial fundamentally unfair. (*Id.*, 165 Cal.App.3d at p. 1174; *People v. Melton* (1988) 44 Cal.3d 713, 753 [same judge criticized for quips about shooting defense counsel]; *Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1024, overruled on other grounds in *Curle v. Superior Court* (2001) 24 Cal.4th 1056, 1069, fn.6 [same judge's derogatory and unfounded statements concerning counsel, inter alia, required that further proceedings be heard before a different trial judge]; see also *People v. Sturm, supra,* 37 Cal.4th at p. 1140 relying in part on *People v. Fatone, supra*, 165 Cal.App.3d at p. 1174.)[19]

Here, it is unimaginable that any juror would be oblivious to the judge's implication that the defense attorney was dishonest. The judge's comment effectively destroyed the only defense which defendant offered in exculpation of the crimes charged, effectively removing the issue of defendant's credibility from the jury.

It was "completely improper" for the judge to advise the jurors of his "negative personal views concerning the competence, honesty, or ethics of the attorneys in a trial." (*People v. Sturm, supra,* 37 Cal.4th at p. 1240, quoting *People v. Fatone, supra,* 165 Cal.App.3d at pp. 1174-1175.) The judge's conduct communicated disapproval and contempt for counsel, to appellant's detriment in violation of his constitutional rights to a fair trial under the Fifth and Fourteenth Amendment of the United States

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[19] This judge has also been criticized for the same conduct in unpublished opinions.

Constitution and article I, section 15, of the California Constitution.

In addition to his attack of defense counsel during his closing argument, the judge engaged in numerous other incidents of misconduct and participated in the trial more as a prosecutorial advocate and partisan than as a member of the judiciary.

For example, during counsel's cross-examination of Detective Tarpley, the judge and prosecutor commiserated openly about defense counsel:

> MR. ROSENBLUM: Counsel again is testifying. He's trying to summarize –
>
> THE COURT: I don't know how to stop him; do you have a hint for me Mr. Rosenblum?
>
> MR. ROSENBLUM: All I can do is object.

(9 RT 1352.)

At other times during trial, the judge improperly coached prosecution witnesses while interfering with appellant's examination of witnesses. During the cross-examination of Colleen Heuvelman by the defense, the following exchange occurred:

> Q. [MR. FREEMAN] Well, look at the accused. Can you identify him as being the person that you saw? Please look at the accused and ask – I'm asking you, can you identify –
>
> THE COURT: Hang on a minute. Remove your glasses, please. Thank you.
>
> MR. ROSENBLUM: Your Honor, I'm going to object as well unless he puts a hat on.
>
> THE COURT: We're not going to do that right now. I just want to make sure that she sees at least the facial features; she

can subtract the hair in her mind.

(4 RT 629.)

During the same cross-examination, the judge assisted the prosecution further during the following exchange:

> A. The only thing that's missing, sir, is that I said I thought he was wearing a long, military-type trench coat. And I made it clear to them that I was focused on his face and not the jacket.
>
> Q. Yes, I'm holding up here for you what purports to be a long, military-type trench coat. Was it similar to this?
>
> A. I cannot recall, sir, I'm sorry.
>
> Q. Pardon Me?
>
> A. I cannot recall, I'm sorry. I cannot recall.
>
> MR. ROSENBLUM: Your Honor, the record should reflect he's holding up a blue trench coat.
>
> THE COURT: Not military type.
>
> MR. ROSENBLUM: No, nothing military about that coat.
>
> MR. FREEMAN: Everybody's entitled to opinions.
>
> THE WITNESS: Oh, sir, my husband's military trench coat is much different than that.
>
> THE COURT: So is mine, so is Mr. Rosenblum's, I'm sure.

(5 RT 738.)

The trial court intervened to assist the prosecution by having appellant remove his glasses so that the witness could more easily identify him as the assailant. He also assisted by distinguishing the defense trench

coat as non-military. These were not-so-subtle cues to jurors as to which side the court owed its allegiance. "A trial judge who creates the impression that he is allied with the prosecution has engaged in improper conduct. [Citation omitted.]" (*People v. Sturm, supra*, 37 Cal.4th at p. 1242.) Here, the judge's behavior created "such an impression by intervening in a significantly uneven fashion and making comments that implied that such interventions were made in the prosecutor's stead, constitut[ing] misconduct." (*Ibid.*)

> The influence of the trial judge on the jury is necessarily and properly of great weight, . . . and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word.

(*Bollenbach v. United States* (1946) 326 U.S. 607, 612, citation omitted; see also *Kennedy v. Los Angeles Police Department* (9th Cir. 1989) 901 F.2d 702, 709; *United States v. Harris* (9th Cir. 1974) 501 F.2d 1, 10 [judge "must be ever mindful of the sensitive role [the court] plays in a jury trial and avoid even the appearance of advocacy or partiality"].)

The judge also improperly interjected himself further during appellant's cross-examination of Colleen Heuvelman, chastising defense counsel for engaging in "silliness." Counsel attempted to impeach Ms. Heuvelman about her memory regarding the homicide. In her in-court testimony she failed to mention anything about her son distracting her in the bank. (5 RT 690-691.) In an earlier statement she had reported that her young son acted like a "wild man" in the bank and she had to chase after him. (5 RT 734.) The judge interrupted counsel's cross-examination of Ms. Heuvelman and called him to the bench:

THE COURT: Mr. Freeman, if you've got some prior

> inconsistent statements or something that you want to impeach her with, get to it, don't be reading the entire transcript into the record. I don't care about the kid and how he was running around the place or any of that kind of silliness.
>
> MR. FREEMAN: That was the first inconsistent statement, she didn't remember about the kid.
>
> THE COURT: I don't care about the kid, it's superfluous and it's not [sic] improper impeaching. ¶ The Court's objection is sustained.

(5 RT 735.)

In fact, counsel had only read approximately seven sentences from her earlier statement to the witness, hardly the "entire transcript." (5 RT 732-734.) The key evidence linking appellant to the crime was the faulty eyewitness testimony of Ms. Heuvelman and Ms. Redondo making impeachment of Ms. Heuvelman's memory regarding the day's events not only completely relevant but critical to the defense. The judge's ruling also curtailed counsel's ability to show the full extent of Ms. Heuvelman's distraction with her young son at the time she allegedly saw appellant at the bank. (5 RT 735.) There was therefore nothing "sill[y]" or "superfluous" about counsel's cross-examination. (5 RT 735.) The judge's interruption of defense counsel's cross-examination and summoning him to the bench to chastise him was not only wholly unwarranted but one of several times the judge rudely interrupted counsel without cause, breaking the flow of his defense and serving to undercut counsel's confidence. It is one thing where the judge attempts to exercise his discretion pursuant to Penal Code section 1044, to limit the evidence to what is relevant and material, but in this case, "the trial court intervened in a way that created the impression that the trial judge was allied with the prosecution." (*People v. Sturm, supra*, 37 Cal.4th

at p. 1241.) It is also noteworthy that the zealous prosecutor in this case, while making numerous other objections, found no fault with counsel's line of questioning.

The judge "sustained" another of his own objections during a similar incident when he improperly restricted counsel's cross-examination of Detective Solis. The detective testified that shortly following the homicide, police stopped a suspect, not appellant, near the crime scene who matched the physical description and clothing of the alleged assailant. (5 RT 800-801.) Detective Solis transported approximately six witnesses to the suspect's location but denied that any of them made an in-field identification. (5 RT 801-802.) The following exchange occurred:

> Q. Do you recall a witness by the name of Jenkins saying that he fits the profile?
>
> A. No, I don't recall that.
>
> THE COURT: Let me see counsel at the bench, please.

The following proceedings were held out of the presence of the jury:

> THE COURT: Witnesses that were transported to a scene of a show-up that did not make an identification, whatever they said is all hearsay. Do you want to be heard, Mr. Freeman?
>
> MR. FREEMAN: We're not offering it for the truth of the matter.
>
> THE COURT: What are you offering it for?
>
> MR. FREEMAN: We're offering it to impeach his testimony . . . that all the witnesses that were taken out there didn't make any identification.
>
> THE COURT: That's true. They did not. Now what's your

point.

MR. FREEMAN: The point is that witnesses have made various types of identification. This one says he fits the profile.

THE COURT: That's argumentative. The objection's sustained.

The judge then allowed Mr. Peters to speak:

MR. PETERS: Just, the report does indicate some of the in-field show-up witnesses did make various types of identification, different from what he testified to. He said that none of them made identifications, some of them did, some of them didn't.

THE COURT: Was this person arrested?

MR. PETERS: No, but it goes – it also goes to – number one, it goes to his credibility or recollection. ¶ It also shows various people made the identifications, and then some agreed and some couldn't agree.

MR. ROSENBLUM: Are you saying somebody said that this was the man at the bank, or are you saying that – is that what you're saying? I mean, I'm just asking.

THE COURT: You're tilting at wind mills. ¶ The court's objection's sustained. Go back to work.

(5 RT 803-804.)

Initially the judge erroneously concluded that none of the witnesses made any in-field identifications. When this is refuted by both defense counsel (and uncontested by the prosecution), the judge then decided that since the suspect was not arrested, counsel is "tilting at wind mills ." (5 RT 804.) Once again, the judge improperly denied appellant an opportunity to

impeach a witness on his memory of the day's events, and more importantly cast doubt on the credibility of the already shaky identifications made by Ms. Heuvelman and Ms. Redondo. The judge's relentless and unreasonable interference with appellant's examination of witnesses is reversible error. (*People v. Burns* (1952) 109 Cal.App.2d 524, 542-552 [judge frequently objected to attorney's questions of witnesses and unreasonably curtailed attorney's cross-examination of witnesses].) In contrast, the judge assisted the prosecutor in his examination of witnesses by coaching the witnesses. (4 RT 629, 5 RT 738.) The judge's comment that the defense was "tilting at wind mills" sums up his attitude towards the defense during the entire trial, an attitude in which he made not even a meager attempt to shield from the jury. (See also Arg. X. regarding court's evidentiary errors.)

In yet another unfounded attack on the defense, the trial judge told the prosecutor to have the defense investigator arrested. It occurred during the direct examination of prosecution witness Bettina Redondo. Redondo testified that the defense investigator, Douglas Portraz, showed her a photograph of Craig Elz, informed her that Elz and Gano had committed the crime, and then tried to convince her that the composite of the suspect resembled Elz more than Abel. (4 RT 590-593, 5 RT 652-656.) In fact, the actual tape recording of this interview (which was entered into evidence by the defense along with a transcript and subsequently played for the jury) was not so straight forward. (5 RT 642-643.) During the taped interview, Portraz showed Redondo photographs of Gano and Elz stating that after Gano was arrested for a bank robbery in 1995 "that started this whole thing." (5 RT 558.) Ms. Redondo interpreted the "whole thing" to mean the Miller homicide. (5 RT 658.) Ms. Redondo also admitted that Portraz had pointed out similarities between the photograph of Elz and the suspect composite

with which she agreed. (5 RT 590-599.) At the end of the interview, Portraz told Redondo that if she had any questions she was free to discuss the case with Detective Tarpley or anyone else. (5 RT 659.) Prior to playing the tape, however, the judge ordered the parties to the bench and the following exchange occurred:

> THE COURT: Have you caused Mr. Portratz to be arrested for attempting to dissuade a witness?
>
> MR. ROSENBLUM: No.
>
> THE COURT: Why not? I mean, I haven't seen a better case for it than this.
>
> MR. ROSENBLUM: Maybe that's something --
>
> THE COURT: Is it in the scheme of things, I hope?
>
> MR. ROSENBLUM: It's something I'll look at, your honor.

(4 RT 592.)

Investigator Portraz had not knowingly and maliciously attempted "to prevent or dissuade any witness" from giving testimony and had in fact encouraged the witness to talk with Detective Tarpley - which she did immediately following the interview. (5 RT 659-660; Pen.Code, § 136.1.) Moreover, the defense "has an absolute right to explore avenues of potential bias with a prosecution witness . . ." (*People v. Fatone, supra*, 165 Cal.App.3d at p. 1173.) The judge directing the prosecution to have the defense investigator arrested on wholly unwarranted grounds cast a chilling effect on appellant's defense. The judge's conduct is consistent in showing that he repeatedly "implied devious tactics on the part of the defense." (*Id.* at p. 1181; see also *People v. Orosco* (1925) 73 Cal.App.580, 584-604

[reversal where judge implied that defense counsel was not above resorting to improper measures]; *United States v. Kelley* (6th Cir. 1963) 314 F.2d 461, 463 [reversal where court threatened to hold defense counsel in contempt for repeating a question because it threw him off balance so that he could not devote his best talents to the defense of his client].)

The judge also showed his contempt for defense counsel by refusing their requests for a side bar. During the redirect examination by the prosecutor of Bettina Redondo, the prosecutor asked Redondo to find the page and line in the transcript where defense investigator Portratz was "trying to sell you that it was Elz involved [sic]." (5 RT 654.) Defense counsel objected to the form of the question which the judge overruled before counsel could even finish his sentence. (*Ibid.*) Counsel then requested a side bar which the judge denied. (*Ibid.*)

Later, during the prosecutor's redirect examination of Lorraine Ripple, defense counsel objected to the prosecutor delving into robberies she committed in the Los Angeles area and again requested a side bar. (6 RT 936-937.) The judge denied the defense request. (6 RT 937.) Immediately thereafter, however, the judge granted the prosecution's request for a side bar. (*Ibid.*)

In repeatedly denying the defense requests for a side bar while granting the prosecution's, the judge sent a clear message to jurors: he favored the prosecution and considered the defense efforts a waste of time. (See, e.g., *People v. Becker* (N.Y. 1914) 104 N.E. 396, 404 [reversal where trial judge, inter alia, refused to hear defense arguments and after refusing adjournment on application of the defendant's counsel, readily granted it at the request of the prosecuting attorney].)

At another point in the trial, the judge told jurors that appellant's wife

was "probably in custody now" even though no evidence had been introduced that she had ever been in trouble with the law. (6 RT 871.) It happened during the cross-examination of Lorraine Ripple when defense counsel showed Ripple a photograph of appellant and his wife taken at their wedding in 1991 in an attempt to establish that appellant's appearance at the time of the homicide did not match the description of the suspect. (6 RT 870-873.) The following exchange occurred:

> Q. You recall about when he got married?
>
> THE COURT: That's hearsay, counsel, Sustained. She's probably in custody now.

(6 RT 871.)

There is nothing in the record to suggest Ms. Ross was ever in trouble with the law -- just the opposite. Detective Steve Rubino testified that on the day appellant was arrested, authorities were looking for appellant, Ms. Langford, and Ms. Ripple – not Ms. Ross. (7 RT 998-1001.) When they arrested appellant, he was in a car with Ms. Ross. (7 RT 1001-1008.) After speaking with Ross, authorities released her the same morning. (7 RT 1008-1009.) The judge's wholly unsubstantiated comment that Ross was "probably in custody now," also improperly introduced (inaccurate) extrinsic evidence. The judge communicated to jurors his belief that appellant's family, like appellant, were criminals, once again reflecting his prejudicial bias. And since Ross did not testify at trial, jurors would have every reason to believe the judge's comment to be true. Such judicial comment on a matter not in evidence was improper and highly prejudicial. (See, e.g., *People v. Armstead* (2002) 102 Cal.App.4th 784, 793-794; see also *People v. Santana* (2000) 80 Cal.App.4th 1194, 1202 [drug conviction

reversed where, inter alia, judge made disparaging comment regarding the claimed use by defendant's wife of a triple beam scale for cooking food].)

Even at the very beginning of appellant's trial the judge showed his bias against appellant. During voir dire, the trial judge made repeated reference to prospective jurors having the "intestinal fortitude" to impose either penalty. (2 RT 125, 128, 129.) While the trial court referred to having the "intestinal fortitude" to impose either penalty, he also asked "[d]o you have the inner strength at the end to be able to pronounce a death verdict?" (2 RT 135.) The judge thus looked upon those jurors favoring death as having more character or "inner strength." By equating "intestinal fortitude" with a death sentence, asking for jurors with "intestinal fortitude" was akin to asking for pro-death penalty jurors. It also signaled to the jury pool this judge's preference: a death sentence. Other courts have found the use of these words by prosecutors reversible error:

> Asking the jury if it had the 'intestinal fortitude' to do its 'legal duty' was highly improper. . . prosecutor erred in trying 'to exhort the jury to 'do its job'; that kind of pressure ... has no place in the administration of criminal justice.' 'There should be no suggestion that a jury has a duty to decide one way or the other; such an appeal is designed to stir passion and can only distract a jury from its actual duty: impartiality.' [Citations omitted.]

(*Evans v. Nevada* (Nev. 2001) 28 P.3d 498, 515.)

The judge made other inappropriate comments to jurors as well, indicating his rush to a death verdict. For example he told jurors that

> as a general rule, there is absolutely no reason for the jury to relisten to all the testimony. Your collective recollections, generally speaking, should be adequate to determine all the issues before you. ¶When you ask for testimony, all parties must be notified of the request, then the reporter must preread

> all the requested testimony and excise all sustained objections, all conferences that occurred at the bench, and any hearings conducted outside the jury's presence. ¶The time consumed in this process may be equal to the time it took for the testimony to occur. The court would request that before you ask for a reading of testimony, that you determine among yourselves that it's necessary and in order for you to reach a verdict.

(10 RT 1744-1745.)

Although the judge then denied any attempt to "dissuade" them from requesting a read back, that is, of course, precisely what he was doing. (10 RT 1745.) Such a comment tells jurors that they should not bother court staff with a read-back because the case does not warrant it. The prosecutor bolstered the court's attitude by informing jurors: "I don't think you will need to have testimony reviewed in this case, it should be very fresh in your minds." (10 RT 1513.) Not surprisingly, there were no requests for read-back of testimony in this case. In fact, the jury returned a guilty verdict very quickly, in a little over one and one-half hours. (2 CT 787.) It took the jury only about three hours to return a death verdict. (3 CT 1039.)

Adding to the mix, the judge also seemed to qualify his definition of LWOP at times and equivocate over whether it really meant life without possibility of parole. During voir dire he stated that LWOP "*generally* speaking" means that a man will spend his life in prison and die there. (2 RT 137, emph. added.) Another time he stated:

> Previously I told you that for purposes of your decision, you have to assume that the government will keep the man locked up for his entire life and he'll die in prison. That's the assumption you have to make. We're not telling you and

> guaranteeing to you that that's true. We're simply trying to impose upon you the gravity of your responsibility as jurors.

(3 RT 304.)

Jurors hearing this could readily conclude that LWOP amounted to a legal fiction – the court has to tell you to assume that "he'll die in prison" but we are not saying "that's true." (*Ibid.*) These along with the judge's other comments all lent judicial weight to a death verdict.

Additionally, the judge, in admonishing jurors not to discuss the case during recesses, cautioned as follows:

> Do not talk about case. It means what it says. Because if we catch you talking about the case, we have to have you shot, or some other reasonable form of punishment.

(3 RT 398.)

This comment shows an improper attitude of the judge. While attempting to be funny, his comment may have caused jurors not to take the admonition seriously and to undermine the jury's responsibility regarding the gravity of their task. While "[w]ell-conceived judicial humor can be a welcome relief during a long, tense trial" (*People v. Melton, supra,* 44 Cal.3d at p. 753), such was not the case here. Here, the judge

> intermingled his outbursts of anger with jests and attempted jokes . . . whatever may have been the motivation behind the Judge's humor, it had no place in the serious business of a murder trial. Humor which is purposefully generated detracts from the solemnity of court procedure and can work an unjust disadvantage to the accused . . ."

(*Commonwealth v. Hales, supra*, 119 A.2d at pp. 170-171.)

Appellant recognizes that this Court recently rejected a similar judicial misconduct claim in *People v. Monterroso* (2004) 34 Cal.4th 743, 762,

where the same judge told other jurors they would be "shot" if they failed to follow an admonition. However, the claim here must be viewed in context with the numerous other prejudicial acts of judicial misconduct. Moreover, as the numerous appellate cases admonishing this judge make clear, he will continue to defy the judicial canons and deny defendants a fair trial until this Court instructs him otherwise. (*People v. Fatone, supra*, 165 Cal.App.3d at p. 1174; *People v. Melton, supra,* 44 Cal.3d at p. 753; *Ng v. Superior Court, supra,* 52 Cal.App.4th at p. 1024.)

Another indication of the judge's biased attitude towards appellant came out when the parties discussed appellant's custodial status regarding shackling. Defense counsel argued that appellant's prior escape did not involve any violence and cited to appellant's older age of fifty-three years. (2 RT 82) The judge responded:

> I'm 61 . . . so 53 doesn't impress me at all. Poor old gentleman. Am I supposed to feel sorry for him?

(2 RT 82)

The judge then said he was just being silly. (*Ibid.*)

The derisive comments served to remind appellant of his disfavored status in the eyes of the court as well as to "discredit[] the cause of the defense." (*People v. Fudge, supra,* 7 Cal.4th at p. 1107.)[20]

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[20] The judge's biased attitude towards defense counsel and appellant also surfaced during post-conviction record correction proceedings. The following exchange occurred after a comment about the need to confer with trial counsel:

> THE COURT: Was there defense counsel in this case?
>
> MS. JOHNSTON: Mr. Freeman has died, but Mr. Peters

C. Prejudice

"O it is excellent to have a giant's strength; but it is tyrannous to use it like a giant." (Shakespeare's *Measure for Measure*, act II, scene 2; *People v. Fatone, supra*, 165 Cal.App.3d at p. 1181.) In the instant case, the judge's

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> THE COURT: That's supposed to be levity.
>
> MS. JOHNSTON: I guess I missed something.
>
> THE COURT: If you looked at the transcript you know what my sense of humor is.

(1 RT (8/3/03) 12.)

Later at the same hearing, after a discussion on the need for another hearing, the judge showed his frustration at the delay in appellant's execution due to the appellate process:

> THE COURT: Three years. The longer we delay the less certainty of execution?
>
> MS. JOHNSTON: Unfortunately, no.
>
> MR. DUTTON: If you think there's delay here there's going to be a lot more delay down the road in different places with the federal courts.
>
> THE COURT: I know.

(1 RT (8/3/03) 28.)

Appellate counsel also objected to the court conducting an in-chambers hearing without a court reporter present, only to be informed that future hearings would be conducted in the same fashion, in other words, in violation of section 190.9.

(1 RT (8/3/03) 19, 29.)

inappropriate comments spanned the entire trial, creating a "pattern of judicial hostility." (*Id.* at p. 1175.) And although counsel objected to some of this misconduct, his failure to object to other incidents does not preclude review. Any objection could not cure the prejudice caused by the misconduct and would have been futile given the judge's exhibition of hostility towards the defense. (*People v. Sturm, supra*, 37 Cal.4th at p. 1237; *People v. Hill* (1998) 17 Cal.4th 800, 821; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648.) The judge told jurors that defense counsel was a liar, he chastised the prosecutor for not arresting the defense investigator on meritless charges, he misled jurors about appellant's wife being a criminal, and he inappropriately interrupted appellant's cross-examination of critical witnesses while at the same time coaching the prosecution's witnesses. In sum, the judge

> honored [the rules of judicial conduct] in the breach rather than in the observance. He ridiculed the defendant's case, harassed and lampooned defense counsel, hampered legitimate cross-examination, volunteered statements from the bench which amounted to testimony and generally reflected an unchanging, unremitting bias in favor of the prosecution.

(*Commonwealth v. Hales, supra*, 119 A.2d at p. 523.)

When all of the judge's comments are "added together their influence increases as does the size of a snowball rolling downhill. [Citation omitted.]" (*People v. Sturm, supra*, 37 Cal.4th at p. 1243.) The trial judge's misconduct "created an atmosphere of unfairness . . . likely to have led the jury to conclude that 'the trial court found the People's case against [defendant] to be strong and [defendant]'s evidence to be questionable, at best. [Citation omitted].'") (*Ibid.*) The judge's biased comments and rulings violated appellant's rights to due process, compulsory process, right to

counsel, and a fair trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. It is well recognized that particularly in a death penalty case "it violates a defendant's due process rights to subject his life, as well as his liberty and property, to the judgment of a court in which the judge is not neutral or fair." (*DelVecchio v. Illinois Dept. of Corrections* (7th Cir. 1993) 8 F.3d 509, 514; *United States v. Mostella* (9th Cir. 1986) 802 F.2d 358, 361 [trial judge's participation may overstep the bounds of propriety and deprive the parties of a fair trial]; *United States v. Larson* (9th Cir. 1974) 507 F.2d 385, 389 [trial judge's responsibility is to preside in the manner and with the demeanor to provide a fair trial to all parties].)

The prosecution had a weak case completely lacking in forensic evidence tying appellant to the crime. The prosecution's entire case hinged on credibility. The state had only shaky identification testimony and testimony from a convicted felon. But by calling defense counsel a liar, the judge as much as gift wrapped a directed verdict for the prosecution.

When, as here, the appearance of judicial unfairness colors the entire record, it is structural error and appellant does not have to show prejudice. *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [listing judicial bias as an example of errors not subject to harmless error analysis]; *Mitchell v. State* (Okla. 2006) 136 P.3d 671, 706, fn. 194, citation omitted ["biased judge is 'structural defect [ ] in the constitution of the trial mechanism' and therefore not subject to harmless error analysis"].) Other courts have held that the test is whether "the court's comments would cause a reasonable person to doubt the impartiality of the judge or would cause us to lack confidence in the fairness of the proceedings such as would necessitate reversal." (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 461.)

Under any standard of review, the record here does not inspire confidence. Given the paucity of evidence against appellant and the cumulative effect of the judge's many instances of misconduct in which he aligned himself with the prosecution, the prosecution cannot possibly meet its burden by demonstrating that the judge's conduct was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even under the more stringent *Watson* standard, reversal is required because absent the judicial misconduct, it is reasonably probable that a more favorable verdict would have been rendered. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Sturm, supra*, 37 Cal.4th at p. 1244.) Judgment must be reversed.

* * * * *

II.

THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO GRANT A MISTRIAL AFTER THE PROSECUTOR IMPROPERLY ELICITED TESTIMONY FROM PROSECUTION WITNESS LORRAINE RIPPLE ABOUT APPELLANT'S GANG MEMBERSHIP AND THREATS AGAINST HER

A. Proceedings Below

Prosecution witness Lorraine Ripple testified on re-direct examination that she had concerns about her sons' safety because of appellant's gang affiliations. (6 RT 940.) The prosecutor elicited the information:

> You had said something on cross-examination about why it is so difficult for you to be here. I think you indicated something about having sons in Arizona, things of that nature, that caused you some concern as you sit here today. Could you please explain what you were talking about to the jury?
>
> A. Okay. My son is also affiliated with a gang that John was once a member of –
>
> Q. Before we talk about that, I just –
>
> A. Is that what you wanted?

(6 RT 940.)

Both of Ripple's sons were serving time in prison, one in a state prison in Arizona and one in the federal penitentiary at Leavenworth. (6 RT 912, 940.) At the prosecutor's continued prompting, Ripple also testified about letters she received from more than one person warning her not to testify against appellant. (6 RT 941.) One of the letters came from defense

witness, Deborah Lankford. (6 RT 941.)[21] Over appellant's hearsay objection, Ripple testified about Lankford's threats:

> [Ripple]: [Lankford] didn't want me to testify, but she even went further with writing other inmates in the S.H.U. Unit. And I was attacked a year ago May 7th on the S.H.U. yard by six other inmates . . .
>
> Q. Deborah Langford is a close friend of John Abel?
>
> A. Yes, she is.
>
> Q. So as you sit here today and you testified [sic] before this jury, you're doing so at risk to yourself and your children?
>
> A. Yes.

(6 RT 941-942.)

During cross-examination Ripple offered the following non-responsive testimony:

> A. . . .And while we're putting all this in the record, let's go one better. John's had Debbie Langford sending all this paperwork to every God damn prison in the fuckin' state laying on my sons to keep me off the stand. Now put that in your record if one of my kids gets hurt.

(6 RT 957-958.)

In fact, no reliable evidence connected any of Lankford's threats to appellant. Lankford testified she wrote letters to Ripple and others on her own. (8 RT 1134.) Ms. Ripple also stated that she had been involved with a Colombian Cartel. (6 RT 943.)

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[21] Deborah Lankford's name is misspelled throughout the transcript as Deborah "Langford." (7 RT 1013.)

During a hearing held outside the presence of the jury, appellant argued that he had been "ambushed" by Ripple's testimony and that the prosecutor had failed to comply with appellant's request for all Evidence Code section 1101 material. (6 RT 864, 960.) Appellant requested a mistrial based on the improper and irrelevant character evidence that had been elicited by the prosecution about gang connections, a Colombian Cartel, and letters trying to intimidate a witness; all of which improperly impugned appellant.

> MR. PETERS: She's talking about her son's safety, how can the jury possibly not absorb that and all the negative inferences from that flow to Mr. Abel? I mean - - and I asked on the record for hearings before we get into this kind of garbage . . . getting ambushed by this material, it's serious material. Gangs and Colombian Cartels, and he's gone [sic] to kill the sons and Debbie Langford is doing this. And it has - - without any proof or any offer of proof it has any connection to do – that John Abel's behind this . . . and the chances of Mr. Abel getting any kind of fair hearing is passed. The jury's going to forget about that and focus on the character of Mr. Abel, which is not an issue here.

(6 RT 961-963.)[22]

The trial court felt that Ripple had "blurted out" the word "gang" and that it was "non-responsive." (6 RT 960.) As to the threats, the next day the trial court decided "upon further reflection" that the defense objection was a proper one, and struck that portion of Ripple's testimony dealing with retaliation against herself or her family members. (7 RT 997.) The court

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[22] Defense counsel also contended that although appellant knew gang members, a two-month investigation done at Folsom Prison by the "S.I.W." came to the conclusion that appellant was not a gang member. (6 RT 969.)

admonished jurors. (*Ibid.*)[23] The court's belated admonition, however, was completely ineffective because it served only to call further attention to Ripple's highly inflammatory allegations. Moreover, the prosecutor disregarded the trial court's ruling, telling jurors in closing argument that "Lorraine Ripple was here at great risk to herself and great risk to her family." (10 RT 1542.) In bolstering her credibility, the prosecutor further argued "[d]o you think she would risk being killed . . ." (10 RT 1692.)

The trial court thus abused its discretion in refusing to grant appellant's motion for mistrial and the prosecutor's improper elicitation of gang affiliation and witness threats denied appellant his rights to a fair trial, to due process of law, to confront witnesses and to a reliable death judgment. (U.S. Const., Amends. V, VI, VIII and XIV; Cal. Const., art. I, sections 7, 15, 17; *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6 ["[a]n important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence"]; *Perry v. Rushen* (1983) 713 F.2d 1447 ["due process draws a boundary beyond which state evidentiary rules cannot stray"].)

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[23] The trial court instructed the jury:

> During redirect examination, the defense objected to a portion of witness Lorraine Ripple's testimony regarding possible retaliation against herself or family members. Upon further reflection, the court believes that the objection to be a proper one. You are therefore instructed that the answer of the witness dealing with that limited portion of her testimony is stricken. You are hereby instructed not to consider or discuss that portion of her testimony in any fashion in deciding this case. Treat it as though you never heard it.

(7 RT 997.)

B. Erroneous Admission of Irrelevant and Inflammatory Gang Membership

Appellant's alleged gang affiliation had no relevance to the proceedings below. Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Evidence is relevant if it "tends 'logically, naturally and by reasonable inference' to establish material facts such as identity, intent or motive." (*People v. Cunningham* (2001) 25 Cal.4th 926, 995, citations omitted.) Here, appellant's alleged gang affiliation had no relevance to identity, intent, motive, or any other issue in the case.

The prosecution as much as conceded this point but lamely justified the admission by arguing that the defense had already impugned appellant's character to the jury by discussing his forty-four year sentence on past crimes. (6 RT 963.) However, the fact that appellant may have chosen to impugn his own character does not open the door for the prosecution to offer otherwise inadmissible evidence that may do the same thing. Evidence of uncharged criminal acts or misconduct may not be admitted at trial merely to show criminal propensity or bad character. (Evid. Code, § 1101 [prohibiting the admission of evidence that serves no purpose other than to demonstrate a defendant's bad character as a means of creating an inference that he committed the charged offense]; *People v. Sam* (1969) 71 Cal.2d 194, 208.) Such evidence should not be admitted even if only tangentially relevant (*People v. Cox* (1991) 53 Cal.3d 618, 660) because of the possibility that the jury "will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged" (*People v. Williams* (1997) 16 Cal.4th 153, 193) or will jump to the conclusion the

defendant deserves the death penalty. (*People v. Gurule* (2002) 28 Cal.4th 557, 653-654; see also *Dawson v. Delaware* (1992) 503 U.S. 159, 163 [evidence of membership in Aryan Brotherhood was not relevant to any disputed fact].) Thus, even in cases where gang evidence is relevant, this Court has cautioned that "trial courts should carefully scrutinize such evidence before admitting it." (*People v. Champion* (1995) 9 Cal.4th 879, 922, disapproved on another point in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn 2 .)

The prosecutor, without any showing that the threats were attributable to appellant, improperly elicited evidence about them from Ripple to infer that appellant was dangerous because Ripple feared for her safety and the safety of her family. (See *People v. Williams, supra*, 16 Cal.4th at p. 200; *People v. Hannon* (1977) 19 Cal.3d 588, 599; cf. *People v. Pensinger* (1991) 52 Cal.3d 1210, 1246, and *People v. Slocum* (1975) 52 Cal.App.3d 867, 887 [where specific evidence tied the defendants to threats against witnesses and efforts to suppress evidence].) No evidence tied appellant to the threats against Ripple. Neither could the mere friendship alone between appellant and Lankford provide the necessary nexus the prosecution needed to make this evidence admissible. (Cf. *People v. Lybrand* (1981) 115 Cal.App.3d 1, 11-12 [defendant told witness never to report the incident, that "he had a lot of bad friends," and the threat came from a caller who identified himself as defendant's "friend"].) Under these circumstances, the only purpose for eliciting the irrelevant information about the fear of the witness was to imply without proper foundation that appellant was dangerous. The record undeniably suggests the "strong possibility that the prosecutor intended to get the threat testimony before the jury under a pretext." (*Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967,

969-972, see also *People v. Mason, supra*, 52 Cal.3d at p. 972, fn. 17.)

The improper admission of gang evidence violated appellant's right to federal due process of law. Although a state court's evidentiary errors do not, standing alone, violate the federal Constitution, state law errors that render a trial fundamentally unfair violate the Due Process Clause. *(Ballard v. Estelle* (9th Cir. 1991) 937 F.2d 453, 456.) Here, the admission of gang evidence was not only violative of state evidentiary law due to irrelevance, but was sufficiently inflammatory that its admission rendered appellant's trial fundamentally unfair. (*Dawson v. Delaware, supra,* 503 U.S. at p. 163 [admission of evidence in the penalty phase of a capital trial that a defendant belonged to a white racist organization constituted federal constitutional error when such evidence was not relevant as proper rebuttal to any specific mitigating evidence].)

Given the highly inflammatory impact of evidence of appellant's alleged gang affiliation, the trial court also abused its discretion in refusing to grant appellant's motion for mistrial.

C. The Prosecutor Committed Misconduct by Eliciting Prejudicial Inadmissible Testimony from Ripple

A prosecutor engages in misconduct by eliciting inadmissible testimony even absent a showing of bad faith. (*People v. Hill* (1998) 17 Cal.4th 800; 821 [bad faith showing not required for reversible error due to prosecutorial misconduct]; *People v. Smithey* (1999) 20 Cal.4th 936, 960["misconduct for a prosecutor to 'intentionally elicit inadmissible testimony.' [Citations omitted]."] In general, a prosecutor commits misconduct by "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' [Citation omitted.]" (*Ibid.*) "The mere offer of known inadmissible evidence or asking a known improper question

may be sufficient to communicate to the trier of fact the very material the rules of evidence are designed to keep from the fact finder." (ABA Standards for Criminal Justice, The Prosecution Function (3d ed. 1993) §§ 3-5.6, p. 102.)

Here, the prosecutor cleverly calculated the introduction of inadmissible evidence to prejudice appellant. He specifically asked Ripple to talk about her concerns for her sons, knowing it would undoubtedly lead to a disclosure about appellant's gang affiliations. Ripple even wanted to make sure that she had implicated appellant as the prosecutor intended, asking "Is that what you wanted?" (6 RT 940.)

The prosecutor next turned to eliciting inadmissible evidence about witness threats. Ripple believed that she was assaulted and threatened because of her testimony in this case but the prosecution had no evidence showing that appellant or anyone acting on his behalf had made any threats to her. Without that essential connection, the evidence served no legitimate purpose. Instead, the prosecutor used the unsupported and inflammatory evidence to lead the jury to the "inescapable conclusion" that the threats were made by or on behalf of the defendant on trial. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 781.)

And if there were any doubt about the prosecutor's "use of deceptive or reprehensible methods to persuade" jurors, one has only to look at the prosecution's closing argument. (*People v. Smithey, supra,* 20 Cal.4th at p. 960.) In complete disregard of the trial court's express ruling that Ripple's intimidation or threat testimony be stricken, the prosecutor actually reminded jurors that Ripple had testified "at great risk to herself and great

risk to her family." (10 RT 1542.)[24]

Moreover, the prosecution's excuses for eliciting this inadmissible evidence are meritless. For instance, the prosecutor argued that Ripple's comments about the threats were necessary to explain "her demeanor on the witness stand, her credibility as a witness. If she's in fear for whatever reason, I think the jury's entitled to know about it." (6 RT 964-965.) Not so. (See, e.g., *People v. Brooks* (1979) 88 Cal.App.3d 180, 187 [reversal where trial court allowed irrelevant testimony regarding threats to a witness without proof of any connection to defendant].)

Additionally, the prosecutor argued that evidence of the threats related to the testimony of Deborah Lankford . (6 RT 965.) The prosecutor claimed that the defense had forwarded Ripple's inculpatory letters to Lankford who then used them to intimidate Ripple. (6 RT 965.)[25] The prosecutor argued that since the defense intended to call Lankford as a witness, it wanted "to lay a foundation . . . that she in fact received these letters from the defense . . . and is one of the ones who was trying to keep [Ripple] off the stand." (6 RT 965-966.) This argument is also specious. Ripple could not attest to whether or not Lankford received copies of Ripple's letters from the defense; only Lankford could. The prosecutor also used Ripple's direct examination as an opportunity to inform her (and jurors) that Lankford had sent copies of the letters (which Ripple had

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[24] Appellant did not waive his objection to the prosecutor's comments since any objection would have only served to draw further attention to the matter and the issue had already been litigated. (*People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 236.)

[25] The defense had obtained Ripple's inculpatory letters to investigators via discovery. (6 RT 965.)

written to investigators) to other people: "Are you aware as you sit here today that Deborah Langford sent your letters to the police department, to other people?" (6 RT 941.)

The prosecutor could not tie appellant to the threats against Ripple but elicited them anyway in order to depict appellant as a dangerous man. And he committed misconduct in doing so. (*People v. Smithey, supra,* 20 Cal.4th at p. 960.)

D. The Admonition Did Not Cure the Error

The court's admonition could not un-ring the proverbial bell in the jurors' mind. (*People v. Brooks, supra,* 88 Cal.App.3d at pp. 185-187 [reversal where trial court allowed irrelevant testimony regarding threats to a witness and where prosecutor could not prove defendant had anything to do with threats and error not cured by court's specific cautionary instructions].) While jurors are presumed to follow the court's admonitions and instructions (*People v. Hill* (1992) 3 Cal.4th 959, 1011, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), "where the misconduct is of such a character that it cannot be purged of its harmful effect by an admonition, it will be considered as a possible ground for reversal in cases where the jury has been admonished." (*People v. Ford* (1948) 89 Cal.App.2d 467, 470.) It is also well-settled that "facts that have been impressed upon the minds of jurors which are calculated to materially influence their consideration of the issues cannot be forgotten or dismissed at the mere direction of a court." (*People v. Roof* (1963) 216 Cal.App.2d 222, 225.)

Here, the judge did not give the admonition until the next day, letting jurors absorb the prejudicial impact overnight. (7 RT 997.) Moreover, the prosecutor highlighted the threats in his argument, just prior to their

deliberations. (10 RT 1542.) The improper threat evidence could have hardly been "forgotten or dismissed" under these circumstances. (*People v. Roof, supra,* 216 Cal.App.2d at p. 225.)

E. Prejudice

The inflammatory nature of gang evidence, and its tendency to imply criminal disposition, frequently results in reversible error where gang-related evidence is erroneously admitted. (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1498-1501); *People v. Perez* (1981) 114 Cal.App.3d 470, 479; *In re Wing Y* (1977) 67 Cal.App.3d 69, 79.) In the instant case, the impact from this emotionally-charged evidence served only to prey on the emotions of jurors, causing them to "forget" about a fair hearing and instead "focus on the character of Mr. Abel." (6 RT 961-963.) Undoubtedly, this evidence led the jurors to mistrust appellant and to consider him a bad and violent man. (See *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-1386.) This case hinged entirely upon credibility of the prosecution witnesses versus appellant. No fingerprints, DNA, or other forensic evidence pointed to appellant. The prosecution's portrayal before the jurors of appellant as a gang-connected witness-threatening defendant eradicated any chance appellant had at a fair trial.

The improper gang evidence and admission of threats to a witness unconnected to appellant amounted to an "evidential harpoon." (*Dudley v. Duckworth, supra,* 854 F.2d at p. 970, quoting *Keyser v. State* (Ind. 1981) 160 Ind. App. 566, 312 N.E.2d 922, 924.) "[S]uch evidence becomes so prejudicial to a defendant that no jury could be expected to apply it solely to the question of the credibility of the witness before it and not to the

substantial prejudice of the defendant." (*Ibid.*) Such evidence is "highly prejudicial" because threats tend to establish guilty knowledge or an admission of guilt by the defendants. (*Dudley v. Duckworth, supra*, 854 F.2d at p. 970.) Added to the mix was Ripple's irrelevant commentary on her "Colombian cartel" connection which also tainted appellant. (6 RT 943.)

The prejudice here is of such magnitude that it resulted in a denial of fundamental fairness. (*Dudley v. Duckworth, supra*, 854 F.2d at p. 972.) Such federal constitutional error requires the state to prove that the error in admitting this evidence was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The state cannot meet its burden. Unsupported and improper evidence of threats made appellant appear more culpable and more dangerous. As previously set forth, the prosecution's case against appellant was far from overwhelming and hinged principally on shaky eyewitness testimony. Given the weakness in the prosecution's case and its reliance on this inflammatory evidence that appellant had a role in threatening a witness, it cannot be said that the error was harmless.

Even under the *Watson* standard, there is a "reasonably probability" of a different result absent the prejudicial error. "[A]n allegation that the defendant has attempted to suppress adverse evidence, if not entirely refuted, may not only destroy the credibility of the witness but at the same time utterly emasculate whatever doubt the defense has been able to establish on the question of guilt." (*People v. Hannon, supra,* 19 Cal.3d at p. 603.) Prejudice is even more probable in the penalty determinations. The improper evidence made appellant appear dangerous as a continuing threat to the safety of others and more deserving of the death penalty. Because there is a "reasonable possibility" of a more favorable result absent the error,

the judgment must be reversed. (*People v. Hernandez* (2003) 30 Cal.4th 835, 877; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

* * * * *

III.

THE TRIAL COURT'S ERRONEOUS DENIAL OF APPELLANT'S REQUEST FOR A PRETRIAL LINEUP DEPRIVED APPELLANT OF DUE PROCESS AND REQUIRES REVERSAL

A. Introduction

Approximately five months prior to the commencement of trial, on December 30, 1996, appellant filed a Motion for Lineup in the trial court asking for a physical lineup of appellant in front of Bettina Redondo, Colleen Heuvelman, and any other crime scene witnesses the prosecution intended to call. (1 CT 349-372.)[26] The prosecution objected to appellant's request as untimely and argued that the appellant looked differently now due to the passage of time. (2 RT 68-69.) The trial court denied appellant's motion on January 24, 1997, without stating its reasons for doing so. (2 CT 497; 2 RT 69.)

On February 13, 1997, appellant filed his Petition for Writ of Mandate and Request for Stay of Proceedings in the Fourth Appellate District, challenging the lower court's ruling. (1 ACT (4/21/03) 1-81.) The appellate court invited a response from the prosecution on February 18, 1997, finding that appellant's petition and request for stay "may have merit." (1 ACT (4/21/03) 79.) The prosecution filed its informal response on March 3, 1997, and on March 6, 1997, the appellate court summarily denied appellant's petition and request for stay. (1 ACT (4/21/03) 98.)

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[26] At the time appellant filed the motion the trial date was set for February 24, 1997. (1 CT 252.) By the time of the hearing on this motion, the court had calendared the start of trial for April 28, 1997. (RT(2) 60.) Trial actually commenced on May 29, 1997. (2 CT 595A; 4 RT 402.)

Both due process and the right of reciprocal discovery dictate that an accused be afforded a pretrial lineup, sometimes referred to as an "*Evans* lineup," where appropriate and upon timely request. (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 625.) *Evans* is "founded on the right of the defendant to a fair trial; the United States Supreme Court is 'particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial.' " (*People v. Hansel* (1991) 1 Cal.4th 1211, 1221, quoting *Wardius v. Oregon* (1973) 412 U.S. 470, 474, fn. 6].) "[B]ecause the People are able to compel a lineup and use any favorable evidence, fairness require[s] that the defendant be given a reciprocal right to discover and use lineup evidence." (*People v. Hansel, supra*, 1 Cal.4th at p. 1221.) Whether eyewitness identification is a material issue and whether fundamental fairness requires a lineup are questions decided within the discretion of the trial court.

Here, all of the requirements for an *Evans* lineup were met and the trial court's erroneous denial of appellant's request denied him the constitutional protections of due process guaranteed under the Constitutions of the United States and California. (U.S. Const., Amends. VI and XIV; Cal. Const., art. I, §§ 7 and 15.)

B. The Trial Court Erroneously Denied Appellant's Lineup Request

1. Materiality and Mistaken Identification

The accused is entitled to the lineup when (1) eyewitness identification is shown to be a material issue and (2) there exists a reasonable likelihood of a mistaken identification which a lineup would

tend to resolve. (*Evans v. Superior Court, supra,* 11 Cal.3d at p. 625; Cal. Criminal Law: Procedure and Practice (Cont. Ed. Bar 2006) § 22.17, pp. 585-586.)

Here, the prosecution made no attempt to contest the importance of the witness identification. No forensic evidence linked appellant to the crime. The only evidence connecting appellant to the homicide at trial besides the inculpatory testimony from convicted felon Ripple, was the questionable identification by Heuvelman and Redondo. The material nature of this evidence clearly satisfied the first prong of *Evans*.

There also existed a more than reasonable likelihood of a mistaken identification in this case. Both Colleen Heuvelman and Bettina Redondo saw a suspicious person near the bank at the time of the homicide but neither initially identified appellant as that suspect. (4 RT 577-578, 5 RT 709-710, 6 RT 823.)

Ms. Redondo changed her mind three times as to the identity of the assailant. Days after the homicide, Redondo picked out Larry ("Turtle") Jones from a photographic lineup as the suspect, stating that she was "90 (ninety) percent" sure he was the gunman. (4 RT 577-578, 6 RT 823, 8 RT 1234.)[27] She subsequently recanted this identification. (4 RT 579.) A couple of months later, she traveled to San Diego for a physical lineup. (8 RT 1231.) Although she shook and wiped away tears when she saw Larry Jones, she identified Mr. Nettle as the assailant, not Jones. (8 RT1232-1235.) Four years after the homicide, when her memory would have been less sharp than when she made her earlier identifications, she picked out

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[27] Jones had also been thrown out of the victim's store for being drunk. (8 RT 1369-1370.)

appellant from a photographic lineup, stating that she was 80 (eighty) percent sure appellant was the assailant on the record and 100 (hundred) percent sure off the record. (4 RT 585, 9 RT 1409-1410.)

Shortly after the homicide, Ms. Heuvelman identified two different suspects from a photographic lineup as bearing a resemblance to the man she saw, neither of whom was appellant. (5 RT 709-710.) Four years later, Heuvelman identified appellant from a six-pack of photographs as the man she had seen in the bank parking lot several years earlier. (5 RT 712.)

The prior identifications by Heuvelman and Redono readily satisfied the second prong of *Evans,* that there must exist a reasonable likelihood of a mistaken identification which a lineup would tend to resolve. One witness identified three separate individuals as the assailant and the other witness thought that two suspects, not appellant, looked like the perpetrator.[28] It is difficult to imagine a more compelling showing for a physical lineup. And to require any greater showing by the defense would violate the reciprocity requirement described in *Hansel* and *Evans,* the fundamental fairness required by the federal Due Process Clause, and the Equal Protection Clause, by treating similarly situated parties differently without reasonable basis. (*People v. Hansel, supra*, 1 Cal.4th at p. 1221; *Evans v. Superior Court, supra,* 11 Cal.3d at p. 625; *Garcia v. Superior Court, supra,* 1 Cal.

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[28] On August 31, 2006, the California State Senate passed S.B. 1544 to address the inaccuracy of eyewitness identification which is the leading cause of wrongful convictions. The bill embodies recommendations of the California Commission on the Fair Administration of Justice and, if signed by the governor, will add section 686.3 to the Penal Code to require law enforcement agencies to develop guidelines regulating eyewitness lineup identifications in criminal investigations. (Sen. Bill No. 1544 (2005-2006 Reg. Sess.).)

App.4th at p. 985; see also *Wardius v. Oregon, supra*, 412 U. S. at pp. 474-475.) This is particularly true given that the prosecution had compelled an earlier physical lineup. (8 RT 1232-1235.)

Moreover, appellant easily met the standard for admissibility of evidence because the lineup was both relevant to a contested identification and not unduly inflammatory. (Evid. Code, § 210.) Additionally, it is not supposed to be difficult for the defense to obtain an *Evans* lineup; it is supposed to be "a readily available remedy." (*People v. Harmon* (1989) 215 Cal.App.3d 552, 568.)

The prosecutor attempted to argue the weight which should be afforded the witness identification, stating: "Mr. Freeman wants you to believe that she made a completely wrong I.D. and it was set in stone. But she fully recanted." (2 RT 67.) However, the trial court simply does not have the discretion to determine witness credibility as a means of denying a lineup when the prosecution is not subject to such restrictions to get a lineup. (*People v. Hansel, supra*, 1 Cal.4th at p. 1221; *Evans v. Superior Court, supra,* 11 Cal.3d at p. 625; see, e.g., *People v. Cudjo* (1993) 6 Cal.4th 585, 609 ["[e]xcept in these rare instances of demonstrable falsity, doubts about the credibility of the in-court witness should be left for the jury's resolution"].)

The prosecutor also argued that the lineup should be denied because appellant's appearance had changed from the passage of time and from "a facial hair standpoint." (2 RT 68-69.) Minor differences in facial hair among the participants of a lineup are permitted. (*People v. Carpenter* (1997) 15 Cal.4th 312, 367.) Moreover, any change in appellant's appearance was more attributable to the prosecution's lengthy four-year charging delay rather than the one-year lapse between appellant's

arraignment and lineup request.

Where, as here, "so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself." (*United States v. Wade* (1937) 388 U.S. 218, 235.)[29] Those pitfalls were especially prevalent in this case. Neither Heuvelman nor Redondo were ever asked to pick out appellant from the neutral setting of a non-suggestive physical lineup. Instead, the identification of appellant occurred in the suggestive courtroom setting "where the defendant is conspicuously seated in relative isolation." *(United States v. Williams* (9th Cir. 1970) 436 F.2d 1166, 1168.) These circumstances rendered the in-trial identification impermissibly suggestive. (See *United States v. Caldwell* (D.C. 1973) 481 F.2d 487, 489 [where trial court denied defendant's pre-trial lineup and witnesses denied an opportunity to identify defendant in a formal live lineup prior to in-court identification, defendant's conviction set aside as irredeemably tainted].)

The lineup could have resolved the problems with mistaken identification in this case and the trial court abused its discretion in denying appellant's request. (*Evans v. Superior Court, supra*, 11 Cal.3d. at p. 625.) The error by the trial court rises to the level of a federal due process violation because it rendered the trial fundamentally unfair. (*United States v. MacDonald* (9th Cir. 1971) 441 F.2d 259, 259.) It also unfairly restricted appellant's ability to present his theory of defense - mistaken identification. (U.S. Const., Amends. VI and XIV; Cal. Const., art. I, §§ 7, 15; *Evans v.*

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[29] Although *Wade* spoke to the subject of the right to counsel at a lineup, the same can be said of the right to compel a lineup.

Superior Court, supra, 11 Cal.3d. at p. 625; *Wardius v. Oregon, supra,* 412 U.S. at p. 472.)

2. Timeliness

Appellant first appeared for arraignment in Municipal Court on September 15, 1995. (1 ACT (Municipal Court Proceedings 9/15/95) 10.) The court subsequently arraigned him on the First Amended Information on January 24, 1997, *after* his request for an *Evans* lineup. (2 CT 497.) At the start of the in-limine proceedings on January 24, 1997, and prior to discussions on appellant's lineup request, the trial court granted the prosecution's request for a continuance of the trial date from February 25 to April 28, 1997. (1 CT 390-391, 2 CT 497; 2 RT 60, 87-88.)[30]

Knowing that the trial date was now months away, the prosecutor nonetheless objected to appellant's lineup request as untimely. (RT(2) 68-69.) A motion for pretrial lineup "should normally be made as soon after arrest or arraignment as practicable." (*People v. Evans, supra*, 11 Cal.3d at p. 626; *People v. Baines* (1981) 30 Cal.3d 143, 148.) Motions which are not made until shortly before trial should, unless good cause is clearly shown, be denied. (*Ibid.*) "Dilatory or obstructive tactics made under the guise of seeking discovery but which tend to defeat the ends of justice will necessarily be weighed heavily on timeliness grounds against the granting of the motion within discretionary limits." (*Evans v. Superior Court, supra*, 11 Cal.3d at p. 626.)

Although appellant's request for a lineup came over one year after his first arraignment, his trial date was still months away. He also made the

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[30] The trial court had previously denied appellant's motion for continuance. (2 CT 589.)

request prior to his arraignment on the amended Information. Trial did not commence until May 29, 1997, five months after appellant filed his request and four months following the hearing on it. (2 CT 595A; 4 RT 402.) The prosecutor had ample opportunity to arrange for a lineup during these intervening months. He could not and did not argue that he would be burdened by any potential delay as a result of granting appellant's motion given that the trial court granted his request for a continuance on the same day. (2 CT 497; 2 RT 87-88.) Although he objected on grounds of untimeliness, the prosecutor made no showing that either he, law enforcement, or the witnesses would be unduly burdened or inconvenienced. Neither did any evidence of "[d]ilatory or obstructive tactics" exist in conjunction with appellant's delay in making his request. (*Evans v. Superior Court, supra*, 11 Cal.3d at p. 626.)

On the other hand, defense counsel offered a "good cause" explanation to the trial court for the delay as well as for the necessity of the lineup. (*People v. Evans, supra*, 11 Cal.3d at p. 626; *People v. Baines, supra,* 30 Cal.3d at p. 148.) Counsel explained that the delay stemmed in part from appellant's unexpected transfer from county jail to Folsom Prison directly following the preliminary examination. (2 RT 64.) Counsel had to coordinate schedules and travel from Southern California to Folsom to discuss proposed motions with their client. (*Ibid.*) They made the trip in August of 1996 but then became involved in other pressing legal matters before the same trial judge. (*Ibid.*) Prior to making the lineup request, counsel also attempted to confer with one of the witnesses, Ms. Heuvelman, but she refused to have any communication with the defense. (2 RT 64-65.)

If anyone was guilty of untimeliness, it was the prosecutor. The prosecutor did not charge appellant until four and one-half years after the

homicide and twenty-one months after police received an anonymous tip naming him as a suspect. (1 ACT (Municipal Court Record) 18-21, 2 CT 453; 5 RT 706-708, 790-795.) It is incongruous that appellant should be penalized for a minor delay in making his request when the prosecution's far more egregious and unjustified speedy-trial delay went unaddressed. (See Arg. VI.) It is also worth noting that a defense request for a live lineup, particularly in a capital case, will frequently arise at a time far removed from the occurrence of the crime. Under the prosecution's reasoning, trial courts could easily sidestep the *Evans*' requirement merely by viewing the inevitable passage of time as a circumstance rendering the live lineup incapable of resolving the identification issue.

Similarly, in *Jackson v. United States* (D.C. 1978) 395 A.2d 99, the prosecutor argued that the defense pretrial lineup request, made six weeks before trial, was untimely. The state court found otherwise:

> In filing his lineup motion, however, [the defendant] had another, equally important concern: reliability of any in-court identification which the government might call upon [the witness] to make. There is often considerable delay between initial identification and trial (in this case 7-1/2 months). There is, moreover, inherent suggestiveness in a defendant's location at the table next to his counsel at trial. [Citations omitted.]. . . . Arguably, therefore, if defense counsel anticipates an in-court identification, the most appropriate time for a lineup in the event one has not yet been held is sometime near the trial date, as a way of testing that proposed identification with a preliminary, nonsuggestive procedure. [Footnotes omitted.]

(*Id.* at pp. 104-105.)

As with the *Jackson* defendant, appellant arguably made a timely request given the anticipated in-court identifications by Heuvelman and

Redondo, and as a way of testing their identifications in a nonsuggestive setting. (*Ibid.*)

C. The Denial Prejudiced Appellant

Identification was the primary disputed issue at trial, and although tenuous identifications placed appellant at the scene, there were no fingerprints, murder weapon, cash, or other physical evidence connecting him to the crime. Further, witnesses initially described the assailant as Hispanic, which appellant is not. (1 ACT (4/21/03) 37, 39, 43.) And, one of the two witnesses who identified appellant as the assailant, previously identified two other men, one of whom had an altercation previously with the victim. (4 RT 577-579, 6 RT 823, 8 RT 1231-1234.)

The determination of appellant's guilt hinged on Heuvelman's and Redondo's ability to identify him. Given the lack of certainty involved in the initial identifications, the description of the assailant as Hispanic, and the other discrepancies involved here, as well as the high incidence of miscarriage of justice caused by mistaken identification (*United States v. Wade, supra*, 388 U.S. at p. 228), the state cannot demonstrate that the erroneous denial of appellant's request for a pretrial lineup was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Even under the more stringent *Watson* standard, it is readily apparent that a different result would have been more probable had the trial court not denied the lineup. (*People v. Watson, supra*, 46 Cal.2d at p. 818.) The judgment must be reversed accordingly.

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IV.

THE IMPROPER PARADE OF WEAPONS AND GRAPHIC DEPICTION OF APPELLANT'S ARREST, BOTH UNRELATED TO THE PRESENT OFFENSE, CONSTITUTE REVERSIBLE ERROR

A. Proceedings Below

Prior to Detective Steve Rubino's testimony, appellant objected during in-limine proceedings to the prosecution's proposed introduction of several weapons unrelated to the present offense. (6 RT 962; 7 RT 983-984.) The weapons were confiscated from a car in which appellant was a passenger when he was arrested by Detective Rubino, nine months following the homicide. (7 RT 998-1005) Appellant argued that the guns lacked any relevancy whatsoever to the present charge. (6 RT 962; 7 RT 983-984.)[31] As an offer of proof, the prosecution contended that the defense was taking the position that Ms. Ripple "is lying about everything" and the weapons corroborated that she was not. (7 RT 986.) Specifically, the prosecution argued that Ms. Ripple testified that appellant had these guns and "sure enough, when he's arrested, they're in his possession." (7 RT 986.) Appellant offered to stipulate that he was in possession of these weapons but the prosecution failed to respond to that offer. (7 RT 985.) The trial court, while not granting appellant's motion to exclude the guns, attempted to limit the manner in which the evidence was introduced by ordering that Detective Rubino testify that appellant was "contacted" rather than "arrested." (7 RT

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[31] In fact the weapons were still in envelopes with case numbers related to the separate cases in which appellant was a co-defendant with Lorraine Ripple. (6 RT 962.)

986-987.)

During Detective Rubino's testimony, he stated that he belonged to a multi-jurisdictional police team looking to apprehend certain individuals including appellant. (7 RT 999-1000.) Rubino testified that together with nine armed undercover officers, they "contacted" appellant in a vehicle with guns drawn and recovered a loaded MAC-11, semi-automatic pistol from underneath the right-front passenger seat, a .22 caliber pistol loaded with a magazine from under the driver seat, along with a couple of other magazines containing nine millimeter rounds. (7 RT 1000, 1004-1005.) Rubino identified the actual weapons in court as well as a photograph of them. (7 RT 1005-1006.) Over defense objection, Rubino also testified that the serial numbers of the weapons had been scratched off. (6 RT 1009.)

During side bar proceedings directly following Rubino's testimony, defense counsel claimed that the prosecution ambushed him. Counsel stated that "I made the objection before Rubino testified and it got worse than I ever predicted . . . about this character evidence business" stating that Rubino "was just going to come in and say they had possession of these guns. And now the picture painted is obviously much, much broader than that." (7 RT 1011.) Counsel's Motion for a Mistrial and subsequent Motion for a New Trial based on Rubino's testimony were denied. (7 RT 1011; 3 CT 1067.)[32]

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[32] In light of appellant's objections prior to and directly following Rubino's testimony, appellant's failure to object during Rubino's testimony does not constitute a waiver of this issue. A defendant is excused from the necessity of making a timely objection or a request for admonition if either would be futile. (*People v. Hill, supra,* 17 Cal.4th at p. 820; *People v. Zambrano, supra,* 124 Cal.App.4th at p. 236.) The trial court denied the objections made both before Rubino's testimony and after his testimony so any

Admission of the weapons as well as Detective Rubino's graphic depiction of appellant's arrest on unrelated charges were highly prejudicial errors which deprived appellant of a fair trial in violation of his Fifth, Sixth and Fourteenth Amendment rights to due process of law, and further undermined his right to a reliable guilt and penalty determination as guaranteed by the Eighth Amendment proscription against cruel and unusual punishment. The trial court abused its discretion in allowing Detective Rubino to testify regarding appellant's possession, in 1991, of different weapons, one of which was similar in make and model to the murder weapon. Such evidence was irrelevant. Moreover, as trial counsel correctly argued, this evidence was not proper rebuttal, and its admission also violated both Evidence Code section 1101, subdivision (a), in that one's "propensity to own a certain type of weapon" is inadmissible character evidence, and Evidence Code section 1101, subdivision (b), in that the circumstances of the arrest were not "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity . . .)." The prosecutor's improper guilt phase argument only served to compound the court's error. Accordingly, the trial court's erroneous admission of this highly prejudicial evidence necessitates reversal of appellant's conviction and death sentence.

B. Parading Guns Before the Jury Which Had No Relevance to the Present Offense

"Evidence of possession of a weapon not used in the crime charged against defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons--a fact of no

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objection made during his testimony clearly would have been futile.

relevant consequence to determination of the guilt or innocence of the defendant." (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360, italics omitted.) Here, as in *Henderson*, the weapons had no relationship whatsoever to the charged offense and were therefore not relevant to any issue in dispute. (See also, *People v. Witt* (1958) 159 Cal.App.2d 492, 497 [weapons that were not taken in the burglary of which defendant was convicted, but were found in his car, should have been inadmissible at his trial for burglary]; *People v. Henderson, supra*, 58 Cal.App.3d at p. 360 [second handgun found in defendant's apartment that he did not use in committing assault upon police officers with a firearm was irrelevant for any purpose]; *People v. Archer* (2000) 82 Cal.App.4th 1380, 1392, 99 Cal.Rptr.2d 230 [knives found in defendant's backyard almost two years after the murder with which he was charged, that were determined not to have been the murder weapons, were irrelevant to show planning or availability of weapons]; *United States v. McKinney* (9th Cir. 1993) 993 F.2d 1378, 1384 [possession of weapons unrelated to offense was not harmless error]; *People v. Riser* (1956) 47 Cal.2d 566, 577, overruled on another point in *People v. Chapman* (1959) 52 Cal.3d 95, 98 [where murder weapon, which was never recovered, was a .38 caliber revolver, evidence that defendant possessed two other .38 caliber revolvers, neither of which could have been the murder weapon, was irrelevant to prove that defendant had committed the crime].)

The prosecution's justification for the admission of the box of weapons -- that the evidence was admissible as rebuttal to appellant's cross-examination of Ms. Ripple -- is meritless. The prosecution claimed that since appellant attempted to depict Ms. Ripple as a liar and to impeach her credibility, it could bring in evidence of weapons to show that at least on this

topic she was telling the truth. (7 RT 986.) Ms. Ripple had testified that she had seen appellant with different weapons. (6 RT 930-932.)

Every defense impeachment of a prosecution witness attempts to attack that witness's credibility. It certainly does not follow that *anything* a witness discusses is automatically relevant evidence on rebuttal. (See *People v. Carter* (1957) 48 Cal.2d 737, 753; 5 *Witkin*, Cal. Crim. Law 3d (2000) Crim Trial, § 546, p. 782.) Moreover, the prosecution had already displayed these weapons, a Mac-11 and a .22 caliber, before the jury during the direct examination of Ripple. (6 RT 930-931.) Ripple testified that the weapons either "look[ed] like" or "appear[ed]" to be appellant's weapons, even though it was undisputed that neither was the murder weapon. (6 RT 931.)[33] Even the trial court became concerned over the prosecution's handling of these dangerous weapons in open court, cautioning the prosecutor "Hang on just a minute. Deliver it to the marshal, please." (6 RT 930.) By parading these weapons a second and unnecessary time before the jurors during Rubino's testimony, the prosecutor ensured their intended, prejudicial impact.

No doubt the prosecution rejected the proffered stipulation to the weapons so that it could parade this irrelevant and highly inflammatory evidence before the jurors a second time. Regardless, it was "error to admit evidence that other weapons were found in [the defendant's] possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." *(People v. Riser, supra,* 47 Cal.2d at p. 577; *People v. Henderson, supra,* 58 Cal.App.3d at p.

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[33] Appellant objected on grounds of relevancy and impermissible character evidence to the prosecution's waving the guns around during Ripple's examination as well. (6 RT 962.)

360.)

As with the inadmissible and highly inflammatory gang evidence which the prosecution also improperly introduced, the prosecution admitted improper gun evidence to demonstrate appellant's criminal propensity and bad character in the hopes that jurors would infer that appellant had "a criminal disposition and is therefore guilty of the offense charged" (*People v. Williams* (1997) 16 Cal.4th 153, 193; Evid. Code, § 1101; see Arg. II.) Such evidence should not be admitted if only tangentially relevant. (*People v. Cox*, *supra*, 53 Cal.3d at p. 660.) Here, the evidence lacked any relevance, tangentially or otherwise.

C. Improper Testimony on the Circumstances of Appellant's Arrest on Unrelated Charges

The prosecution knew that both the defense and the trial court wanted to limit Rubino's testimony by the order to soften the term "arrest" to "contact." At most, the defense understood that Rubino would be testifying solely to his "contact" with appellant and confiscation of weapons; it had no warning that the prosecution planned on having Rubino testify about nine officers converging on appellant with guns drawn. (7 RT 1011.) The prosecutor never offered any justification for Detective Rubino's irrelevant testimony concerning the inflammatory circumstances of appellant's arrest on unrelated charges. (7 RT 1011.) Nor could he. The circumstances of the arrest were, like the weapons, irrelevant to the present offense and served only as further improper attacks on appellant's character. (*People v. Williams, supra,* 16 Cal.4th at p. 193; Evid. Code, § 1101.)

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D. The Erroneous Admission of the Guns and Arrest Was Prejudicial

As with the improper admission of gang evidence, the error here not only violated state evidentiary provisions but it permitted the prosecution to convict appellant on wholly irrelevant and inflammatory evidence in violation of appellant's Sixth and Fourteenth Amendment rights to a fair trial and due process of law, warranting reversal. (See *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357 [state court evidentiary ruling violates federal law if it infringes upon federal constitutional provision or deprives defendant of fundamentally fair trial].)

The jurors heard that nine armed officers with guns drawn apprehended appellant while he was within arm's reach of semi-automatic fully-loaded weapons ready to be fired. (7 RT 1000-1005.) None of this information related in any way to the current offense. Worse, the "emotionally charged" evidence helped the prosecution "paint a picture" of appellant as an extremely dangerous predator. (*United States v. McKinney, supra*, 993 F.2d at p. 1385.) In closing argument the prosecutor acknowledged the fear on the jurors' faces when they saw the box of weapons and played to that fear to get a conviction:

> I was looking at your faces just the way you watch me during trial. I have watch [sic] you, too. *And I saw your faces when those guns were taken out.* And you thought, oh, you have – oh, this is real. This isn't make believe. . .Folks, these are real people . . .these are the kinds of people with loaded guns that shoot people . . . These are dangerous people.

(10 RT 1538-1539, emph. added.)

The prosecutor drove home his improper intent in his argument: "people with loaded guns . . .shoot people." (10 RT 1539.) In other words, the prosecutor told jurors that they could assume appellant shot the victim because he had a loaded gun with him on another occasion. This is precisely the type of improper inference which is too prejudicial to be tolerated. (*United States v. McKinney, supra*, 993 F.2d at p. 1385.)

Appellant suffered additional harm by the introduction of the .22 caliber weapon because the actual murder weapon in this case, also a .22 caliber weapon, was never recovered. (4 RT 531.) Showing that appellant had possession of a similar, albeit different, .22 caliber weapon implied guilt by association with the same type of weapon. None of this evidence was relevant to the questions before the jury and "served only to prey on the emotions of the jury, to lead them to mistrust [appellant], and to believe more easily that he was the type" (*id.* at p. 1385) of person "with loaded guns that shoot[s] people." (10 RT 1539.)

Appellant's trial was so impermissibly tainted by irrelevant evidence that the erroneous admission of weapons and the circumstances of appellant's arrest cannot be considered harmless under *Chapman*. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The prosecution led jurors to believe that if appellant were the type of person to be so heavily armed and dangerous as to need nine law enforcement officers with guns drawn to arrest him, he is the type of person who would be guilty of the charged offense. And even under the more stringent *Watson* standard, reversal is warranted. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) The prosecution placed much emphasis on appellant's possession of weapons and the circumstances of his arrest in its depiction of appellant as a dangerous felon. Removing this evidence from the jury's consideration

would have altered the jury's perception and created a "reasonable probability" of a different result absent the prejudicial error. (*People v. Watson, supra,* 46 Cal.2d at p. 836.)

The prejudice is even more probable in the penalty determination. Hearing that nine trained armed officers were needed to take down appellant and visibly reacting to the cache of weapons paraded before them, jurors would more likely want a death verdict out of concern that such a dangerous criminal would pose safety threats in prison. The prosecutor drove home this point in closing argument during the penalty phase when he told jurors that the "only reason" a person would carry a Mac 11 "is to use it on other people." (12 RT 2036.) Because there is a "reasonable possibility" of a more favorable result absent the error, the judgment must be reversed. (*People v. Brown, supra,* 46 Cal.3d at p. 448; *Chapman v. California, supra*, 386 U.S. at p. 24.)

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V.

PREJUDICIAL VICTIM IMPACT EVIDENCE THAT APPELLANT "KILLED" THE VICTIM'S BROTHER VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND HIS DEATH JUDGMENT MUST BE REVERSED

A. Introduction

America Miller, Armando's mother, testified at the penalty phase that "you know, he don't just kill me one son he kill me two sons [sic]." (11 RT 1958.) The prosecutor then asked "So your son, Bobby, eventually died of heart problems?" to which Ms. Miller responded "Yes, uh-huh." (*Ibid.*) After the jurors were excused, appellant argued that "Mrs. Miller equates the death of the second son from heart disease, she has indicated that Mr. Abel killing [sic] two sons." (11 RT 1961.) The court treated the defense objection as a motion to strike and denied the motion. (*Ibid.*) The court subsequently denied appellant's Motion for a New Trial based, inter alia, on the improper admission of this victim-impact evidence. (3 CT 1086, 1146.)

In *Payne v. Tennessee* (1991) 501 U.S. 808, the United States Supreme Court overruled *Booth v. Maryland* (1987) 482 U.S. 496, and *South Carolina v. Gathers* (1989) 490 U.S. 805, to the extent that those cases held that a statutory scheme permitting admission of evidence or argument relating to the victim and the impact of the victim's death on the victim's family violates the Eighth Amendment.

Payne does not hold that "victim impact evidence must be admitted, or even that it should be admitted." (*Id.* at p. 831 (conc. opn. of O'Connor, White, and Kennedy, JJ.).) There are substantial limits on the use of victim-impact evidence in California. The only factors relevant to the

penalty determination in a capital case in this state are those set out in section 190.3. (*People v. Boyd* (1985) 38 Cal.3d 762, 772-776.) In *People v. Edwards* (1991) 54 Cal.3d 787, this Court determined that some victim-impact evidence may be admissible as "circumstances of the crime of which the defendant was convicted in the present proceeding. . . " under section 190.3, factor (a). (*Id.* at p. 834.) *Edwards* held that section 190.3, factor (a) "allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim." (*Ibid.*) The holding is limited to "evidence that logically shows the harm caused by the defendant." (*Ibid.*)

Finally, *Edwards* warned that, "[w]e do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne*. . . ." (*People v. Edwards, supra*, 54 Cal.3d at pp. 835-836.) Here, however, the prosecutor chose to explore and exceed those outer reaches in violation of appellant's rights to a fair and reliable penalty determination and in so doing denied him due process by rendering the penalty trial fundamentally unfair. (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, §§ 7, 15, & 17; *Tuilaepa v. California* (1994) 512 U.S. 967, 975; *Payne v. Tennessee, supra*, 501 U.S. 808.)

B. The Improper Victim-Impact Evidence

To be consistent with the facts and holding of *Payne*, the admission of victim impact evidence, if admitted at all, must be attended by appropriate safeguards to minimize its prejudicial effect and to confine its influence to the provision of information that is legitimately relevant to the capital sentencing decision. Among other things, the evidence should be limited to testimony which describes the effect of the murder on a family

member who was present at the scene during or immediately after the crime, and it should be limited to those effects which were known or reasonably apparent to the defendant at the time he committed the crime or which were properly introduced to prove the charges at the guilt phase of the trial. (See, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 935 [victim impact evidence concerns the "the immediate injurious impact of the capital murder"]; *People v. Fierro* (1991) 1 Cal.4th 173, 264-265 (conc. and dis. opn. of Kennard, J.) [proper victim impact evidence of the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes and the facts of the crime which were disclosed by the evidence].) These limitations are consistent with *Payne*, where the victim impact evidence described the effect of the crime on the victim's son and brother who were present at the scene of the crime. Given the boy's presence at the scene and the fact that he was critically injured during the attack, the defendant presumably knew about his likely grief and suffering.

In addition to comporting with *Payne*, these limitations are necessary to make the admission of victim impact evidence consistent with the plain language of California's death penalty statutes and to avoid expanding our aggravating circumstances to the point that they become unconstitutionally vague. In California, aggravating evidence is admissible only when it is relevant to one of the statutory factors (*People v. Boyd, supra*, 38 Cal.3d at pp. 775-776), and victim impact evidence is admitted on the theory that it is relevant to factor (a) of Penal Code section 190.3, which permits consideration of the "circumstances of the offense." (*People v. Edwards, supra*, 54 Cal.3d at p. 835.)

To be relevant to the circumstances of the offense, the evidence must

show circumstances that "materially, morally, or logically" surround the crime. (*People v. Edwards, supra*, 54 Cal.3d at p. 833.) The only victim impact evidence which meets this standard is evidence of "the immediate injurious impact of the capital murder" (*People v. Montiel* (1993) 5 Cal.4th 877, 935), evidence of the victim's personal characteristics that were known or reasonably apparent to the defendant at the time of the capital crimes, and facts of the crime which were disclosed by the evidence properly received during the guilt phase. (*People v. Fierro* (1991) 1 Cal.4th 173, 264-265 (conc. and dis. opn. of Kennard, J.).)

Here, there were no witnesses to the murder. Therefore, Mrs. Miller could not testify as to the effect of the murder on a family member who was present at the scene during or immediately after the crime, as was the case with the grandmother's testimony regarding the boy who witnessed the capital crimes in *Payne*.

Moreover, appellant could not have known that Armando's murder would lead to the premature death of his brother. Nor was there any evidence to establish that the brother's heart disease was a product of the crime. Nonetheless, the prosecutor extracted this illogical and highly prejudicial information through his questioning of America Miller. (11 RT 1958.)

That the victim impact testimony included testimony that Armando's brother died of a heart attack as a result of Armando's murder far exceeds the confines of acceptable victim impact evidence. (See, e.g., *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872 [Tennessee Supreme Court expressed concern about admissibility of victim impact evidence describing matters which were unknown to the defendant].) Things that happened after the crime, like the death of Armando's brother, do not fall within any

reasonable common sense definition of the phrase "circumstances of the crime." (Pen. Code, § 190.3, subdivision (a).) Yet this information was introduced under the rubric of victim impact evidence. If such evidence is proper under state law, then factor (a) of Penal Code section 190.3 is unconstitutionally vague. (Cf. *People v. Boyette* (2002) 29 Cal.4th 381, 445.) An interpretation of "circumstances of the crime" so broad that it would allow for admission of this victim impact evidence renders that factor unconstitutionally overbroad and vague. (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, §§ 7, 15, & 17.) When deciding between life and death, the jurors should be given clear and objective standards providing specific and detailed guidance. (See *Lewis v. Jeffers* (1990) 497 U.S. 764, 774-776.) Sentencing factors must have a common sense core of meaning that juries are capable of understanding. (*Tuilaepa v. California, supra,* 512 U.S. at p. 975.)

C. The Erroneous Admission Of The Victim Impact Evidence Requires Reversal

Because the trial court's error occurred at the penalty phase of a capital trial, this Court must determine whether there is a "reasonable possibility" that the error affected the verdict. (*People v. Brown, supra,* 46 Cal.3d at pp. 447-448.). The state cannot meet its burden here.

It is difficult to imagine anything more prejudicial than jurors hearing for the first time during the penalty phase that appellant had actually murdered not one, but two members of the same family. (See, e.g., *People v. Cash* (2002) 28 Cal.4th 703, 721 [reversible error where counsel not permitted to voir dire on defendant's prior murder because it was "likely to be of great significance to prospective jurors" at penalty phase].) As this Court recognized in *Cash*, the shock of hearing about a second murder for

the first time at the penalty phase could easily prompt jurors to vote automatically for death. (*Ibid.*) Even worse, jurors heard about the second victim's "murder" from the victim's grieving mother.

The prosecutor's disingenuous penalty phase argument exacerbated the impact of this prejudicial evidence. The prosecutor told jurors that they should not consider appellant responsible for the death of Bobby Miller (Armando's brother). (12 RT 2012.) However, he did so while emphasizing the impact of Bobby's death on Mrs. Miller:

> I mean, this is a mother, obviously, in her mind she feels that this somehow impacted her son's heart. But we're not asking you to hold Mr. Abel responsible for the heart problems of Bob, Bobby Miller, who eventually died. ¶ But in her own mind – this is, again, the impact of this crime on this victim and the victim's family. In her mind, the way she's dealing with this is she feels the killing of Armando Miller is such a heartbroken event to her other son, who he was close to, that this is what caused his illness."

(12 RT 2012.)

The prosecutor again disingenuously advised jurors not to "consider that the death of Bobby Miller had anything to do with this incident" but then added that it "is just [Mrs. Miller's] impression and it's part of her victim impact, but there's no proof of that." (*Ibid.*) The prosecutor thus cleverly highlighted Bobby's death while feigning caution about holding appellant responsible.

Hearing more about appellant's prior robberies during the penalty phase would not have inflamed or outraged jurors like the shock of hearing for the first time that appellant also killed the victim's brother. News of such emotional evidence, another murder for which appellant had not even

been punished, could have easily provoked the jurors into a death verdict. The prosecutor relied upon the victim impact evidence as crucial to securing a death sentence against appellant. In light of this fact, as well as the nature of the victim impact evidence and the prosecutor's exploitation of it during closing argument, more than a "reasonable possibility" exists that the error affected the verdict. (*People v. Brown, supra,* 46 Cal.3d at p. 447.) The death verdict must be reversed.

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VI.

APPELLANT WAS DENIED HIS DUE PROCESS RIGHTS BY THE UNJUSTIFIED PRE-CHARGING DELAY

A. Proceedings Below

This crime occurred on January 4, 1991. (1 CT 216.) The criminal complaint against appellant was not issued until four and one-half years later, on June 26, 1995. (1 ACT (Municipal Court Record) 18-21.) On August 3, 1993, police received an anonymous tip that appellant was the shooter. (2 CT 453; 5 RT 790-795.)[34] The case remained "suspended" or inactive until a new detective took it over in March 1995, and followed up on the 1993 lead. (5 RT 706-708, 794-795.)[35]

In appellant's Motion to Dismiss based on denial of due process appellant argued that law enforcement inexcusably delayed fifteen months before following up on the anonymous tip naming him as a suspect, and inexcusably delayed a total of twenty-one months before charging him. (1 CT 286-299.) In his lower court pleadings, appellant demonstrated how the delay irrevocably prejudiced him because telephone records which could have corroborated his alibi had been destroyed. (*Ibid.*) Appellant also set forth how memories of potential witnesses who could have corroborated appellant's alibi had faded. The missing elderly witness referred to in appellant's lower court pleadings as a potential alibi witness and a client

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[34] The informant was subsequently identified as Joanne Gano, James Gano's wife. (2 CT 453.)

[35] Appellant went to state prison in January 1992, serving a forty-four year sentence for robbery. (1 CT 2881 CT 288; 9 RT 1429.)

appellant visited with on the day of the homicide, though ultimately located and identified as Mrs. Tribble, could not remember the events in question due to the lengthy delay in proceedings. (8 RT 1142-1157.) Appellant also argued that because his own memory and the memory of James Gano had faded, he could not establish certain details of his alibi. (1 CT 292-294.)[36]

In opposition to appellant's motion to dismiss, the prosecution argued that Investigator Solis could not give appellant's case immediate attention because of his heavy caseload. (2 CT 407.) The prosecution also argued that appellant had failed to show how the phone records or witnesses would have been helpful to his case or to detail precisely how appellant's own fading memory had prejudiced the defense. (2 CT 412-414.)

Appellant's Motion to Dismiss was denied on June 24, 1997. (1 CT 286-299, 3 CT 800.) The trial court also denied appellant's Motion for New Trial based, inter alia, on the pre-charging delay or speedy trial violation. (3 CT 1054-1112; 3 CT 1146-1155.)[37] The pre-charging delay in appellant's case seriously prejudiced his ability to prepare a defense due to loss of records and fading memories, denying appellant his rights to a fair trial and due process of law under article I, section 15 of the California Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. (*Scherling v. Superior Court* (1978) 22 Cal.3d 493, 505; *People v. Belton* (1992) 6 Cal.App.4th 1425, 1433.)

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[36] Appellant's lower court claims regarding the loss of a material witness (John Rojas) and the tape recording of Joanne Gano's phone call are not the subject of appeal. (1 CT 292-2931 CT 292-293.) Mr. Rojas was ultimately located and the tape recording produced. (2 CT 449-452.)

[37] The parties often referred to the motion as a "speedy trial" motion. (3 RT 399, 10 RT 1582, 12 RT 1968.)

B. The Three-Step Analysis in Showing a Constitutional Violation from a Pre-Charging Delay

A pre-charging delay requires a three-step analysis to determine whether a defendant's rights have been violated. First, the defendant must show he has been prejudiced by the delay. Second, the burden then shifts to the prosecution to justify the delay. Third, the court balances the harm against the justification. (*Jones v. Superior Court* (1970) 3 Cal.3d 734, 740; *People v. Pellegrino* (1978) 86 Cal.App.3d 776, 779-781.)

The test for determining whether the right to due process has been violated is the same as the test for determining whether the right to speedy trial has been violated: balancing the effect of the delay on the defendant against the justification offered by the government for the delay. (*Scherling v. Superior Court, supra*, 22 Cal.3d at p. 505; *Jones v. Superior Court, supra,* 3 Cal.3d at p. 741, fn. 1.) The federal rule is that substantial and intentional pre-charging delay requires that the effect of the delay be balanced against its justification. (*United States v. Marion* (1971) 404 U.S. 307, 324-325; *People v. Archerd* (1970) 3 Cal.3d 615, 640.) In California, a negligent delay is sufficient to require a balancing. (*Scherling v. Superior Court, supra*, 22 Cal.3d at p. 505; Cal.Criminal Law: Procedure and Practice (Cont.Ed.Bar 2006) § 19.3, pp. 490-491.) Negligent delay in bringing a defendant to trial, while not considered "as onerous as deliberate delay, is still weighed against the People because it is the duty of the State to bring a defendant to trial promptly." (*People v. Hill* (1984) 37 Cal.3d 491, 497, relying upon *Barker v. Wingo* (1972) 407 U.S. 514, 531.)

1. Appellant Established Prejudice

Appellant established the prejudice from this delay in his lengthy pleadings, supported by exhibits, in the lower court. (1 CT 286-300, 2 CT 489-494, 3 CT 1054-1074.) As set forth in the lower court, the delay completely sabotaged appellant's ability to establish his innocence. At the time of the homicide to the best of his recollection he was thirty or forty miles away from the crime scene returning mortgage loan documents to a client in Long Beach. (1 CT 288-289; 9 RT 1451-1459.) He also made a collect phone call from the San Pedro area to his employer, Money Funders Mortgage in Orange County, around the same time as the crime. (*Ibid.*)[38] The client with whom appellant visited that day, Mrs. Tribble, was ultimately located and testified at trial. (8 RT 1142-1157.) However, by the time of trial Mrs. Tribble's memory had faded and she could only remember dealing with appellant during a general time period, between Christmas 1990 and March 1991, could not remember if appellant visited with her on the day in question, and could not even remember if her loan documents had actually been returned or if she threw them out. (*Ibid.*)

Appellant also suffered prejudice because of the faded memory of James Gano who testified against appellant at the preliminary hearing. (1 CT 86-103.) Throughout his preliminary hearing testimony, Gano repeatedly testified "I don't recall" or "I don't remember," often in reference to his inability to recall specific information about critical conversations which allegedly occurred with appellant. (1 CT 106-107, 110, 111-116, 119-123, 128-138, 140, 142-143, in passim.) Without being able to pin

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[38] Money Funders was owned and operated by the prosecution's chief witness at the preliminary hearing, James Gano. (1 CT 86-103, 3 CT 1076; 12 RT 2146-2151.)

Gano down to the details of his incriminating statements, appellant's ability to cross-examine him was hindered.[39] Because Gano was so vague and forgetful, appellant could not establish the details of his alibi. (See *People v. Hill, supra,* 37 Cal.3d at p. 498 [thirteen-month delay and fading memory of a *prosecution* witness in a case which relied almost entirely on eyewitness identification made a fair trial impossible, resulting in reversal].)

Appellant's own memory had also understandably faded after so many years. In his declaration in support of the speedy trial motion, appellant stated that the time lapse had seriously hindered his ability to reconstruct all his activities for the time in question and thereby contact potential corroborating witnesses. (2 CT 494.)

The delay in prosecution also prevented appellant from obtaining corroborative documentary evidence. Appellant made numerous, diligent

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[39] Appellant never had an opportunity to cross-examine Gano at trial because the prosecution switched theories between the preliminary hearing and trial. Gano had been the prosecution's chief witness against appellant during the preliminary hearing but when a different prosecutor took over the case prior to trial, the new prosecutor viewed Gano as an accomplice who, as a mortgage banker, conspired with appellant to rob the Millers as part of an "inside job." (4 RT 405-406, 5 RT 671-672.) When appellant learned that the prosecution had no intention of producing Gano for trial, appellant initially requested Gano's appearance. (5 RT 668-674.) It would have cost over $8,000 to transport Gano from federal prison where he had been sent by the time of trial and the trial court denied appellant's request without a substantial offer of proof. (*Ibid.*) The parties each discussed Gano's involvement in the crime during argument. (4 RT 404-407, 436-444.) Although the prosecution did not oppose admission of Gano's preliminary hearing transcript, appellant ultimately chose not to admit it nor to make the requisite offer of proof for Gano's appearance. (5 RT 812-814.) In arguing against appellant's motion for new trial, the prosecution relied upon, *inter alia*, Gano's testimony against appellant at the preliminary hearing. (12 RT 2159.)

efforts to obtain phone records from Money Funders Mortgage to corroborate his alibi that he had made a collect call some thirty to forty miles away from the crime scene at the time of the homicide. However, by the time of trial these records had been destroyed. (2 CT 490-491 [Declaration of defense investigator, Douglas Potratz, regarding his numerous attempts to obtain Money Funders' phone records]; 3 CT 1117-1121 [Declaration of defense investigator Kristen M. Smith regarding her search of eight boxes of business records for Mortgage Funders and her inability to locate phone records for 1/4/91 from those boxes and her inability to locate the loan application of Elaine Tribble]; 9 RT 1458-1459.)[40] Appellant was also unable to obtain the company's January 1991 phone records from Pacific Bell because they only kept records back to August of 1991. (3 CT 1121.)

2. The Prosecution Could Not Justify the Delay

Once appellant established prejudice, the burden shifted to the prosecution whose "justification," however, was less than persuasive. (2 CT 406-460.) Authorities were aware that appellant was a suspect in August of 1993 but sat on this information for twenty-one months before launching an investigation. Initially, Detective Solis handled the case, and

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[40] Defense counsel brought a Motion to Dismiss based on the prosecution's loss and/or destruction of the Money Funders' records. (2 CT 557-578.) The police had claimed that these records had been destroyed up until the day of trial when they announced they had been found. (3 CT 1076.) Appellant's thorough search of these records revealed that although records were found relating to the months prior to and after the incident, the records for the month of January 1991 were missing. (Ibid.) These records had been in the custody of Joanne Gano, wife to James Gano, and the informant in this case, prior to being held by the Tustin Police. (2 CT 490, 3 CT 11182 CT 490, 3 CT 1118.)

although he recorded the informant's August 1993 phone conversation naming appellant, he mislabeled and misfiled the tape. (5 RT 799.)[41] The case became "inactive" or "suspended" until March of 1995, when Detective Tarpley was assigned to it and followed up on the informant's tip. (5 RT 797-798; 9 RT 1351.) The prosecution justified its twenty-one month delay by claiming that Detective Solis had a heavy caseload and that since appellant was in prison already on other charges, the case was a "lower priority." (2 CT 407.)

Presumably the homicide unit also had a heavy caseload at the time Detective Tarpley took over appellant's case twenty-one months after Detective Solis. More importantly, the same information which Detective Tarpley acted upon in 1995 was available to Detective Solis in 1993, almost two years earlier. (See *People v. Hartman* (1985) 170 Cal.App.3d 572, 581 [murder conviction reversed after over five year pre-charging delay where the prosecution was unable "to offer any satisfactory explanation" for the delay (*id.* at p. 582)]; see also *Doggett v. United States* (1992) 505 U.S. 647, 657-658 [lengthy delay weighed more heavily against government's negligence where investigators made no serious effort to locate defendant after charging].)

Appellant's imprisonment did not constitute a satisfactory explanation for the delay or for making his case a low priority. (2 CT 407.) *People v. Pellegrino* (1978) 86 Cal.App.3d 776, is instructive on this point. In *Pellegrino*, the pre-charging delay of seventeen to twenty-four months left the defendants unable to remember events. The court found that the reason for the delay was "the lack of interest of the responsible agencies in

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[41] Detective Solis discovered the misfiled tape prior to trial. (5 RT 799.)

prosecuting the defendants on the basis of [the] evidence." (*Id.* at p.781.) The court upheld the trial court's determination that "[t]he People cannot simply place gathered evidence of insubstantial crimes on the 'back burner' hoping that it will some day simmer into something more prosecutable . . ." (*Ibid.*)

> "[Unreasonable] delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each case must await its turn."

(*Barker v. Wingo, supra,* 407 U.S. at p. 538 (conc. opn. of White, J.).)

At bare minimum, this State sanctioned indifference to appellant's right to a speedy trial constituted negligence and cannot justify violating his due process rights. *(Penney v. Superior Court* (1972) 28 Cal.App.3d 941, 951-952 [mere negligence on the part of the State, if resulting in prejudice to the defendant, and if not outweighed by sufficient justification for the delay, can violate due process]; *Scherling v. Superior Court, supra*, 22 Cal.3d at p. 505; see also *Craft v. Superior Court* (2006) 140 Cal.App.4th 1533, 1535, fn. 2 ["A defendant's right to speedy trial cannot be stifled by procrastination or neglect by public officials [citation omitted]"].)

In the present facts, as in *Hartman* and *Pellegrino*, *supra*, the prosecutor failed to establish justification for the delay because the evidence had been available to the prosecution months earlier. (*People v. Pellegrino, supra*, 86 Cal.App.3d 776; *People v. Hartman, supra*, 170 Cal.App.3d 572.) Moreover, appellant suffered irreparable harm. The only witness who could corroborate his alibi could not remember when during the time frame of the homicide appellant visited with her at her home. (8 RT 1142-1157.) Documentary evidence in the form of phone records and loan paperwork

which could have corroborated his alibi was also lost or destroyed. (3 CT 1117-1121; 9 RT 1458-1459.) Appellant's own memory had faded along with his ability to provide other exculpatory evidence. (2 CT 494.)

3. The Trial Court Failed to Balance the Harm from the Delay Against the Justification

The lower court had a duty to balance the harm from the pre-charging delay against the justification for it. (*Jones v. Superior Court, supra,* 3 Cal.3d at p. 740; *People v. Pellegrino, supra,* 86 Cal.App.3d at pp. 779-781.) While the trial court heard argument on this matter, there is nothing in the record to indicate it actually conducted any "balancing" whatsoever between the harm to appellant and the prosecution's "justification" for the delay. The judge made no comments other than to deny the speedy trial motion outright. (2 CT 497-498, 2 CT 640-641, 3 CT 797-801; 10 RT 1582, 12 RT 1968-1976.) Indeed, if the court had properly balanced the factors, it would have dismissed the complaint in favor of appellant given the crippling prejudicial effect of the delay on appellant's defense.

C. The Standard of Review

Whether a pre-trial delay was unreasonable and prejudicial is a question of fact. (*People v. Wright* (1969) 2 Cal.App.3d 732, 736; *People v. Hill, supra,* 37 Cal.3d at p. 499.) As such, the lower court's ruling will not be disturbed on appeal if substantial evidence supports the court's finding. (*People v. Mitchell* (1972) 8 Cal.3d 164, 167.) Here, the record lacks the necessary substantial evidence to support the court's ruling. The record shows that authorities made no effort to bring appellant to trial for almost two years after he was identified as a suspect. Moreover, while appellant clearly laid out the prejudice suffered from this delay, the prosecution failed

to justify it. The lower court also improperly denied appellant's speedy trial motion without analyzing the harm against the justification or lack thereof. (*Jones v. Superior Court, supra,* 3 Cal.3d at p. 740; *People v. Pellegrino, supra,* 86 Cal.App.3d at pp. 779-781.) Under the circumstances, where there is insubstantial evidence to support the finding of the trier of fact, the ruling of the trial court cannot be upheld. (See *People v. Wright, supra*, 2 Cal.App.3d at p. 736.)

D. Reversal is Required

Corroboration was critical to appellant's defense. Jurors knew that he was a convicted felon already serving time on numerous prior robbery convictions. (4 RT 461.) They were not likely to believe his version of events without corroboration.

In *Ibarra v. Municipal Court* (1984) 162 Cal.App.3d 853, 858, the appellate court ruled that "even a minimal showing of prejudice may require dismissal if the proffered justification for delay be unsubstantial." (See also *Godfrey v. United States* (D.C. 1966) 358 F.2d 850, 852 and *Woody v. United States* (D.C. 1966) 370 F.2d 214, 216-218 [reversals where unreasonable delays prejudiced defendants' ability to defend themselves].) Here, appellant presented a substantial showing of prejudice; he established that his entire alibi defense was eviscerated by the delay. Balancing this irreparable damage against the prosecution's lack of justification for the delay resulted in a denial of appellant's due process rights as guaranteed by the state and federal Constitutions. (*Scherling v. Superior Court, supra*, 22 Cal.3d at p. 505; *Jones v. Superior Court, supra,* 3 Cal.3d at p. 741, fn.1.) Judgment must be reversed.

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VII.

THE TRIAL COURT PREJUDICIALLY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY INSTRUCTING THE JURY ON FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH MALICE MURDER

A. Introduction

Appellant was charged only with second degree malice murder by his First Amended Information. (2 CT 495-496.) The relevant part of the Information reads as follows:

> On or about January 4, 1991, John Clyde Abel . . . in violation of Section 187(a) of the Penal Code (murder), a felony, did willfully and unlawfully and with malice aforethought murder Armando Miller, a human being.

(2 CT 495.)

At the close of trial, however, the jury was instructed on first-degree felony murder pursuant to Penal Code section 189 and CALJIC No. 8.21:

> The unlawful killing of a human being whether intentional, unintentional, or accidental which occurs during the commission or attempted commission of the crime of robbery is murder of the first degree when the perpetrator had the specific intent to commit such crime."

(2 CT 685; 10 RT 1730.) The jury was also instructed on Penal Code section 187 and CALJIC No. 8.10. (2 CT 683; 10 RT 1730-1731.) However, because appellant's Information did not charge him with first degree felony murder and did not allege the facts necessary to establish first

degree felony murder, his first degree murder conviction must be reversed.[42]

B. The Trial Court Lacked Jurisdiction to Try Appellant for Felony Murder

Second degree murder is the unlawful killing of a human being with malice aforethought, "but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder." (*People v. Hansen* (1994) 9 Cal.4th 300, 307; Pen. Code, §187.)[43] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[44]

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[42] Appellant is not contending that the Information was defective. On the contrary, as set forth above, Count One was an entirely correct charge of second degree malice-murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crime of first degree felony-murder in violation of Penal Code section 189.

[43] Subdivision (a) of Penal Code section 187, provides: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[44] At the time the murder at issue occurred, Penal Code section 189 provided in pertinent part:

> "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, kidnaping, train wrecking, or any act punishable under Sections 286, 288, 288a, or 289, is murder of the first degree; and all other kinds of murders are of the second degree."

Because the Information charged only second degree malice-murder in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information. [Citations omitted.]" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7; see also *People v. Granice* (1875) 50 Cal. 447, 448 [defendant could not be tried for murder after grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an information charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

C. This Court Should Reconsider its Case Law Regarding the Relationship Between Malice Murder and Felony Murder

Appellant recognizes that this Court has heard and rejected various arguments pertaining to the relationship between malice murder and felony murder (see, e.g., *People v. Carpenter* (1997) 15 Cal.4th 312, 394; *People v. Pride* (1992) 3 Cal.4th 195, 249-250) but submits that this line of cases does not address what appear to be irreconcilable contradictions in the law of first-degree murder in California. These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances

> of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought.' (Pen. Code, sec. 187.) Murder, thus defined, includes murder in the first degree and murder in the second degree.[45] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

However, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes* (2002) 27 Cal.4th 287, 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that section 187 was *not* "the statute defining" first degree felony-

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[45] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in section 189. On the contrary, "[s]econd degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot both include another crime and be included within it.

murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe *section 189* as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, emphasis added, fn. omitted.)

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter, supra,* 15 Cal.4th at p. 394, quoting *People v. Pride, supra,* 3 Cal.4th at p. 249; accord *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder, murder during the commission of a felony, or murder while lying in wait, and *Dillon* expressly held that the first degree felony-murder rule was codified in section 189. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472.) Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes . . ." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice-murder clearly *are* distinct crimes. (See *People v. Hart* (1999) 20 Cal.4th 546, 608-609 [discussing the differing elements of those crimes]; *People v. Bradford, supra,* 15 Cal.4th at p. 1344 [holding that second degree murder is a lesser

offense included within first degree murder].)[46]

The greatest difference is between second degree malice murder and first degree felony murder. By the express terms of section 187, second degree malice murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder. (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189, and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense." (*Id.* at p. 194, fn. 14).

D. Reversal is Warranted

Regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury-trial

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[46] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements* for conviction. This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, 60 Cal.2d at pp. 502-503 (dis. opn. of Schauer, J.), original emphasis.)

guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, emphasis added.)[47]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. Therefore, those facts should have been charged in the information. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict appellant of murder without finding the malice which was an essential element of the crime alleged in the Information. (U.S. Const., Amends. VI and XIV; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423;

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[47] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation omitted.]"

People v. Henderson (1977) 19 Cal.3d 86, 96, overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 483.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., Amends. VIII and XIV; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1034-1035.) Accordingly, appellant's conviction for first degree murder and death sentence must be reversed.

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VIII.

THE TRIAL COURT IMPROPERLY DENIED APPELLANT'S AUTOMATIC MOTION FOR MODIFICATION OF THE VERDICT

In denying appellant's automatic motion for modification of the penalty verdict, the trial court employed the wrong standard, stating that the factors in mitigation had to be proven beyond a reasonable doubt, and also heard extrinsic victim impact testimony before making its final ruling on the motion. Because the trial court failed to exercise its responsibilities properly under section 190.4, subdivision (e)[48], appellant's death judgment must be vacated.

A. Applicable Law

"Although [section 190.4, subdivision (e)] does not so state, [the Court has] interpreted this subdivision to require the judge to make an independent determination whether imposition of the death penalty upon the defendant is proper in light of the relevant evidence and applicable law." (*People v. Burgener* (2003) 29 Cal.4th 833, 891, citing *People v. Rodriguez* (1986) 42 Cal.3d 730, 793.) Thus, in ruling on a capital defendant's automatic motion for a sentence modification, the trial court must

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[48] Section 190.4, subdivision (e), provides: "In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding. . . . In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings."

independently re-weigh the evidence of aggravating and mitigating factors presented at trial and determine whether, in its independent judgment, the weight of the evidence supports the jury's death verdict. (*Ibid.; People v. Steele* (2002) 27 Cal.4th 1230, 1267.)

The trial court's review is limited to the evidence that was presented at trial, and in ruling on the modification motion, the court must not consider extraneous materials or facts not presented to the jury. (*People v. Lewis* (2004) 33 Cal.4th 214, 225; *People v. Farnam* (2002) 28 Cal.4th 107, 196; *People v. Lewis* (1990) 50 Cal.3d 262, 287.) The court must state its ruling on the record (§ 190.4, subd. (e); *People v. Marshall* (1990) 50 Cal.3d 907, 939) and, if denying the motion, must make a statement of the reasons why it concluded the aggravating circumstances exceeded those in mitigation that is "sufficient 'to assure thoughtful and effective appellate review.'" (*People v. Young* (2005) 34 Cal.4th 1149, 1227, quoting *People v. Rodriguez, supra,* 42 Cal.3d at p. 794.) Such a record is necessary to ensure that California's statutory death penalty scheme complies with the Eighth and Fourteenth Amendment requirements that the death penalty not be imposed in an arbitrary or capricious manner. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 195; *Proffitt v. Florida* (1976) 428 U.S. 242, 259-260; see also *Pulley v. Harris* (1984) 465 U.S. 37, 51-53 [citing § 190.4, subd. (e) as one of the key "checks on arbitrariness" in California's death penalty scheme].) As the Court stated in *People v. Frierson* (1979) 25 Cal.3d 142, 179-180, the statutory requirements under section 190.4, subdivision (e) that the trial court "review the evidence, consider the aggravating and mitigating circumstances, make its own independent determination as to the weight of the evidence supporting the jury's findings and verdict, and state on the record the reasons for its findings" ensures that "[t]he California procedure

[for imposing the death penalty] substantially comports with the requirements of both *Gregg* and *Proffitt* with respect to the disclosure of the reasons supporting a sentence of death."

Where the trial court fails to properly exercise its responsibilities under section 190.4, subdivision (e), the death judgment it rendered upon the defendant must be vacated, and the case must be remanded for a new hearing on the application for modification of the verdict. (*People v. Burgener, supra,* 29 Cal.4th at p. 892; *People v. Lewis*, *supra*, 50 Cal.3d at p. 287.)

B. The Trial Court's Application Of Improper Standards In Ruling Upon Appellant's Motion To Modify The Death Verdicts Entitles Him To A New Modification Hearing

1. The 190.4 Hearing

On September 8, 1997, appellant filed a combined Motion for New Trial/Modification of Verdict pursuant to sections 1181 and 190.4, to either grant a new trial and/or modify the death sentence returned by the jury to a sentence of life in prison without the possibility of parole. (3 CT 1054-1112.) [49] At the hearing held on September 26, 1997, the trial court denied

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[49] Appellant raised numerous points in this combined motion principally addressed to the motion for new trial, arguing that appellant had not received a fair trial because of insufficient credible evidence to support the verdict, prosecutorial misconduct for, *inter alia*, switching theories about Gano's involvement in the homicide, the admission of improper gun and victim impact evidence, a speedy trial violation, and the trial court's admonition to the jurors during defense counsel's closing argument that they could disregard a "lying" attorney. (3 CT 1054-1112; see Args. I, II, IV, V, VI.)

the motion as to both the new trial request and the modification of the verdict. (12 RT 2170, 2182.)

The trial court began the modification hearing by reciting its responsibilities as to the appropriateness of the penalty pursuant to section 190.4. (12 RT 2170-2173.) After reciting its duties and making an initial finding that the death verdict was "supported overwhelmingly by the weight of the evidence," the trial court asked counsel if they wished to be heard on the modification motion. (12 RT 2171-2172.) Appellant spoke directly to the court, affirming his innocence. (12 RT 2172.) The prosecution then presented two witnesses, Holly Daniels and America Miller. Ms. Daniels, who had not testified as a victim impact witness at the penalty phase, now spoke to the court for the first time about her horror at seeing Armando's corpse at the hospital and the hardship both she and her young daughter had suffered and continued to suffer from her boyfriend's death:

> His body seemed inflated. I guess this is what happens when you die. And his skin was actually yellow. Mondo's eyes were open. . . . The bullet hole was on the left side of his temple, and one of the hospital staff made a nonsuccessful [sic] attempt at trying to cover it up with a band-aid. And the whole right side of his face was actually a burgundy wine color. Later I found out that is what happens when a bullet explodes in your brain . . .I wept some more and held his arm . . . I wanted to crawl in that little bed with him and tell him everything was going to be okay . . .A nurse walked in and told me that I could not touch him, he was evidence . . . A few hours earlier Armando was changing our baby's diaper and now he was just considered a "body." . . . Through the years I have been able to curb my daughter's questions, with one answer, "Daddy's in heaven." This doesn't work anymore. She doesn't understand why the bad man had to hurt her daddy. She is angry that her mommy cries so much and that the bad man made her this way....She is and has been in counseling for the last three years. Her little mind is trying

> desperately to understand, just how far away is heaven? . . . I've been having a particularly hard time lately because she has a new question, "Can't daddy just come down for a little bit? I mean, just to meet me? Won't Jesus just let him meet me and then he can go back and watch over me . . . John Abel, I will not rejoice in your death . . . You are a waste of life . . . of taxpayers' money . . . you are a coward . . . And when the time comes I will tell her that you are gone. That you can never hurt anyone ever again . . .on the night of your death literally hundreds of people will breathe a little easier"

(12 RT 2174-2175.)

Armando's mother, America Miller then addressed the court stating that although she had forgiven appellant she did not believe that people like him should be allowed in the "county [sic]". (12 RT 2177.) She also spoke about her son's unrealized plans and dreams. (*Ibid.*)

The trial court then stated "[the] Court appreciates and is thankful that the victims came and addressed the court." (12 RT 2178.) The court reviewed more of the evidence presented in the case, finding that it overwhelmingly supported the verdict and rejecting appellant's alibi defense. (12 RT 2178-2179.) The court reviewed aggravation and mitigation and found that "there were no factors in mitigation proven beyond a reasonable doubt." (12 RT 2180.)

2. The Trial Court Erroneously Believed That the Factors in Mitigation Had to Be Proven Beyond a Reasonable Doubt In Order to Modify Appellant's Death Sentence

Regardless of the fact that the trial judge made a rote recitation of the applicable law at the outset of the modification hearing, he failed to apply the appropriate law to the death verdict in this case. The judge relied upon

the erroneous belief that because "there were no factors in mitigation proven beyond a reasonable doubt," he could not overturn appellant's death verdict. (12 RT 2180.) California law is unequivocal on this point: a reasonable doubt standard should not be used during any part of the penalty phase of a capital defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance. (*People v. Panah* (2005) 35 Cal.4th 395, 499 [recognizing there is no burden of proof in the penalty phase of a capital trial, other than on other crimes evidence]; *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and... not factual," and therefore not "susceptible to a burden-of-proof quantification"]; *People v. Hayes* (1990) 52 Cal.3d 577,643 [holding the burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made]; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 979.)

Moreover, capital appellants have long argued that if anything, the factors in *aggravation*, not mitigation, should be proven beyond a reasonable doubt before imposing a death verdict. Here, the trial court imposed an impossible burden of *proof* for any capital appellant to achieve since by the very nature of penalty determinations, the decisions are "moral" rather than "factual." (*People v. Hawthorne, supra*, 4 Cal.4th at p.79.) The trial court thus imposed a blatantly incorrect standard and one which ensured a "meaningless" rather than an "independent" review of the evidence. (*People v. Burgener, supra,* 29 Cal.4th at p. 891; *People v. Rodriguez* (1986) 42 Cal.3d 730, 793.)

* * * * *

3. The Trial Court's Improper Review of Extrinsic Victim Impact Evidence

Next, the trial court listened to the emotionally-charged statements from Ms. Holly Daniels, Armando's girlfriend and mother of his child, and from Ms. America Miller, Armando's mother, *before* rendering its final judgment on the modification motion. (12 RT 2172-2177.) These statements were not presented to the jury at trial, and indeed, it would have been error if they had. (*Payne v. Tennessee, supra,* 501 U.S. at p. 830, fn. 2; *id.* at p. 833 (conc. opn. of O'Connor, J.) [*Payne* does not reach that part of the decision in *Booth v. Maryland* (1987) 482 U.S. 49, holding that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate punishment violates the Eighth Amendment]; see also *People v. Smith* (2003) 30 Cal.4th 581 at p. 622.) This Court "has repeatedly emphasized that a modification application hearing 'is limited to review of the evidence that was before the jury . . . .'" (*People v. Lewis, supra,* 33 Cal.4th at p. 225, quoting *People v. Brown, supra,* 6 Cal.4th at p. 336.) Thus, in ruling on the modification motion, the court must not consider extraneous materials or facts not presented to the jury, including victim impact statements permitted by section 1191.1.[50] (*Id.* at p. 223; see also *People v. Farnam, supra,* 28 Cal.4th at p. 196.)

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[50] In relevant part, section 1191.1 provides: "The victim, or up to two of the victim's parents or guardians if the victim is a minor, or the next of kin of the victim if the victim has died, have the right to appear, personally or by counsel, at the sentencing proceeding and to reasonably express his, her, or their views concerning the crime, the person responsible, and the need for restitution."

Given the prejudicial nature of Ms. Daniels' statement in particular, her description of the emotional impact on her young daughter, and how "hundreds of people will breathe a little easier" once appellant is executed, the trial court would have been hard-pressed to ignore these remarks. (12 RT 2176.) Moreover, the court's subsequent comments thanking Ms. Miller and Ms. Daniels and telling them it appreciated their addressing the court (12 RT 2178), as well as the court's subsequent reference to its consideration of "victim impact witnesses describing the nature of the victim and detailing the loss to their family" (12 RT 2179), suggest that it did in fact place stock in these statements.

The trial court's application of the erroneous law and its consideration of improper extrinsic evidence violated both the statutory requirements of section 190.4, subdivision (e), and appellant's Fourteenth Amendment due process right that he would be sentenced to death only as provided by state law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.) It also violated appellant's rights to due process and a meaningful sentencing hearing, as guaranteed by the Fifth and Fourteenth Amendments, and his right to a reliable penalty verdict and death judgment, as guaranteed by the Eighth and Fourteenth Amendments (see *Lankford v. Idaho* (1991) 500 U.S. 110, 125-127; Gardner v. Florida (1977) 430 U.S. 349, 358-361; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305), as well as his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to sentencing by an impartial judge and the analogous provisions of the California Constitution. (Cal. Conts., art. I, §§ 1, 7, 15, 16, 17; see *Gomez v. United States* (1989) 490 U.S. 858, 876; *Chapman v. California, supra*, 386 U.S. 18, 23 ["right to an impartial adjudicator, be it judge or jury" is a "basic fair trial right[]"]; *In*

re Murchison (1955) 349 U.S. 133, 136 ["A fair trial in a fair tribunal is a basic requirement of due process"].)

E. The Death Judgment Must Be Vacated

A trial court's erroneous denial of section 190.4, subdivision (e), motions are reviewed by this Court under the *Chapman* federal constitutional error test, i.e., the burden is on the beneficiary of the constitutional error to prove that such error was harmless beyond a reasonable doubt. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1187; *People v. Benson* (1990) 52 Cal.3d 754, 812.)

Appellant maintained his innocence throughout both phases of the trial. At the penalty phase, he argued lingering doubt in mitigation. (12 RT 2063-2087.) The prosecution had no eyewitnesses who actually saw appellant kill Armando and no forensic evidence linked appellant to the crime. The prosecution built a weak case on faulty identifications and the unreliable testimony of an admittedly psychologically unsound former accomplice. (See Args. II-IV.) The court's consideration of the extrinsic, highly-charged emotional victim-impact evidence concerning a small child, and the application of the wrong standard placing a burden of *proof* on appellant for mitigation, impermissibly tainted the court's ability to independently re-weigh the evidence such that the state cannot demonstrate that it is harmless under *Chapman*. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

The errors described above plainly require that the death judgment be vacated and the matter remanded to the superior court for a new hearing on the automatic motion for modification of the verdict. (*People v. Burgener, supra,* 29 Cal.4th at p. 892; *People v. Lewis, supra,* 50 Cal.3d at p. 287; *People v. Rodriguez, supra,* 42 Cal.3d at p. 794.)

IX.

THIS COURT MUST INDEPENDENTLY REVIEW LORRAINE RIPPLE'S CONFIDENTIAL PSYCHIATRIC RECORDS TO ENSURE THE ACCURACY OF THE TRIAL COURT'S RULING

A. Proceedings Below

On June 5, 1997, the day after Lorraine Ripple testified at the guilt phase, appellant filed a Motion to Appoint Psychologist to Examine Witness Lorraine Ripple for Mental Illness and requested Ripple's psychiatric, disciplinary and drug treatment records. (2 CT 614-616; RT(6) 939.)[51]

Appellant based his request, *inter alia*, on Ripple's bizarre behavior while incarcerated including a suicide attempt where she slashed her own throat, her delusional possessiveness towards appellant, and a letter she wrote to Sherry Barnes about cutting off men's genitals and fingers. (2 CT 615-616; 7 RT 990-991, 7 RT 1045-1052.) Appellant also referenced Ripple's emotional outburst at defense counsel during proceedings held outside the jury's presence where she said:

> (Ripple) Well, you don't have any problem with that – and sending that God damn letters all over the God damn country, do you? Who is financing that, because Debbie Lang (sic) is not affording 30 cents a page for every God damn one of these pages you got to send around, you son of a bitch.
>
> (Peters) I didn't understand why there was a

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[51] Ripple testified that after her arrest she had been hospitalized for drug addiction and had been treated while incarcerated by private psychologist Roxanne Davenport. (6 RT 913-914.) Ripple said that Davenport was writing a book on prolonged isolation. (6 RT 914.) Ripple suffered from sensory deprivation and had trouble being around people. (*Ibid.*) She also said she received mental health treatment for her insomnia. (*Ibid.*)

women's S.H.U., now I can see why.

(6 RT 961.)[52]

During closing argument at the guilt phase, even the prosecutor commented about Ripple's bizarre behavior:

> Let's talk about Lorraine Ripple. ¶ Have you ever met anyone like her in your life? No, I didn't think so. ¶ Now, as a prosecutor we have to take our witnesses the way we find them. Not like T.V., we don't call up central casting in Hollywood and tell them send us down a witness. That is the real deal.

(10 RT 1538.)

The trial court ordered the California Department of Corrections to release the records to the court. (2 CT 631; 6 RT 939.) Upon conducting an in-camera review of sixty pages of records, the trial court concluded that except for a couple of paragraphs, the records were not material. (10 RT 1580.) The trial court read the following paragraphs, which it identified as the only relevant portion, into the record:

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[52] She also had another outburst during cross-examination, making the following unsolicited comment:

> And while we're putting all this in the record, let's go one better. John's had Debbie Langford [sic] sending all this paperwork to every God damn prison in the fuckin' state laying on my sons to keep me off the stand. Now, put that in your record if one of my kids gets hurt.

(6 RT 957-958.)

> Ripple, Lorraine. Since Inmate Ripple, W27065, is not suffering from a serious mental disorder, and since more than six months has elapsed since her previous self-destructive behavior, it is recommended that the 'sharps restriction' described in my chrono dated 5/28/96 be lifted. ¶ Although Ripple is perhaps a no greater than average risk of dangerousness to herself at this time, this does not mean that her dangerousness to others has declined. ¶ Signed by Senior Psychologist, Eric Kunkel.

(10 RT 1581.)

Appellant's request for full disclosure of the records and for appointment of a psychiatrist to examine Ripple were both denied. (2 CT 641, 3 CT 799; 10 RT 1581.)[53] The trial court ordered Ripple's records sealed and they became part of the certified appellate record. (2 CT 641; 10 RT 1581). The trial court also denied appellant's Motion for New Trial and Modification of the Verdict based in part on the court's denying the defense access to Ripple's mental health records. (3 CT 1085-1086.)[54]

B. This Court's Independent Review of Ripple's Records is Necessitated by the Trial Court's Bias Against Appellant

Appellant does not dispute that the trial court followed proper procedure by reviewing Ripple's confidential records in-camera. (*People v. Reber* (1986) 177 Cal.App.3d 523, 530, overruled in *People v. Hammon*

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[53] The trial court also denied appellate counsel's request to review these records in preparation of this capital appeal. (1 Clerk's Suppl. Transcript (1/20/04) 70.)

[54] Appellant had requested the expert examination, full disclosure of the records, and the ability to recall Ripple for further cross-examination - all of which were denied by the trial court. (3 CT 1083-1086.)

(1997) 15 Cal.4th 1117, 1124 to the extent it permitted pretrial discovery of privileged information in the hands of third-party providers; *Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 43; *People v. Boyette* (1988) 201 Cal.App.3d 1527, 1531.) Appellant disputes the ability of the trial court to conduct that review in a fair and impartial manner given its record of uncensored bias against appellant. (See Arg. I.)

Appellant had a Sixth Amendment right to obtain at trial information contained in Ripple's records necessary to make cross-examination effective. (*Davis v. Alaska* (1974) 415 U.S. 308, 320 [a defendant cannot be prevented at trial from cross-examining for bias a crucial witness for the prosecution, even though the question called for information made confidential by state law]; *People v. Hammon, supra,* 15 Cal.4th at pp. 1123-1124.) Appellant's defense rested on his ability to wage an effective cross-examination of Ripple because of her highly damaging testimony. Ripple testified that appellant confided in her that he had killed someone in Tustin who had a little store that cashed checks for a lot of "wetbacks"; he described it as an "easy score." (6 RT 854-856.) She said that after the Tustin homicide, appellant gave her the gun he used, which she traded for drugs. (6 RT 856-857.) Ripple further testified that she had seen appellant with different weapons. (6 RT 930-932.) As previously set forth, no forensic evidence connected appellant to this homicide and Heuvelman and Redondo's identification of appellant were riddled with doubt. (See Args. II-IV.) Ripple's testimony that appellant confessed the murder to her kept the prosecution's case from falling apart. Appellant's defense therefore hinged on his ability to impeach Ripple thoroughly based upon all the relevant mental health information. As the *Reber* Court recognized,

> ". . .the Sixth Amendment guarantee that an accused in a criminal prosecution ' "be confronted with the witnesses against him" ' means more than confronting the witnesses physically. The primary right secured by confrontation is cross-examination. [Citation omitted.] 'Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit the witness.' [Citation omitted.] 'While counsel was permitted to ask [Ripple] whether [she] was biased, counsel was unable to make a record from which to argue why [Ripple] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial.' [Citation omitted.]"

(*People v. Reber, supra*, 177 Cal.App.3d at pp. 529-530; *Nielsen v. Superior Court* (1997) 55 Cal.App.4th 1150, 1154-1155.)

A trial court which had, *inter alia*, accused defense counsel of lying in front of jurors, could hardly be trusted to fairly identify all the relevant information beneficial to the defense in those records. This Court should therefore independently review Ripple's records to determine whether the lower court erroneously excluded any documentation which would have assisted the defense. Precedent exists for such an independent review. (See *People v. Mooc* (2000) 26 Cal.4th 1216, 1232 [Supreme Court independently reviewed the entire personnel file in a Pitchess hearing before determining that there was no abuse of discretion]; *People v. Castain* (1981) 122 Cal.App.3d 138, 144 [appellate court's second in-camera review of police personnel files resulted in reversal where trial court erred in finding one past complaint of excessive force by the police officer irrelevant]; *People v.*

Hobbs (1994) 7 Cal.4th 948, 973-974 [independent in-camera review related to documents containing information on confidential informant].)

Appellant is requesting that this Court ensure that the lower court did not deny him his right to confront and cross-examine his accusers by reviewing Ripple's sealed transcript of the in-camera proceedings. This review will determine whether the lower court abused its discretion in disclosing only a few short paragraphs out of sixty pages of documents. Without it, appellant cannot know whether the lower court correctly exercised its discretion.

These concerns, in conjunction with the heightened constitutional protections applicable to capital cases (see, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 638; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358) and the fact that the State plainly has no interest in executing appellant absent exploration of all potential claims found in the trial record, make clear that review by this Court is the only sufficient means of protecting appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to meaningful and effective review of his capital murder conviction and death sentence, and to assistance of counsel in presenting his post-conviction claims.

* * * * *

X.

THE CUMULATIVE EVIDENTIARY ERRORS BY THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO A FAIR AND RELIABLE DETERMINATION OF GUILT AND PENALTY

A. Introduction

In capital cases, the United States Supreme Court "has demanded that fact-finding procedures aspire to a heightened standard of reliability." (*Ford v. Wainwright* (1986) 477 U.S. 399, 411.) State evidentiary rules "may not be applied mechanistically to defeat the ends of justice." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) And even "mere" state evidentiary errors can violate federal due process if they render the fact-finding process fundamentally unfair. *(Ballard v. Estelle, supra,* 937 F.2d at p. 456.)

Such was the case here. The trial court made erroneous evidentiary rulings which cumulatively undermined the integrity of the trial and violated appellant's rights to a fair trial, confrontation, due process, effective assistance of counsel and a reliable and non-arbitrary sentencing process under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and sections 7, 15, and 17 of the California Constitution. (*Woodson v. North Carolina* 428 U.S. 304-305; *Irwin v. Dowd* (1961) 366 U.S. 717, 722.)

* * * * *

B. Erroneous Evidentiary Rulings

1. The Trial Court Improperly Permitted the Prosecutor to Use Blatantly Leading Questions in Direct Examination of Colleen Heuvelman

During the prosecution's direct examination of Heuvelman, the prosecution asked the following questions:

> Q. Did you indicate that his eyes could be close?
>
> A. Yes, sir.
>
> Q. Okay. Did you tell the police that there was a possibility of 20 to 40 percent?
>
> A. Yes, sir.
>
> Q. Did you ever identify this person as being the person you saw outside the bank?
>
> MR. PETERS: I will object. That is a leading question. She can indicate what she said.
>
> THE COURT: Overruled. You may answer.
>
> BY MR. ROSENBLUM: Q. Did you ever identify this person, number six, as being the person that you saw standing outside the bank?
>
> A. No, sir.

(5 RT 711.)

Appellant's objection should have been sustained. Under California law, "[e]xcept under special circumstances where the interests of justice

otherwise require," "[a] leading question may not be asked of a witness on direct or redirect examination." (Evid. Code, § 767, subd. (a)(1).) A "leading question" is one "that suggests to the witness the answer that the examining party desires." (Evid. Code, § 764.) Witkin has noted that "[t]he dangers of improper suggestion are obvious" (3 Witkin, Cal. Evidence (4th ed. 2000) § 165, pp. 228-229), and Justice Jefferson has more directly explained that "[l]eading questions are considered objectionable under certain circumstances because of the danger that the witness may acquiesce in a false suggestion" (1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 27.8, p. 762). Thus, "such questions are normally excluded on direct and redirect examination." (Witkin, *supra*, § 165, p. 229.)

While California appellate courts have repeatedly held that permitting leading questions is largely within the trial court's discretion (see, e.g., *People v. Williams* (1997) 16 Cal.4th 635, 672), such discretion is not unfettered. As noted above, such "broad" discretion is statutorily bounded by the requirement that "special circumstances" are present which permit leading questions in "the interests of justice." (*Ibid.*) Thus, while "special" factors like the immaturity of a witness (see, e.g., *People v. Goff* (1950) 100 Cal.App.2d 166, 169-170), language barriers (see, e.g., *People v. McNeal* (1954) 123 Cal.App.2d 222, 225), or other infirmities (see, e.g., *People v. Augustin* (2003) 112 Cal.App.4th 444, 449-450 [speech impediment]; *People v. Scaggs* (1957) 153 Cal.App.2d 339, 357 [aged or sick witness]); may sometimes justify the use of leading questions of one's own witness, in the absence of such "exceptions" "leading questions are ordinarily improper." (*People v. Smith* (1963) 223 Cal.App.2d 225, 238). For example, although leading questions may be used on direct examination to question "hostile" witnesses (see Witkin, *supra*, § 166, p. 230), to impeach a

witness with his prior inconsistent statements (see, e.g., *People v. Thomas* (1939) 35 Cal.App.2d 206, 209-210), or to stimulate or revive a witness's recollection (see *People v. Williams, supra*, 16 Cal.4th at pp. 672-673), where the witness is "friendly or pliant" leading questions should not be permitted. (1 McCormick on Evidence (4th ed. 1992) § 6, pp. 16-17, citing *State v. Hosey* (N.C. 1986) 348 S.E.2d 805, 808 [leading questions are usually impermissible on direct examination "because of the danger that they will suggest the desired reply to an eager and friendly witness"].) Indeed, similar concerns may preclude leading questions even on cross-examination "when the witness is biased in favor of the cross-examiner so as to be unduly susceptible to the influence of questions that suggest the desired answer." (1 Jefferson, *supra*, Supplement (1990), § 27.8, pp. 296-297, citing *People v. Spain* (1984) 154 Cal.App.3d 845, 851-854; see also McCormick, *supra*, § 6, pp. 19-20; 3 Wigmore, Evidence (Chadbourn rev. 1970) § 773, p. 166.)

Here, witness Heuvelman was neither hostile, nor a child witness, nor infirm or mentally disabled, nor did she have a language barrier, or fit into any of the above-cited categories to justify the use of leading questions by the prosecutor on direct. In short, even under the wide discretion afforded California trial judges, no proper basis existed whatsoever for permitting the prosecutor to lead Heuvelman on direct examination, much less to do so repeatedly and in such flagrant fashion. (See *People v. Whitehead* (1957) 148 Cal.App.2d 701, 704-705 [in reversing because trial judge led child witness into showing exactly where the defendant had touched her, appellate court notes that "[i]t would have been grievous error for the prosecuting attorney to direct the child where to place her hand"]; see also *United States v. Williams* (9th Cir. 1970) 436 F.2d 1166, 1168-1169; *Stovall*

v. Denno (1967) 388 U.S. 293, 302 [where abuse of discretion results in procedure so unnecessarily suggestive and conducive to irreparable misidentification as to amount to a denial of due process of law].)

Such an abuse of discretion resulting in an unnecessarily suggestive and prejudicial identification process occurred in the instant case. The prosecutor spoon-fed Heuvelman the percentage, twenty to forty percent, of her prior identification of another suspect, not appellant. (5 RT 711.) He then specifically directed her to disclaim that she had ever identified this other man as the person she saw outside the bank. (*Ibid.*)

Heuvelman's testimony was the lynchpin of the prosecution's case. She placed appellant at the scene. (5 RT 712.) While Redondo also placed appellant at the scene, she had been seriously impeached with her prior identification of two other suspects, one of whom she had identified with "ninety-percent" certainty while only identifying appellant with "eighty-percent" certainty on the record. (4 RT 577-578, 585, 6 RT 823.) To ensure a guilty verdict, the prosecutor needed an unequivocal identification from Heuvelman. To that end, he needed her to minimize the certainty of her prior identification - to 20-40% - of other suspects whom she told police resembled the man she saw outside the bank. Most importantly, the prosecutor needed Heuvelman to tell jurors that she never actually identified someone other than appellant as the man she saw outside of the bank. He accomplished this by going beyond mere "leading" and "suggestive" questions, and into the realm of prosecutorial testifying.

Suggestion by the examining attorney should especially be avoided in the case of an identification witness. (*Madison v. United States* (D.C. Cir. 1966) 365 F.2d 959.) The leading and suggestive questioning and behavior of the prosecutor in appellant's case effectively permitted him to "testify" for

"an eager and friendly witness." (*State v. Hosey, supra*, 348 S.E.2d at p. 808.) "[T]his procedure so undermined the reliability of the eyewitness identification as to violate due process." (*Kennaugh v. Miller* (2d Cir. 2002) 289 F.3d 36, 46, quoting *Foster v. California* (1969) 394 U.S. 440, 443.)

The identification of appellant under such egregious circumstances not only violated the California Evidence Code, but also denied appellant his constitutional rights to due process (U.S. Const., Amend. XIV), a fair trial by jury (U.S. Const., Amends. VI and XIV), and a reliable guilt determination in a capital case (U.S. Const., Amends. VIII and XIV).

2. The Trial Court Improperly Restricted Detective Solis' Cross-Examination Regarding In-Field Identifications

As previously set forth, the trial judge "sustained" one of his own objections during appellant's cross-examination of Detective Solis regarding the police stop of a suspect near the crime scene who matched the physical description and clothing of the assailant. (5 RT 800-804; Arg. I.) Detective Solis transported approximately six witnesses to the suspect's location but denied that any of them made an in-field identification. (5 RT 801-802.) Appellant sought to question Solis' testimony that no in-field identifications occurred because his testimony conflicted with a police report. (5 RT 803-804.) However, because police did not arrest the detained suspect, the judge disallowed appellant's question:

> (out of the presence of the jury)
>
> MR. PETERS: Just, the report does indicate some of the in-field show-up witnesses did make various types of identification, different from what he testified to. He said that none of them made identifications, some of them did, some of them didn't.

THE COURT: Was this person arrested?

MR. PETERS: No, but it goes – it also goes to – number one, it goes to his credibility or recollection. ¶ It also shows various people made the identifications, and then some agreed and some couldn't agree.

THE COURT: You're tilting at wind mills. ¶ The court's objection's sustained. Go back to work.

(*Ibid.*)

"A full cross-examination is not a matter of privilege; it is a matter of absolute right. [Citation omitted]." (*People v. Flores* (1936) 15 Cal. App. 2d 385, 401 [reversal where undue restriction of cross-examination prejudiced appellant in a case where the guilt of the defendant depended upon the credibility of a witness]; accord *Alford v. United States* (1931) 282 U.S. 687, 691 [reversal where defendant not permitted to cross-examine witness on place of residency].) The Confrontation Clause of the United States Constitution guarantees a defendant in a criminal proceeding the opportunity to confront and cross-examine witnesses against him. (*Smith v. Illinois* (1968) 390 U.S. 129, 131-133; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294-295; *Davis v. Alaska* (1974) 415 U.S. 308, 315-318.) Indeed, cross-examination is the "primary interest" served by the confrontation clause. (*Douglas v. Alabama* (1965) 380 U.S. 415, 418.) Cross-examination is an "essential and fundamental requirement for the kind of fair trial that is this country's constitutional goal." (*Pointer v. Texas* (1965) 380 U.S. 400, 405.)

In criminal cases, defendants should be given wide latitude in cross-examining witnesses. (*People v. Flores, supra,* 15 Cal. App. 2d at pp. 401-406; see also *People v. Hurlburt* (1956) 166 Cal. App. 2d 334, 337-343

[reversal where defendant prevented from cross-examining victim regarding prior false accusations]; *People v. Whitehead* (1952) 113 Cal.App.2d 43, 45-50 [reversal where cross-examination restricted to physical acts of defendant]; *Alford v. United States, supra,* 282 U.S. at pp. 691-694.)

As set forth throughout this brief, this case hinged on credibility: appellant's versus the so-called eyewitnesses. Critical to appellant's defense was his ability to demonstrate to jurors the unreliability of the eyewitness identification. Redondo and Heuvelman themselves identified different suspects and appellant sought to show that even other witnesses at the scene also identified someone other than appellant. Contrary to the lower court's ruling, regardless of the suspect's arrest, appellant had an "absolute right" to cross-examine Solis on the issue of mistaken identification in this case. *(People v. Flores, supra,* 15 Cal. App. 2d at p. 401.) Appellant's entire theory of defense rested upon mistaken identification. Questioning Solis concerning other misidentifications which occurred contemporaneously with the crime would have afforded jurors a significantly different impression of Heuvelman's and Redondo's credibility - particularly since they did not pick out appellant until several years after the crime. The prohibited cross-examination interfered with appellant's ability to present his theory of defense and also "would have produced 'a significantly different impression of [the eyewitness'] credibility' [citation]," thereby violating appellant's Sixth Amendment right to confrontation. (*People v. Frye* (1998) 18 Cal.4th 894, 946.)

3. Other Evidentiary Errors

The record here reveals a trial court with a clear bias in favor of the prosecution. (See Arg. I.) Notably, the trial court sustained the prosecution's objection to appellant asking leading questions on direct examination of

Detective Tarpley, while overruling appellant's objection to the very same conduct by the prosecution. (5 RT 711; 9 RT 1363.) The trial court also denied appellant's request to treat Detective Tarpley as a hostile witness so that he could ask leading questions. (9 RT 1363.)

Also, during the prosecution's direct examination of Lorraine Ripple, he asked her "What has Deborah Langford [sic] said to you about if you testify?" (6 RT 941.) The testimony the prosecutor elicited "was made other than by a witness while testifying" and "offered to prove the truth of the matter," that Lankford had attempted to intimidate Ripple so that she would not testify. (Evid. Code, §1200.) Additionally, Ripple's testimony about Lankford's threat was wholly irrelevant because appellant had nothing to do with the threat. Notwithstanding this violation of evidentiary rules, the trial court overruled appellant's hearsay objection without explanation. (6 RT 941.)

C. Reversal

These evidentiary errors undercut the reliability of appellant's trial. This case was a credibility contest and the trial court's undue restriction on cross-examination, the use of leading questions on an eyewitness, and the numerous other errors discussed elsewhere in this brief skewed the balance in the prosecution's favor.

Standing alone, the improper restriction on cross-examination is an error of federal constitutional magnitude. (*Alford v. United States, supra,* 282 U.S. at p. 691; *Pointer v. Texas, supra,* 380 U.S. at p. 405.) Similarly, the leading questions of an eyewitness so undermined the reliability of the identification as to violate due process and must therefore also be reviewed as federal constitutional error. (*Kennaugh v. Miller, supra,* 289 F.3d at p. 46.) The *Chapman* federal constitutional standard for reversal should apply

to all the evidentiary errors here because in combination they constitute an abridgement of fundamental fairness in violation of due process. (*Chapman v. California, supra*, 386 U.S. at p. 24, *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385.) Under the *Chapman* standard, the state cannot demonstrate that these errors were harmless beyond a reasonable doubt. (*Ibid.*) Even under the *Watson* standard for state law errors, it is reasonably probable that appellant would have achieved a more favorable result in the absence of the evidentiary and numerous other errors identified in this case. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Judgment must be reversed.

* * * * *

XI.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO INSTRUCT THE JURY ON ANY PENALTY PHASE BURDEN OF PROOF[55]

The California death penalty statute fails to provide any of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. As set forth elsewhere in this brief, juries do not have to make written findings or achieve unanimity as to aggravating circumstances. (See Arg. XV.) As discussed herein, they do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is intercase proportionality review not required; it is not permitted. (See Arg. XIII.) Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death. These omissions in the

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[55] Appellant is aware of this Court's ruling in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, holding that "[r]outine instructional and constitutional challenges," will be deemed "fairly presented" for the purposes of state and subsequent federal review so long as the appellant's brief: (1) identifies the claim in the context of the facts; (2) notes that the Court has rejected the same or a similar claim in a prior decision; and (3) asks the Court to reconsider that decision. However, out of concern that the federal courts may take a different view as to whether these challenges have been fully preserved on appeal, appellant has not followed the guidelines recommended by the *Schmeck* decision.

California capital-sentencing scheme, individually and collectively, run afoul of the Sixth, Eighth, and Fourteenth Amendments.

A. The Statute And Instructions Unconstitutionally Fail To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown* (1987) 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[56]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments.

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,

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[56] There are two exceptions to this lack of a burden of proof. The special circumstances (Pen. Code, § 190.2) and the aggravating factor of violent criminal activity (Pen. Code, § 190.3 subsection (b)) must be proved beyond a reasonable doubt. (See Args. XII, XIII.)

[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; *People v. Ghent* (1987) 43 Cal.3d 739, 773-774.) However, this Court's reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 471-472, *Ring v. Arizona* (2002) 536 U.S. 584, 607, and *Blakely v. Washington* (2004) 542 U.S. 296, 300-313.

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id.* at pp. 471-472.) The high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt

unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at pp. 478.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi.*

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.)[57] The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Id.*)

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[57] Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

In *Blakely*, the Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at p. 300.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington, supra*, 542 U.S. at p. 303, original italics.)

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[58] Only

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[58] See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann., art. 905.3 (West 1984); Md. Ann. Code, art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann., §

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*, 16 Cal.4th at p. 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially

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31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann.,§ 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).) On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az. 2003) 65 P.3d 915.)

outweigh any and all mitigating factors.[59] As set forth in California's "principal sentencing instruction" (*People v. Farnam, supra,* 28 Cal.4th at p. 177), which was read to appellant's jury, "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." (3 CT 1036-1036(A); 12 RT 2133-2135; CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[60]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder

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[59] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,'(fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460.)

[60] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown, supra*, 40 Cal.3d at p. 541.)

with a special circumstance is death (see Pen. Code, 190.2 subsection (a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings"]; see also *People v. Snow* (2003) 30 Cal.4th 43.)

This holding in the face of the United States Supreme Court's recent decisions is simply no longer tenable. Read together, the *Apprendi* line of cases render 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 stated in *Ring*, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 586.) As Justice Breyer, explaining the holding in *Blakely*, points out, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also (all punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 542 U.S. at p. 328 (dis. opn. of Breyer, J.), original italics.)

Thus, as stated in *Apprendi*, "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." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made

that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (§ 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541(dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494) and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).) They thus trigger the requirements of *Blakely-Ring-Apprendi* that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death

penalty may be considered.[61] The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow*, *supra*, 30 Cal.4th at p.126, fn. 32, citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has repeatedly sought to reject *Ring*'s applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. In both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal Constitution.

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[61] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

In *Prieto*, the Court summarized California's penalty phase procedure as follows:

> Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 972). No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate.

(*People v. Prieto*, *supra*, 30 Cal.4th at p. 263, italics added.)

This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan, supra,* 53 Cal.3d at pp. 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra*, 65 P.3d at p. 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and

normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 542 U.S. at p. 304.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[62]

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[62] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]'": "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." (*People v. Griffin*, *supra*, 33 Cal.4th at p. 595.) In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC No. 8.88? The maximum sentence would be life without possibility of parole; (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has 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.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is

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> highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

(*Leatherman*, *supra*, 532 U.S. at p. 429.) This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*. *Leatherman* was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (*Id.* at pp. 437, 440.) *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed:

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 606, quoting with approval *Apprendi v. New Jersey*, *supra,* 530 U.S. at 539 (dis. opn. of O'Connor, J.).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring*:

> Capital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment . . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to

allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The State And Federal Constitutions Require That The Jurors Be Instructed That They May Impose A Sentence of Death Only If They Are Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Outweigh The Mitigating Factors And That Death Is The Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (In re Winship (1970) 397 U.S. 358, at p. 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause." (*Gardner v. Florida, supra*, 430 U.S. at p. 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth

Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. Imposition Of Life Or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall*, *supra*, 375 U.S. at p. 525), how much more transcendent is human life itself. Far less valued interests are protected by the requirement of proof

beyond a reasonable doubt before they may be extinguished. (See *In re Winship*, *supra*, 397 U.S. at p. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338, 342 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306, 310 [same]; *People v. Thomas* (1977) 19 Cal.3d 630, 632 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 225 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," *Santosky v. Kramer*, *supra*, 455 U.S. at p. 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.... When the State brings a criminal action to deny a defendant liberty or life, ... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation] The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(*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 the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship*, *supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra*, 447 U.S. at pp. 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at p. 732.) In *Monge*, the Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[*I*]n *a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Monge v.*

California, supra, 524 U.S. at p. 732, quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441, emphasis added.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See, e.g., *People v. Griffin, supra,* 33 Cal.4th at p. 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision in a death penalty case. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it

> makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (Conn. 2003) 833 A.2d 363, 408, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Monge v. California*, *supra*, 524 U.S. at p. 732.) Consequently, under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to

avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 112, at p. 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as proof beyond a reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the State while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the State and another applied a higher standard and found in favor of the defendant. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland*, *supra*, 486 U.S. at p. 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden of persuasion for the prosecution, the prosecution obviously has some burden to show that the

aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see §190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan, supra,* 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[63]

A fact could not be established – i.e., a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 4.420(b) [existence of aggravating circumstances necessary for imposition

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[63] As discussed below, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves acts of wrongdoing (such as, for example, age, when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Fifth, Sixth, Eighth, and Fourteenth Amendments. In addition, as explained in the preceding argument, to provide greater protection to noncapital than to capital defendants violates the Due Process, Equal Protection, and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst, supra*, 897 F.2d at p. 421.)

It is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, *supra*, 428 U.S. at 260) and the "height of arbitrariness" (*Mills v. Maryland*, *supra*, 486 U.S. at p. 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and

another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

If, in the alternative, it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally unacceptable possibility that a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is – or, as the case may be, is not – is reversible *per se*. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.)

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D. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo* (1992) 1 Cal.4th 103, 462-464 (cert. granted on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802); see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to

aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)[64]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and thereby, undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[65]

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[64] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

[65] Appellant acknowledges that the Court recently 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 265.) Appellant raises this issue to preserve his rights to further review. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina, supra,* 494 U.S. at p. 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California,* 524 U.S. at p. 732; accord *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Gardner v. Florida, supra*, 430 U.S. at p. 359; *Woodson v. North Carolina*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury. (Cf. *Johnson v. Louisiana* (1972) 406 U.S. 356, 360 [holding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were not violated by a Louisiana rule which allowed for conviction based on a plurality vote of nine out of twelve jurors].)

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also *People v. Wheeler (1978) 22 Cal.3d 258*, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to

noncapital cases.[66] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the Equal Protection Clause and by its irrationality violate both the Due Process and Cruel and Unusual Punishment Clauses of

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[66] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann., § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann., § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat., ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code, art. 27, § 413(i) (1993); Miss. Code Ann., § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann., § 630:5(IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iv) (1982); S.C. Code Ann., § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.071 (West 1993).)

the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the United States Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "continuing series of violations" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness.... At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

(*Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't

do; and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79; *People v. Hayes, supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

E. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

Compounding the error from the failure of the jury instruction to inform the jurors about the burden of proof (see Arg. XI.) This impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.)

"There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." (*Boyde v.*

California, supra, 494 U.S. at p. 380.) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid.*) That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

A defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer considers it. However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.)

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to convict appellant of any charge or special circumstance. Similarly, the jury was instructed that the penalty determination had to be unanimous. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp.

442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards. Such arbitrariness violates the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments, as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

F. The Penalty Jury Should Also Be Instructed On The Presumption Of Life

In noncapital cases, where only guilt is at issue, 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. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the

presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. Amend. XIV; Cal. Const., art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. Amends. VIII & XIV; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const. Amend. XIV; Cal. Const., art. I, § 7.)

In *People v. Arias* (1996) 13 Cal.4th 92, this Court 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," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

G. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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XII.

THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

In the penalty phase, the trial court instructed the jury with CALJIC No. 8.88[67] on the weighing process. This instruction was vague and

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[67] The trial court instructed the jury: "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant. ¶After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. ¶An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. ¶ The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. ¶ You shall now retire to deliberate on the penalty. The foreperson previously selected may preside over your deliberations or you may choose a new foreperson. In order to make a determination as to the penalty, all twelve jurors must agree. ¶Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom." (3 CT 1036-1036(A); 12 RT 2133-2135.)

imprecise, failed to describe the weighing process accurately that jurors must apply in a capital case, was improperly weighted toward death and deprived appellant of the individualized, moral judgment required under the federal Constitution. This instruction, which formed the centerpiece of the trial court's description of the sentencing process, violated appellant's rights to a fair jury trial, reliable penalty determination and due process under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding sections of the California Constitution.[68] (See e.g., *Mills v. Maryland, supra,* 486 U.S. at pp. 383-384.) Reversal of the death sentence is required.

B. The Instructions Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.) The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in

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[68] As previously set forth (Arg. XII), appellant recognizes that this Court has rejected arguments challenging CALJIC No. 8.88 in cases such as *People v. Preito, supra,* 30 Cal.4th at p. 264 and *People v. Catlin* (2001) 26 Cal.4th 81, 174. However, for the reasons stated below, those decisions should be reconsidered.

usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v. Stephens* (1983) 462 U.S. 862 at p. 867, fn. 5.)

In analyzing the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.

(224 S.E.2d at p. 392, fn. omitted.)[69]

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase

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[69] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 202.)

concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. While *Breaux*, *Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance that used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that

"implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia, supra,* 446 U.S. at p. 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black, supra,* 503 U.S. at p. 235.) Because the instruction rendered the penalty determination unreliable (U.S. Const., Amends. VIII and XIV), the death judgment must be reversed.

C. The Instructions Failed To Convey the Central Duty of Jurors in the Penalty Phase

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra,* 428 U.S. at p. 305; *People v. Edelbacher, supra,* 47 Cal.3d at p. 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown, supra,* 40 Cal.3d at p. 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948 (disapproved on other grounds in People v. Combs 2004 34 Cal.4th 821, 860); *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, the instruction under CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole, the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, *inter alia*, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different determination than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo, supra,* 6 Cal.4th at pp. 462, 464.) Thus, just because death may be warranted or authorized does not mean it is

appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to the appropriateness of the death penalty. (3 CT 1036.) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "appropriateness of the death penalty" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]." (3 CT 1036(A).)

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., Amends. VIII and XIV) denies due process (U.S. Const., Amend. XIV; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346) and must be reversed.

D. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of

parole if "the mitigating circumstances outweigh the aggravating circumstances." (§ 190.3.)[70] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California, supra*, 494 U.S. at p. 377.)

This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violated the Fourteenth Amendment. (See *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 281, original italics.)

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[70] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown, supra,* 40 Cal.3d at p. 544, fn. 17.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan, supra*, 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore, supra,* 43 Cal.2d at pp. 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States, supra,* 157 U.S. at p. 310.)[71]

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[71] There are due process underpinnings to these holdings. In *Wardius v. Oregon, supra*, 412 U.S. at p. 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

People v. Moore (1954) 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the ... instructions ... do not incorrectly state the law ..., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id.* at pp. 526-527, internal quotation marks omitted.)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing

instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the Equal Protection Clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (*See* U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

E. The Instructions Failed To Inform The Jurors That Appellant Did Not Have To Persuade Them The Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes, supra,* 52 Cal.3d at p. 643 ["Because the determination of penalty is essentially moral

and normative ... there is no burden of proof or burden of persuasion"].) That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

The instructions given in this case resulted in this capital jury not being properly guided on this crucial point. The death judgment must therefore be reversed.

F. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the Due Process Clause of the Fourteenth Amendment and with the Cruel and Unusual Punishment Clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

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XIII.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth Amendment and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

A. The Lack Of Intercase Proportionality Review Violates The Eighth Amendment Protection Against The Arbitrary And Capricious Imposition Of The Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original), quoting *Proffitt v. Florida*, *supra*, 428 U.S. at p. 251 [opinion of Stewart, Powell, and Stevens, JJ.].)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the

proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia, supra,* 428 U.S. at p. 198; *Proffitt v. Florida, supra,* 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51 [], the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.* at 53, [], quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (9th Cir. 1982). As litigation exposes the failure of these

> factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris.*

(*Tuilaepa v. California, supra,* 512 U.S. at p. 995 (dis. opn. of Blackmun, J.).)

The time has come for *Pulley v. Harris*, to be reevaluated since, as this case illustrates, the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[72]

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[72] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Coop. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre, supra,* 572 P.2d at p. 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548

The present case exemplifies why intercase review should be mandatory in a capital case. This was a robbery gone bad, a single victim felony murder which in other counties in this state would have never been charged as a capital offense. The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the United States Supreme Court in *Pulley* had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in the arguments following this one. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

S.W.2d 106, 121.)

XIV.

CALIFORNIA'S USE OF THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, THE EIGHTH AMENDMENT, AND LAGS BEHIND EVOLVING STANDARDS OF DECENCY

The Eighth Amendment "draw'[s] its meaning from evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) The "cruel and unusual punishment" prohibited under the Constitution is not limited to the "standards of decency" that existed at the time our Framers looked to the 18th century civilized European nations as models. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn. of Stevens, J.).) Rather, just as the civilized nations of Europe have evolved, so must the "evolving standards of decency" set forth in the Eighth Amendment. With the exception of extraordinary crimes such as treason, the civilized nations of western Europe which served as models to our Framers have now abolished the death penalty. In addition to the nations of Western Europe, Canada, Australia, and New Zealand have also abolished the death penalty. In 2004, five more nations (Bhutan, Greece, Samoa, Senegal, and Turkey) abandoned the death penalty. In 2005, Liberia and Mexico abolished the death penalty and in 2006, the Philippines also abolished it. Forty countries have abolished the death penalty for all crimes since 1990. Indeed, since 1976 an average of three countries a year have abolished the death penalty. (Amnesty International, *The Death Penalty, Abolitionist and Retentionist Countries* (as of August 2006), Amnesty International webcite, [www.amnesty.org]; "Facts and Figures on the Death Penalty," Amnesty

International, August 2006.) The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment, a blemish on a rapidly evolving standard of decency moving to abolish capital punishment worldwide. (See *Ring v. Arizona*, *supra*, 536 U.S. at p. 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.) Indeed, in 2005, ninety-four per cent of all known executions took place in China, Iran, Saudi Arabia and the United States. (Amnesty International, *supra*, "Facts and Figures on the Death Penalty," August 2006.) While most nations have abolished the death penalty in law or practice, this nation continues to join a handful of nations with the highest numbers of executions. The United States has executed more than 1000 people since the death penalty was reinstated in 1976, and as of January 1, 2005, over 3,400 men and women were on death rows across the country. (Amnesty international, *supra, About the Death Penalty*.) As Dr. William F. Schulz, Executive Director of Amnesty International USA ("AIUSA") has said:

> Our report indicates that governments and citizens around the world have realized what the United States government refuses to admit - that the death penalty is an inhumane, antiquated form of punishment . . . Thomas Jefferson once wrote that 'laws and institutions must go hand in hand with the progress of the human mind;' it is past time for our government to live up to this Jeffersonian ideal and let go of the brutal practices of the past.

(April 5, 2005, AIUSA Press Release, "Amnesty International's Annual Death Penalty Report Finds Global Trend Toward Abolition.")[73]

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[73] Amnesty International has also called attention to instances in which U.S. citizens were sentenced to death for crimes they did not commit:

The continued use of capital punishment in California and the United States is therefore not in step with the evolving standards of decency which the Framers sought to emulate. As set forth above, nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See, e.g., *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) California's use of death as a regular punishment, as in this case, therefore violates the Eighth and Fourteenth Amendments. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky, supra*, 492 U.S. at pp. 389-390 (dis. opn. of Brennan, J.).)

Additionally, the California death penalty law violates specific provisions of international treaties. The Universal Declaration of Human Rights, adopted by this country via the United Nations General Assembly in December 1948, recognizes each person's right to life and categorically states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." According to Amnesty International, imposition of the death penalty violates the rights guaranteed by the UDHR. (Amnesty International, *International Law*, Amnesty International

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> The cases of Derrick Jamison and the other 118 individuals released from death row since 1973 demonstrate that no judicial system is infallible. However sophisticated the system, the death penalty will always carry with it the risk of lethal error . . .

(*Ibid*; in February 2005, Derrick Jamison became the 119th wrongfully convicted person to be released from death row on the grounds of innocence.)

website, *supra*.)

Additional support for this position is also evident by the adoption of international and regional treaties providing for the abolition of the death penalty, including, inter alia, Article VII of the International Covenant of Civil and Political Rights ("ICCPR") which prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1990. Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 439-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR.[74]

Appellant's death sentence violates the ICCPR. Because of the

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[74] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. Some of these discussions include: Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate* (1993) 42 DePaul L. Rev. 1169; Posner & Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993* (1993) 42 DePaul L. Rev. 1209; Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights* (1993) 6 Harv. Hum. Rts. J. 59.

improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. For these same reasons, the death sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.

In the recent case of *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284, the Eleventh Circuit Court of Appeals held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (But see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Once again, however, defendant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (*People v. Brown* (2004) 33 Cal.4th 382, 403; *People v. Ghent* (1987) 43 Cal.3d 739, 778-781; see also 43 Cal.3d at pp. 780-781 (conc. opn. of Mosk, J.); *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero, supra,* 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).)

Appellant requests that the Court reconsider and, in this context, find the death sentence violative of international law. (See also *Smith v.*

Murray, supra, 477 U.S. at p. 534 [holding that even issues settled under state law must be reraised to preserve the issue for federal habeas corpus review].) The death sentence here should be vacated.

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XV.

CALIFORNIA'S DEATH PENALTY SCHEME FAILS TO REQUIRE WRITTEN FINDINGS REGARDING THE AGGRAVATING FACTORS AND THEREBY VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS TO MEANINGFUL APPELLATE REVIEW AND EQUAL PROTECTION OF THE LAW

California's death penalty scheme fails to require that the jury make a written statement of findings and reasons for its death verdict. Although this Court has held that the absence of such a requirement does not render the death penalty scheme unconstitutional (*People v. Fauber* (1992) 2 Cal.4th 792, 859), that holding should be reconsidered as the failure has deprived appellant of his Fifth, Eighth, and Fourteenth Amendment rights to due process, equal protection, and meaningful appellate review of his death sentence.

The importance of explicit findings has long been recognized by this Court. (See, e.g., *People v. Martin* (1986) 42 Cal.3d 437, 449, citing *In re Podesto* (1976) 15 Cal.3d 921, 937-938.) Thus, in a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentencing choice. (*Ibid*; Pen. Code, § 1170, subd. (c).) Because the Eighth and Fourteenth Amendments afford capital defendants more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra,* 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and because providing more protection to a non-capital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that the sentencing entity in a capital case is constitutionally required to identify for the record the aggravating and

mitigating circumstances found and rejected.

As discussed previously in this brief, the decisions in *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, *Ring v. Arizona, supra*, 536 U.S. 584, and *Blakely v. Washington, supra*, 124 S.Ct. at p. 2543, require that a jury decide unanimously and beyond a reasonable doubt any factual issue allowing an increase in the maximum sentence. Without written findings by the jury, it is impossible to know which, if any, of the aggravating factors in this case were found by all of the jurors.

Moreover, the Court itself has stated that written findings are "essential to meaningful [appellate] review." (*People v. Martin, supra*, 42 Cal.3d at pp. 449-450.) Explicit findings in the penalty phase of a capital case are especially critical because of the magnitude of the penalty involved (see *Woodson v. North Carolina, supra*, 428 U.S. at p. 305) and the need to address error on appellate review. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 383, fn. 15.) California capital juries have wide discretion, and are provided virtually no guidance, on how they should weigh aggravating and mitigating circumstances. (*Tuilaepa v. California, supra,* 512 U.S. at pp. 978-979.) Without some written explanation of the basis for the jury's penalty decision, this Court cannot adequately assess prejudice where, as in appellant's case, aggravating factors have been improperly considered.

Accordingly, the failure to require written findings regarding the sentencing choice deprived appellant of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, equal protection of the law, and meaningful appellate review of his death sentence. This constitutional deficiency in California's death penalty law requires reversal of appellant' s death sentence and remand for a new penalty trial.

XVI.

THE CUMULATIVE EFFECT OF THE ERRORS UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT, REQUIRING REVERSAL

Numerous errors, many of federal constitutional dimension, occurred at appellant's trial. Appellant has shown how each of those errors individually prejudiced his case. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors undermines any confidence in the integrity of the proceedings and may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1987) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors]; *People v. Hernandez* (2003) 30 Cal.4th 835, 877-878; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 893; *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1206-1208; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *Mak v. Blodgett* (9th

Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476.)

Appellant's biased and hostile trial judge doomed appellant's opportunity for a fair trial at the outset. Compounding the problem, the trial court improperly admitted evidence of (1) threats against a prosecution witness, not made by appellant; (2) appellant's reputed gang affiliation; (3) the circumstances of appellant's arrest; and (4) appellant's ownership of guns unrelated to the present offense. All of this improperly admitted inflammatory evidence depicted appellant as highly dangerous, bringing appellant that much closer to a guilty verdict and death sentence. The trial court also made numerous other improper evidentiary rulings, all to appellant's detriment. In addition, despite the fact that the prosecution's case against appellant hinged almost entirely upon faulty eyewitness identification, the trial court denied appellant's request for a physical lineup. The trial court further erroneously denied appellant's speedy trial motion even though the prosecution had, without justification, delayed almost two years in charging him during which time critical defense evidence was lost. The prosecution also improperly admitted victim impact evidence that appellant had killed not just one but two of Mrs. Miller's sons, even though no evidence supported this. Finally, the trial court employed the wrong standard in improperly denying appellant's joint motion for modification and new trial. These and the other multiple errors undermined the reliability of the both the guilt and penalty verdicts.

In dealing with a federal constitutional violation, an appellate court must reverse unless satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case was harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Williams, supra,*

22Cal.App.3d at pp. 58-59.) In assessing prejudice, errors must be viewed through the eyes of the jurors, not the reviewing court, and the reasonable possibility that an error may have affected a single juror's view of the case requires reversal. (See, e.g., *Parker v. Gladden* (1966) 385 U.S. 363, 366; *People v. Pierce* (1979) 24 Cal.3d 199, 208.)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644.) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

In the instant case, it certainly cannot be said that the errors had "no effect" on any juror. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.) Given the severity of the errors in this case, their cumulative effect was to deny appellant due process, a fair trial by jury, and fair and reliable guilt and penalty determinations, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *Killian v. Poole, supra,* 282 F.3d at p. 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood, supra,* 64 F.3d at pp. 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v.*

Wallace, supra, 848 F.2d at pp. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].) Appellant's conviction and death sentence must be therefore be reversed.

* * * * *

CONCLUSION

For all the foregoing reasons, appellant's conviction must be reversed and the judgment of death must be set aside.

DATED: September 15, 2006

Respectfully submitted,

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(CAL. RULES OF COURT, RULE 36(B)(2))

I, KATE JOHNSTON, am the Deputy State Public Defender assigned to represent appellant, JOHN CLYDE ABEL, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates is 50,682 words in length.

DATED: September 15, 2006

KATE JOHNSTON
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. John Clyde Abel

No. S064733
Orange County Superior
Court No. 95CF1690

I, VERONICA EZECHUKWU, declare that I am over 18 years of age, and not a party to the within cause; my business address is 801 K Street, Suite 1100, Sacramento, CA 95814. A true copy of the attached:

APPELLANT'S OPENING BRIEF

was served on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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Each said envelope was then, on September 15th, 2006, sealed and deposited in the United States Mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 15th, 2006, at San Francisco, California.

Veronica Ezechukwu
DECLARANT